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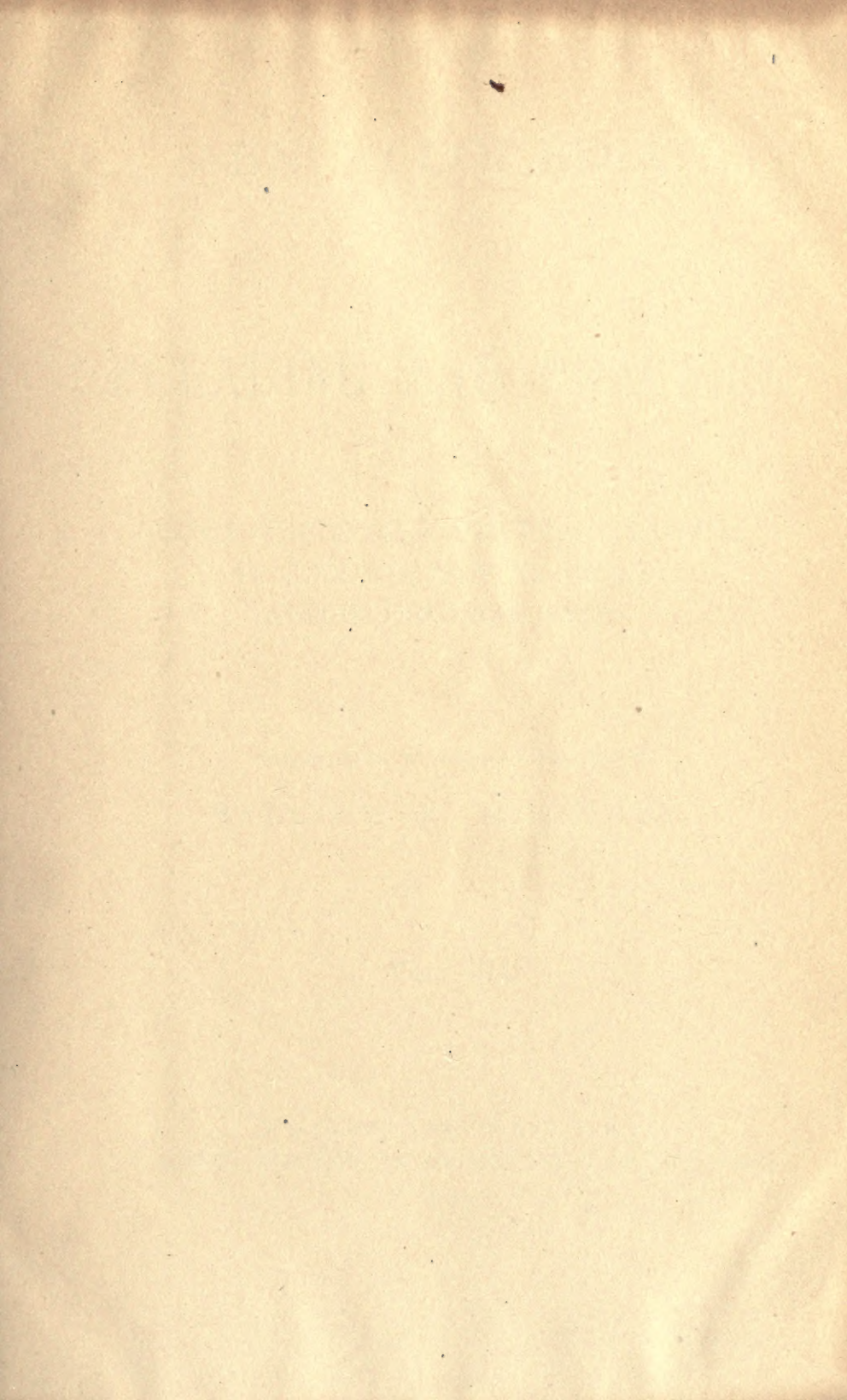
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THE
ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. MCKINNEY.

VOL. VII.

NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.

1897.

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En 197
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MADE AT NORTHPORT, L. I., N. Y.
ROBERT DRUMMOND, J. M. DUNN,
Printer. *Binder.*

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Titles in *italics* are cross references only.

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THE ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

DISORDERLY CONDUCT.

BY MALCOLM TAYLOR.

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CROSS-REFERENCE.

As to Offenses Connected with Disorderly Houses, see article *DISORDERLY HOUSES*, *post*, p. 7. See also articles *DRUNKENNESS*; *GAMING*.

I. JURISDICTION.—Justices of the peace and police magistrates are generally given jurisdiction over persons guilty of disorderly conduct.¹

1. State *v.* Ryno (N. J. 1887), 10 Atl. Rep. 189.

Complaint by Wife—Denial of Marriage by Husband.—In proceedings against a husband for disorderly conduct, a denial by the defendant that he is the husband of the complainant does not deprive a justice of jurisdiction to try the question. Upon the proceed-

ings the justice may determine the question as to the disputed marriage, when such question is necessary to the finding of the guilt or innocence of the person on trial. *People v. Hodgson*, 126 N. Y. 647.

New York.—The enactment in N. Y. Penal Code, which failed to mention proceedings for disorderly conduct,

II. THE COMPLAINT—Complainant.—In general any person injuriously affected by the conduct complained of may institute proceedings before the magistrate.¹

Essentials.—The complaint must contain all the essentials which go to make up the offense, as prescribed by statute.²

does not deprive police magistrates of the right to commit persons for such conduct, in default of bail for good behavior. Nor is their jurisdiction affected by the Code of Criminal Procedure. *Matter of McMahon*, 64 How. Pr. (N. Y. Supreme Ct.) 285. And see generally *People v. Duffy*, 5 Barb. (N. Y.) 205; *People v. Brown*, 23 Wend. (N. Y.) 47.

Wisconsin.—Laws of 1887, c. 218, §§ 2, 4, do not deprive the Circuit Court of jurisdiction of a trial for an unlawful refusal to provide for one's wife and minor children, granted by Rev. Stat. Wis., § 2420. *State v. Grunke*, 88 Wis. 159.

Change of Charge.—A charge against a person for larceny cannot be changed by an examining magistrate into one for disorderly conduct. *Frankfurter v. Bryan*, 12 Ill. App. 549.

Residence of Plaintiff and Defendant.—*New York.*—Where the husband and the wife live in different counties—the abandonment having occurred in another state—the refusal of the defendant to support his wife, made in the county in which she resides, does not confer jurisdiction on the magistrate of such county either of the person of the defendant or the subject-matter of the proceedings. *People v. Vitan* (Ct. of Gen'l Sess.), 10 N. Y. Supp. 909, 20 Abb. N. Cas. (N. Y.) 298.

1. *People v. Crandon*, 17 Hun (N. Y.) 490.

The *New York* act of 1861, c. 127, to secure the conviction of a husband as a disorderly person, provides that "upon complaint made on oath to any justice" he shall issue his warrant, etc. Under this act the complaint required to authorize the justice to issue a warrant for examination of the accused may be made by the wife, as the statute contemplates a complaint on oath by any person competent to make oath in legal proceedings, and does not require such person to be qualified as a witness. *People v. Crandon*, 17 Hun (N. Y.) 490.

Society for Prevention of Cruelty.—Under Laws of 1875, c. 130, the Soci-

ety for the Prevention of Cruelty to Children may prosecute an action against a father as a disorderly person, as provided by N. Y. Code Crim. Pro., § 899. *People v. Strickland*, 13 Abb. N. Cas. (Yonkers City Ct.) 473. And such action may be brought by the president of the society although no formal action has been taken by the society itself. *People v. Strickland*, 13 Abb. N. Cas. (Yonkers City Ct.) 473.

2. *State v. Carville* (Me. 1888), 14 Atl. Rep. 942.

Drunkenness.—Under Rev. Stat. *Maine*, c. 27, § 48, as amended by Stat. 1885, c. 366, § 6, a complaint for drunkenness in a public street is defective if it fails to allege that the defendant was "found intoxicated" in such street, the finding being an essential of the offense. *State v. Carville* (Me. 1888), 14 Atl. Rep. 942.

An affidavit in a prosecution before a mayor for intoxication, under Rev. Stat. *Ohio*, § 2108, must contain an averment that the intoxication resulted in the disturbance of the good order and quiet of the corporation. *Jeffries v. Defiance*, 25 Wkly. Law Bul. (Ohio) 68.

Keeping Disorderly House.—Under a statute providing that "all keepers of houses for the resort of * * * drunkards, tipplers, or gamesters * * * shall be deemed disorderly persons," a sworn complaint for the arrest of the plaintiff, charging that said plaintiff "is a disorderly person, by allowing drunkenness and gambling in his saloon, by men and boys," is sufficient, as it states facts from which the justice might conclude that the plaintiff had committed an offense under the statute. *Gardner v. Bain*, 5 Lans. (N. Y.) 256.

Residence.—Section 5 of the *New Jersey* Act Concerning Disorderly Persons (Rev. Stat., § 305), relating to proceedings against a deserting husband or father, places the jurisdiction of the court at the place of residence, and not at the place of settlement, of the husband or father. A complaint under this act must show the residence of the deserting husband or father, and such complaint can only be made

For Abusive or Offensive Language.—A complaint for disorderly conduct in the use of abusive or offensive language should show the language used,¹ and when the language is used in reference to, or in the presence of, any particular person, the name of such person should be alleged.²

Hearsay or Belief.—Where the complaint is based merely on hearsay or belief, the complainant must state the source of his information or the grounds of his belief.³

III. WARRANT AND COMMITMENT.—In describing the offense of disorderly conduct, the particular circumstances which induced the opinion of the magistrate must be set forth, and a mere following of the wording of the statute is not sufficient.⁴ Thus, the mere statement that a party is a "disorderly person,"⁵ or that the party has been "duly convicted before me,"⁶ is, under the usual statutory provisions, too indefinite.

IV. INDICTMENT AND INFORMATION.—1. **Generally.**—An indictment or information for disorderly conduct should follow the language of the statute and state all essential elements of the offense;⁷ but

in the township or city where he resides. *Decker v. McLorinan*, 42 N. J. L. 413.

Oath.—On a complaint by the commissioners of charities and correction that a person has abandoned and neglects to provide for his wife, the oath of the commissioners is not essential, as the complaint may be sustained by the oath of any person. *People v. Public Charities Com'rs*, 9 Hun (N. Y.) 212.

1. *Bassette v. State*, 51 N. J. L. 502.

Under *New Jersey Revision*, p. 305, a complaint for the use of offensive language on the streets of a town, which is specific as to the time, place, and language used, is sufficient. *Bassette v. State*, 51 N. J. L. 502.

2. *State v. Clarke*, 31 Minn. 207.

If the name be unknown, this fact must be alleged. *State v. Clarke*, 31 Minn. 207.

Wisconsin.—In a complaint under Rev. Stat. Wis., § 4398, for the use of offensive language tending to provoke an assault, it is essential to allege that the language was used in the presence of the complainant or of some member of his family, since the statute makes the offense to consist in the use of such language in reference to, and in the presence of, another or a member of his family. *Peters v. State*, 66 Wis. 339.

3. *People v. Pratt*, 22 Hun (N. Y.) 300.

4. In proceedings against a husband for abandonment of his wife and

family, a warrant directed to the commissioners of charities and correction, directing them to seize any money of the husband on deposit, should also direct such commissioners to make an inventory of the money thus taken and return such inventory with their proceedings to the next court of sessions of the county. *Bourgeois' Case* (Ct. of Gen'l Sess.), 7 Abb. N. Cas. (N. Y.) 260.

Under Laws N. Y. 1881, c. 187, in a commitment to the house of refuge for women of a person for being a common prostitute and associating with disreputable people, the words "and associating with disreputable people" may be treated as surplusage. *People v. Coon* (Supreme Ct.), 51 N. Y. St. Rep. 339.

For the Protection of the Officer it is sufficient if the warrant and commitment describe the offense, conviction, and sentence, without reciting the facts. *Bennac v. People*, 4 Barb. (N. Y.) 31.

5. *Matter of Travis*, 55 How. Pr. (N. Y. Supreme Ct.) 347.

6. *Matter of Travis*, 55 How. Pr. (N. Y. Supreme Ct.) 347, where it was held, under a statute requiring that the magistrate shall file a record of the conviction, specifying generally the nature and circumstances of the offense, that the commitment must state the facts of the case.

7. *Quin v. State*, 65 Miss. 479; *State v. Fogerson*, 29 Mo. 417.

if the statutory words do not fully describe the crime, the indictment must be expanded so that the criminal nature of the offense will be made to appear.¹

Common Nuisance.—An indictment for disorderly conduct as a common nuisance must show that the whole community was affected, and not merely particular persons.²

2. Intent.—It is not necessary, in general, to allege a wilful or malicious intent, such intent being implied in the character of the offense.³

3. Place.—When the place where the disorderly conduct occurred is an essential element of the offense, such locality must be alleged.⁴

4. Language Used.—Under statutes punishing the use of profane, offensive, or abusive language, the words or language used should be specifically set forth in the indictment.⁵ But when the

An information alleging that the defendant did unlawfully, in the presence and hearing of the prosecutor, call said prosecutor certain names, was held sufficient although not charging in statutory terms that the language was used "concerning him." *Menasco v. State*, 32 Tex. Crim. Rep. 582.

"Language" and "Conversation."—Under Rev. Code *Missouri* 1855, § 620, an indictment charging the defendant with wilfully and unlawfully disturbing the peace of the neighborhood, "by then and there cursing and swearing, and by loud and abusive and indecent language," is sufficient, although the word "conversation" is used in the statute. The two words are sufficiently equivalent in meaning. *State v. Fogerson*, 29 Mo. 416.

Drunkenness.—Under *Kansas* Laws 1883, c. 104, § 1, the use of the word "drunk," in an information charging the defendant with drunkenness, is sufficiently definite; nor need it be averred that others were disturbed by the action of the defendant. *State v. Brown*, 38 Kan. 390.

1. *State v. Brewington*, 84 N. Car. 783; *State v. Coffing*, 3 Ind. App. 304.

"Loud and Unusual Noise."—Under Rev. Stat. *Missouri*, § 1527, an indictment which charges the disturbance of a family "by loud and unusual noise" is fatally insufficient for failure to charge a crime with sufficient particularity to inform the defendant of the offense of which he is accused. *State v. James*, 37 Mo. App. 214.

2. *State v. Baldwin*, 1 Dev. & B. (N. Car.) 195. In this case an indict-

ment charging that the defendants assembled at a public place, and profanely and with a loud voice quarreled, etc., in the hearing of divers persons then and there assembled, whereby a certain singing school was disturbed and broken up, *ad commune nocumentum*, was held insufficient as an indictment for a common nuisance.

3. *State v. Archibald*, 59 Vt. 548, where the statute provided that any person who disturbed the public peace "by tumultuous and offensive carriage, by threatening, quarreling," etc., should be guilty of disorderly conduct.

4. A *Mississippi* statute makes it an offense to use abusive language in "the dwelling house of another, or the yard or curtilage thereof, or upon the public highway or any other place near such premises." An indictment under this statute charging the use of such language in the yard, when the proof shows that it was used outside the yard, is fatally defective. *Quin v. State*, 65 Miss. 479.

Drunkenness.—Under *Kansas* Laws of 1883, c. 104, § 1, making it a misdemeanor for any person to be drunk in any highway, street, or in any public place or building, an information which alleges that the defendant was drunk in a street of the city is sufficient, without alleging the name of the street. *State v. Brown*, 38 Kan. 390.

5. *Steuer v. State*, 59 Wis. 472; *Walton v. State*, 64 Miss. 207, where the statute provided for the punishment of any person who should "profanely swear or curse." *State v.*

gravamen of the offense is the disturbance of the peace, and not the use of offensive language, such particularity is unnecessary.¹

V. UNDERTAKING AND ORDER OF SUPPORT.—Under statutes treating persons refusing or neglecting to support their families as disorderly persons, an order of support cannot be made until there has been an express adjudication declaring the defendant to be a disorderly person.²

VI. APPEAL.—An appeal from the judgment of a magistrate convicting a person of disorderly conduct may be taken under the general statutory provisions applying to misdemeanors,³ and

Barham, 79 N. Car. 646; State v. Brewington, 84 N. Car. 783. But see Foreman v. State, 31 Tex. Crim. Rep. 477, where, under the Penal Code, art. 495a, it was held that the language used need not be alleged.

Connection in Which Words were Used.

—When the words used are not necessarily offensive or licentious, unless aided by extrinsic averments, an information must show in what connection the words were used, in addition to setting forth the language itself. State v. Coffing, 3 Ind. App. 304. See also Peters v. State, 66 Wis. 339.

Substantial Proof Sufficient.—When the indictment avers certain language or words as having been spoken or used, it is sufficient if there is a substantial accordance between the allegations and the proof. Thus, under an indictment for using abusive, insulting, or vulgar language, it is not necessary to prove the exact words charged, but it is sufficient if they are proved substantially as alleged, when the difference is not such as to cause a variance in the sense. Benson v. State, 68 Ala. 544.

1. State v. Fare, 39 Mo. App. 110, overruling State v. Bach, 25 Mo. App. 554, where the object of the statute seems to have been mistaken.

State v. Parker, 39 Mo. App. 116, following State v. Fogerson, 29 Mo. 417, where an indictment which failed to set forth the words used was held sufficient.

2. State v. Ryno (N. J. 1887), 10 Atl. Rep. 189.

It is not sufficient that the verdict finds the person guilty of disorderly conduct, but it must be supplemented by an adjudication to that effect before an order of support can be obtained. O'Shaughnessy v. McLorinan, 43 N. J. L. 410.

Undertaking—New York.—An undertaking agreeing to indemnify a city against a wife's becoming chargeable thereon, given by the defendant upon his conviction as a disorderly person, may properly be made in the name of the people for the benefit of the municipality concerned; and a prosecution for breach of such undertaking may be brought in the name of the officer appointed for that purpose. Lutes v. Shelley, 40 Hun (N. Y.) 197.

Under N. Y. Code Crim. Pro., §§ 899, 901, 904, an undertaking is not void because it contains the words "according to his means," if it complies with the statute in other essentials. Bulkley v. Boyce, 48 Hun (N. Y.) 259; Spinney v. Thurber, 33 Hun (N. Y.) 448.

3. Steuer v. State, 59 Wis. 472.

New York.—Under Laws 1882, c. 410, § 1456, which provide that any appeal from or amendment to an order of a police magistrate convicting one as a disorderly person shall be exclusively for the action of the Court of Special Sessions, an appeal still lies to the Court of General Sessions of New York county from an order of the Special Sessions affirming a conviction by a police justice of a defendant as a disorderly person. People v. Vitan (Ct. of Gen'l Sess.), 10 N. Y. Supp. 909, 20 Abb. N. Cas. (N. Y.) 298.

Certiorari.—Laws of 1860, c. 508, § 4, provide that after conviction of a person by a magistrate for disorderly conduct, "any appeal from or amendment to said order shall be exclusively for the action of the Court of Special Sessions;" but under this act the Supreme Court may still review the decision of the Court of Special Sessions upon a common-law writ of certiorari. People v. Public Charities Com'rs, 9 Hun (N. Y.) 212.

such appeals are governed by the general principles of appellate procedure.¹

1. **Objection to the Sufficiency of the Complaint** may be made in the appellate court before trial, on appeal from a justice of the peace, although in the lower court the defendant has gone to trial without objection, where the trial is had *de novo* in the appellate court. *Steuer v. State*, 59 Wis. 472.

Where the complaint is defective for failure to show residence, the prosecutor cannot avail himself of it when he has failed to file any objection in the trial court, and when it appears as a matter of fact that the prosecutor was a resident of the city where the complaint was made. *Decker v. McLorinan*, 42 N. J. L. 413.

New Jersey.—Under Revision 305, 506, relating to disorderly persons, an appeal to the Quarter Sessions, taken from the decision of a justice, brings the whole case before that court for

a trial *de novo* of the issues of fact; and a new determination and order are to be rendered on the facts found. *State v. Ryno* (N. J. 1887), 10 Atl. Rep. 189.

In proceedings against disorderly persons after a verdict of guilty, but before removal by certiorari, the magistrate should make out a conviction which is a record of the proceedings, and which should contain the complaint or information or its substance; also the issuing and return of the process, the appearance of the person charged, and his defense or confession; if he has not confessed, the evidence produced; and, lastly, the judgment of the magistrate, which may conform to the provisions of the particular section of the act under which the proceedings were instituted. *Preusser v. Cass*, 54 N. J. L. 532.

DISORDERLY HOUSES.

BY MALCOLM TAYLOR.

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CROSS-REFERENCES.

As to Disorderly Conduct generally, see article DISORDERLY CONDUCT, ante, p. 1.

Prosecution of Offenses Connected with Gambling Houses, see article GAMING.

I. DEFINITION.—A disorderly house is a house or other dwelling place the inmates of which behave in such a manner as to become a nuisance to the neighborhood. The term includes a bawdy house, gambling house, dancing house, prohibited liquor saloon, or other habitation made obnoxious by the habitual recurrence of fighting, noise, or violence.¹

1. Anderson Law Dict. 365; Bouvier Law Dict. 538. See generally, as to what has been held by the courts to constitute a disorderly house, Am. and Eng. Encyc. of Law, tit. Disorderly Houses.

II. REMEDIES.—The fact that a defendant may be indicted for a different and less penal offense does not prevent a prosecution for keeping a disorderly house, although both offenses were caused by the same acts.¹ Nor is such a prosecution barred by a conviction for the minor offense.²

III. JOINDER OF PARTIES.—At Common Law any number of persons might be jointly indicted for keeping disorderly houses, the use of the word *separaliter* in the indictment making the charges equivalent to separate indictments,³ but the omission of the word *separaliter* was fatal.⁴ With us such a form of indictment has been recognized,⁵ but in modern practice it is not used.⁶

IV. JOINDER OF OFFENSES.—The common-law offense of keeping a disorderly house as a common nuisance and a statutory offense of the same nature may be joined, in separate counts, in the same indictment;⁷ and so with separate statutory offenses.⁸

1. *Henry v. Com.*, 9 B. Mon. (Ky.) 361, in which case the defendant might have been indicted for selling liquor to slaves, as well as for keeping a disorderly house.

The provisions of *New York Code Crim. Pro.* relating to disorderly persons do not abolish the common-law remedy by indictment against such persons for keeping a disorderly house. The two remedies have different ends in view, and both may be taken against any person who keeps such a house. *People v. Sadler*, 97 N. Y. 146.

Injunction.—An injunction will lie to restrain the use of premises as a disorderly house where the persons occupying the house act in a boisterous, noisy, and indecent manner, and thereby interfere with and render uncomfortable the use and occupation of plaintiff's premises, although the acts complained of are also indictable and constitute a public nuisance. *Cranford v. Tyrrell*, 128 N. Y. 341.

2. *Price v. State*, 96 Ala. 1, where the defendant had been convicted for violation of the Sunday laws.

3. 1 Hale P. C. 174; *Young v. Rex*, 3 T. R. 106; *State v. McDowell*, *Dudley* (S. Car.) 347.

Husband and Wife.—At common law a husband and wife might be jointly indicted for keeping a disorderly house, as the keeping of such a house does not necessarily import property, but may signify that share in the management of the house which the wife has as well as the husband. *Reg. v. Williams*, 10 Mod. 63; *Rex v. Dixon*, 10 Mod. 335.

Joinder Oppressive.—When such joinder would have a vexatious or oppressive effect, the court, in its discretion, may quash the indictment. *Rex v. Kingston*, 8 East 41.

4. 2 Hale P. C. 174; *Young v. Rex*, 3 T. R. 98.

5. *State v. McDowell*, *Dudley* (S. Car.) 346.

6. *State v. Nail*, 19 Ark. 563; 1 *Bishop Crim. Pro.*, § 475. See also *Cox v. State*, 76 Ala. 69.

7. *Wooster v. State*, 55 Ala. 217; *Com. v. Kimball*, 7 Gray (Mass.) 328.

And so with the statutory offense of "being a common prostitute." *Wooster v. State*, 55 Ala. 217, *overruling Norvell v. State*, 50 Ala. 174.

8. *Com. v. Davenport*, 2 Allen (Mass.) 299.

Where one offense may be committed in two or more different ways which are included under the same general definition and made punishable in the same manner, such various ways of committing the offense do not constitute distinct offenses, and may be charged conjunctively in one count of the indictment. *Willis v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 787, where the indictment charged the keeping of a disorderly house and the knowingly permitting it to be kept.

Compelling Election.—The refusal of a judge to grant the defendant's demand, asking an order to compel the plaintiff to elect upon which count, among several, he would rely, in an indictment containing a count for keeping a disorderly house, is not error for

V. COMPLAINT.—A complaint charging this offense must contain allegations sufficient to describe the offense, locate the house or houses, and show that they were disorderly.¹

Intent.—No allegation of wilful or unlawful intent on the part of the defendant is necessary when the offense is punishable by statute.²

VI. INDICTMENT—1. **Generally**—*a.* **COMMON-LAW FORMS.**—Under the common-law practice the mere allegation that the defendant kept a disorderly house was insufficient.³ It was essen-

which an exception will lie. *Com. v. Davenport*, 2 Allen (Mass.) 299.

A defendant's right may be seriously compromised by his being compelled to go to trial upon an indictment charging more than one offense, and the fact that he has pleaded to such an indictment does not deprive him of the right to compel an election by the prosecutor as to the count on which he would rely at the trial. *State v. Abrahams*, 6 Iowa 118.

It would seem that in such a case, where the plea of not guilty had been entered, the defendant might compel the election without withdrawing his plea, and sustain his motion for a rule upon the prosecuting attorney to elect. *State v. Abrahams*, 6 Iowa 118.

1. *Northern Pac. R. Co. v. Whalen*, 3 Wash. Ter. 452.

A complaint charging that defendant, on a particular day, "and on divers other days and times between that day and the day of making this complaint, * * * within the judicial district of said court, did keep a certain house of ill fame there situate," etc., sufficiently alleges the place where and the time when the offense was committed. *Com. v. Shea*, 150 Mass. 314.

The mere allegation that the houses were public and private nuisances is insufficient and fatally defective. *Northern Pac. R. Co. v. Whalen*, 3 Wash. Ter. 452.

Pool Rooms.—A complaint setting forth the keeping of a room with apparatus, books, and other devices for the purpose of registering bets, selling pools upon the results of trials of skill, speed, endurance, etc., sufficiently describes the apparatus used, as the essence of the complaint lies in the unlawful purpose for which such apparatus was used, and not in the apparatus itself. *Com. v. Ferry*, 146 Mass. 203.

And such a complaint need not describe the method of such selling and registering, or the particular contests

made the subject of the gambling. *Com. v. Ferry*, 146 Mass. 203.

Duplicity.—In a prosecution for keeping a disorderly house, a complaint is not defective for duplicity because it alleges that defendant was the owner, tenant, and lessee of the house. The proof of either would be sufficient, the other elements of the crime being established. *Merrell v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 41.

A complaint charging defendant in the same count with being engaged in the business and employment of both "registering bets and selling pools" is not open to the objection of duplicity, as they are but different parts of one transaction. *Com. v. Ferry*, 146 Mass. 203.

New York.—As to what has been held a sufficient complaint under N. Y. Penal Code, § 322, for the offense of keeping a disorderly house, see *People v. Hulett* (Supreme Ct.), 15 N. Y. Supp. 630.

Under Laws 1890, c. 55, § 2, providing that the recorder of the city of Gloversville, N. Y., shall have power to issue all criminal processes, to receive and hear all informations and complaints, and to hear, try, and determine all charges of misdemeanor, such recorder has jurisdiction over a complaint for keeping disorderly houses. *People v. Hulett* (Supreme Ct.), 15 N. Y. Supp. 630.

Indiana.—A complaint alleging that defendant did "keep a house of ill fame and prostitution within said city" sufficiently describes the offense in a civil action. *Greensburgh v. Corwin*, 58 Ind. 518.

In a prosecution under Acts of 1859 for keeping a disorderly house, an affidavit which fails to specify the acts constituting the disorder is insufficient. *Hosea v. State*, 47 Ind. 180.

2. *Com. v. Shea*, 150 Mass. 314.

3. *Rex v. Dixon*, 10 Mod. 335.

tial to set out the facts constituting the offense, varied to describe the conduct in the particular instance.¹

b. MODERN FORMS.—Where the indictment is for the common-law offense, the same particularity is in general necessary,² and while the forms of indictment which were in use under the ancient practice are no longer necessary, yet the same acts which formerly constituted the offense of keeping a disorderly house are now

Gambling House.—There are a number of dicta to the effect that a general charge that the defendant kept and maintained a common gaming house is a sufficient averment of the offense. Halroyd, J., in *Rex v. Rogier*, 1 B. & C. 272, 8 E. C. L. 117; *Rex v. Dixon*, 10 Mod. 335; *Mason's Case*, 1 Leach (C. C.) 487; *Morton, J., in Com. v. Pray*, 13 Pick. (Mass.) 359.

For form of indictment held to be sufficient, see *Rex v. Rogier*, 1 B. & C. 272, 8 E. C. L. 117.

1. For form of indictment for keeping a disorderly house at common law, see 2 Chitty Cr. Law 38 *et seq.*

An indictment charging that the defendant "did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house; and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill name and fame and of dishonest conversation, to frequent and come together, then and the said other days and times, there unlawfully and wilfully did cause and procure; and the said persons in the said house, then and the said other days and times, there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully and wilfully did permit and yet doth permit," was held not to be subject to demurrer on the ground of being too general. *Rex v. Higginson*, 2 Burr. 1232.

2. *Taylor v. Com.*, 1 Duv. (Ky.) 160; *Leary v. State*, 39 Ind. 544; *Mains v. State*, 42 Ind. 327; *State v. Stevens*, 40 Me. 559; *Com. v. Stewart*, 1 S. & R. (Pa.) 342; *U. S. v. Milburn*, 4 Cranch (C. C.) 719.

An indictment which charged in substance that the defendant kept a certain bowling alley, at which certain persons played at bowls, thereby causing great noise, damage, and annoyance, and becoming injurious and dangerous to the comfort of divers individuals and of the public, and to the common nuisance, etc., sufficiently

charged the common-law nuisance of a disorderly house. *State v. Haines*, 30 Me. 65.

And an indictment which charged the defendant with keeping "a certain unlawful, disorderly, and ill-governed house," "as a common tavern," "without any lawful authority or license," and kept "a common tippling house," and therein sold liquors, etc., is a good common-law indictment for keeping a disorderly house. *U. S. v. Columbus*, 5 Cranch (C. C.) 304.

House of Ill Fame.—In *Texas* and *Alabama* it is sufficient to allege in the indictment that the defendant kept a disorderly house, said house then and there being kept for the purpose of public prostitution. *Thompson v. State*, 2 Tex. App. 82; *Brown v. State*, 2 Tex. App. 189; *Brooks v. State*, 4 Tex. App. 567; *Toney v. State*, 60 Ala. 97.

Gaming House.—Although, in an indictment for the offense of keeping a common gaming house, it is usual to charge that the defendant did procure persons of evil fame and disposition to assemble there, etc., yet it would seem that in no case are such matters of description material, and that it is sufficient to allege the offense of keeping a common gaming house generally. *Lord v. State*, 16 N. H. 325, *citing Rex v. Rogier*, 1 B. & C. 273, 8 E. C. L. 117; *Clark v. Periam*, 2 Atk. 339; *J'Anson v. Stuart*, 1 T. R. 753.

Prohibited Liquor Saloon.—An indictment which charges that the defendant, at a specified time and place, "a certain tenement there situate, used for the illegal keeping and sale of intoxicating liquors, knowingly and unlawfully did keep and maintain" contains a sufficient description of the offense alleged. *Com. v. Davenport*, 2 Allen (Mass.) 299.

New York.—The provisions of N. Y. Code Crim. Pro. relating to disorderly persons have not superseded the common-law remedy by indictment against the keeper of a bawdy house. *People v. Sadler*, 97 N. Y. 146.

required to be alleged and proved to warrant a conviction.¹

Under Statute.—But in indictments for the statutory offenses it is sufficient to follow the wording of the statute, when the language is such as to identify the offense.²

2. Charging Offense as a Common Nuisance.—An indictment for keeping a disorderly house as a common nuisance must conclude by alleging that the act or acts were to the common nuisance of the public.³ But when the indictment is for an offense created

1. *Com. v. Bessler* (Ky. 1895), 30 S. W. Rep. 1012.

2. *State v. Stevens*, 40 Me. 559.

Although an indictment follows the ancient precedents it may still set forth a statutory offense, and the fact that it also charges a common-law offense is not error, provided the statutory offense is charged with sufficient certainty and particularity. *People v. Hatter* (Ulster County Ct. of Sess.), 22 N. Y. Supp. 691.

Indiana.—The tenth section of the act defining misdemeanor (2 G. & H. 461), so far as it complies with the thirteenth section of the Temperance Law of 1859 (1 G. & H. 617), is repealed, and an information charging that a certain person, on a certain day, and on other days subsequent and prior thereto, was the owner and keeper of a house wherein he sold intoxicating liquors, and then and there kept said house in a disorderly manner to the annoyance of citizens living in the vicinity, specifying the sort of disorder suffered, namely, suffering persons to congregate and remain in and about the same, making divers disturbances and tumults, is sufficient under authority of the above acts. *Huber v. State*, 25 Ind. 175.

Iowa.—An indictment charging the accused with keeping a "house of ill fame, for the purpose of prostitution and lewdness, * * * to the disturbance of others," is sufficient. *State v. Alderman*, 40 Iowa 375.

As to the sufficiency of an indictment for keeping a gambling house, under Code Iowa, § 2761, see *State v. Maurer*, 7 Iowa 406, with form of indictment there given.

Maine.—Under Rev. Stat. Me., c. 160, § 15, an indictment alleging that defendant "did keep a certain house of ill fame, then and there resorted to for the purpose of prostitution and lewdness, by the consent and with the knowledge of said M. H.," was held to be sufficient, without alleging a common

nuisance. *State v. Homer*, 40 Me. 438.

Maryland.—See *Smith v. State*, 6 Gill (Md.) 425.

Massachusetts.—See *Wells v. Com.*, 12 Gray (Mass.) 326; *Com. v. Ashley*, 2 Gray (Mass.) 356.

Missouri.—In an indictment for keeping a bawdy house the statute does not require the name of the prosecutor to be indorsed on the indictment. *State v. Bean*, 21 Mo. 267.

Montana.—For forms of indictment, see *State v. Hendricks*, 15 Mont. 194.

Texas.—For forms of indictment for keeping disorderly houses which have been held sufficient under the Texas statutes, see *Mansfield v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 901; *Loraine v. State*, 22 Tex. App. 640; *State v. Flynn*, 35 Tex. 354; *Morris v. State*, 38 Tex. 603; *Sylvester v. State*, 42 Tex. 496; *Lowe v. State*, 4 Tex. App. 34; *Thompson v. State*, 2 Tex. App. 82; *Brown v. State*, 2 Tex. App. 189; *Killman v. State*, 2 Tex. App. 222.

Vermont.—See *State v. Nixon*, 18 Vt. 70.

3. *State v. Stevens*, 40 Me. 559; *Hunter v. Com.*, 2 S. & R. (Pa.) 298; *Mains v. State*, 42 Ind. 327.

Insertion of Statutory Terms.—In an indictment charging the keeping of a house of ill fame as a common nuisance, the mere insertion of the words "at which said house prostitution and lewdness were then carried on and permitted" does not warrant the conclusion that the offense charged is that of keeping a house of ill fame instead of a common nuisance. *State v. Odell*, 42 Iowa 75.

But the insertion of the words "to wit, a certain house of ill fame," under a charge of keeping a certain common nuisance, cannot be rejected as surplusage, as they charge an offense under an act against the maintenance of houses of ill fame, and not under an act making such houses a common nuisance. *Com. v. Lavonsair*, 132 Mass. 1.

by statute, and such offense is made a crime independent of other facts or circumstances, the above conclusion in the indictment is unnecessary.¹ And the omission of the words "to the common nuisance" is immaterial, when the acts constitute a nuisance *per se*.²

3. Keeping and Leasing—*a*. **GENERALLY**.—An indictment for keeping or leasing premises for disorderly purposes must allege that the defendant either kept the house himself, or leased it to another knowing the purpose for which it would be used,³ or it

Alleging Disturbance.—Where the offense is charged as a common nuisance, an allegation of disturbance to the public is necessary. *Thatcher v. State*, 48 Ark. 60.

1. *State v. Stevens*, 40 Me. 559; *State v. Wilson*, 93 N. Car, 608.

An indictment which alleges that the defendant kept and maintained a building used as a disorderly house, "to the common nuisance of all good citizens," is sufficient without expressly averring that defendant kept and maintained a common nuisance, when the statute under which the indictment is brought declares such a house to be a common nuisance. *Wells v. Com.*, 12 Gray (Mass.) 326; *State v. Osgood*, 85 Me. 288.

2. *Rex v. Dixon*, 10 Mod. 335; *State v. Baldwin*, 1 Dev. & B. (N. Car.) 195, where the court said: "If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words *ad commune nocumentum*, though always proper and safest to be inserted, may be omitted, for they neither describe the crime nor the facts which constitute it. Such facts necessarily show the crime. If the facts charged show an offense inconvenient and troublesome, that may have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum* becomes indispensable."

3. *Taylor v. Com.*, 1 Duv. (Ky.) 160; *State v. Brown*, 7 Wash. 10, keeping a house where women were employed to dance and draw custom.

Keeping a Single Story.—Under an indictment at common law for keeping a disorderly house, it is no variance that the defendant kept only a single story in the building. *Com. v. Bulman*, 118 Mass. 456. See also *Com. v. McCaughey*, 9 Gray (Mass.) 296.

Continuous Use—*Iowa*.—Under Code Iowa, § 2721, in an indictment for keeping a gambling house, it is not necessary to allege that the house was kept in continuous use, although this may be proved under a general allegation. *State v. Crogan*, 8 Iowa 523.

Illegal Sale of Liquors.—In an indictment under Stat. Mass. 1855, c. 405, § 1, an allegation that a certain building was "used for the illegal sale and keeping of intoxicating liquors" is sufficient, without alleging more particularly that such keeping was illegal or without appointment or authority. *Com. v. Kimball*, 7 Gray (Mass.) 328.

Licensed Saloon—*Indiana*.—Under the Ind. Temperance Act of 1859, § 13, an indictment for keeping a licensed saloon need not allege that such house was licensed. *Joseph v. State*, 42 Ind. 370.

Actual Occurrence of Disorderly Acts.—Under Rev. Stat. *Indiana*, § 29, an indictment charging the defendant with keeping a room "to be used and occupied for gambling" is sufficient without alleging that gambling actually took place in the room. The offense created by the statute is the keeping of the room for such a purpose, and not the use of it. *State v. Miller*, 5 Blackf. (Ind.) 502; *Sowle v. State*, 11 Ind. 492.

Texas.—Under the Act of April 4, 1889, declaring a penalty for "any owner, lessee, or tenant" who shall keep a disorderly house, an indictment is fatally defective which fails to allege that accused was the owner, lessee, or tenant of the house. *Lamar v. State*, 30 Tex. App. 693.

Gaming House—*New Hampshire*.—An indictment alleging the keeping of a gaming house need not show what games were played or the amount of money at stake. *State v. Prescott*, 33 N. H. 212.

House of Ill Fame—*Georgia*.—The indictment must charge that the house

must be shown that the disorderly acts were permitted by the defendant at his own house.¹

Charging Lessor.—A person who demises a house to be kept as a disorderly house, and which is so kept with his knowledge, stands in the same position as the keeper of the house, and an indictment should charge him as the keeper in the ordinary form,² but the lessee may be joined with him in the indictment.³

"For Lucro."—The allegation that the house was kept for lucre or gain, which is usually found in the precedents, is unnecessary, whether the indictment be at common law or under statute.⁴

b. INTENT OR KNOWLEDGE.—It must be shown that the owner or lessor knew the purposes for which the house would be used,⁵ or that the owner let the house with intent that it should

was kept "for the practice of adultery and fornication" either by the owner or the lessee. *Jordan v. State*, 60 Ga. 656.

1. *Stephanes v. State*, 21 Tex. 206, where the indictment alleged the keeping of a disorderly house by allowing, permitting, etc., but failed to aver that the defendant permitted the acts alleged at his own house. Archbold Cr. Pl. 607; Wharton Precedents 433.

2. *People v. Erwin*, 4 Den. (N. Y.) 129.

Where the renting of a house to be kept as a disorderly house is made a criminal offense by statute, a person so renting a house may, nevertheless, be punished by charging him in the indictment with keeping a disorderly house, which charge will be sustained by proof of the leasing or letting of the house for that purpose. *State v. Lewis*, 5 Mo. App. 465.

Name of Lessee.—The indictment must give the name of the lessee, or state some reason for not giving it, and should also charge that he accepted the lease. *Com. v. Moore*, 11 Cush. (Mass.) 600.

Texas.—Under Code Crim. Pro. 426, which provides that "where one person owns the property and another person has the possession, charge, or control of the same, the ownership thereof may be alleged to be in either," an indictment which alleges that the defendant was the owner of the house is proper although in fact he rented the house and had merely the control and management of it. *Flynn v. State* (Tex. Crim. App. 1895), 32 S. W. Rep. 1041.

3. *People v. Erwin*, 4 Den. (N. Y.) 129.

4. *Com. v. Wood*, 97 Mass. 225; *Com. v. Ashley*, 2 Gray (Mass.) 356; *State v. Porter*, 38 Ark. 637; *State v. Homer*, 40 Me. 438; *State v. Nixon*, 18 Vt. 71; *State v. Bailey*, 21 N. H. 343.

There is no difference in this respect between the different kinds of disorderly houses. They are all indictable on the same principle, *viz.*, that they are nuisances. *State v. Bailey*, 21 N. H. 343.

5. *State v. Leach*, 50 Mo. 535; *Drake v. State*, 14 Neb. 535; *Frederick v. Com.*, 4 B. Mon. (Ky.) 7; *State v. Abrahams*, 6 Iowa 117.

Actual Use.—It is sufficient to allege that the defendant knowingly permitted the use of the house for illegal purposes, without averring that it was in fact so used and occupied. Such an averment is a certainty to a certain intent in general, and is all that is required; a certainty to a certain intent in particular is not required in criminal pleading. *Crofton v. State*, 25 Ohio St. 249.

But in *Tennessee* mere knowledge is insufficient, and the indictment must allege the actual use of the house. *State v. Wheatley*, 4 Lea (Tenn.) 230.

Gaming House.—Under the Gambling Act of 1833, an allegation that the defendant "did keep a gambling house" is sufficient to identify his interest or concern in the house. But the indictment must also charge that the gaming was permitted by the defendant, and the mere allegation that he kept a house in which games were played and permitted is not sufficient, for it might have been without his permission or knowledge. *Com. v. Crupper*, 3 Dana (Ky.) 466.

be used for disorderly purposes.¹

c. TIME.—An indictment which alleges the keeping of a disorderly house on a certain day is sufficient,² although it is usual to aver the keeping on some fixed day, and on "divers other days and times."³ And an indictment which did not allege any time has been held sufficient, on the ground that time is not of the "essence of the offense."⁴

Date of Lease.—The time at which the lease was made or was to end need not be alleged or proved, as such time is immaterial.⁵

d. LOCATION OF HOUSE.—The location of the house need not be alleged further than to show that the court had jurisdiction.⁶

Frequenting Bawdy House.—An indictment charging a defendant with frequenting a bawdy house must expressly charge that the defendant did knowingly frequent the same. *Brooks v. State*, 2 Yerg. (Tenn.) 482.

1. *State v. Wheatley*, 4 Lea (Tenn.) 230.

Gambling House—*Iowa*.—Under Code Iowa, § 721, an indictment which charges the defendant with keeping a house resorted to for the purpose of gambling implies the charge of intent, and the intent need not be alleged. *Statet v. Cure*, 7 Iowa 479.

2. *Wells v. Com.*, 12 Gray (Mass.) 326. But see *Com. v. Bessler* (Ky. 1895), 30 S. W. Rep. 1012, where it was held that where the offense is laid as a common nuisance, words charging a repetition or frequency of the disorderly acts are necessary.

3. *Com. v. Langley*, 14 Gray (Mass.) 21; *Wells v. Com.*, 12 Gray (Mass.) 326.

In such indictments the omission of the words "then and there," in the clause describing the uses of the house so kept, is of no importance. *Com. v. Langley*, 14 Gray (Mass.) 21.

Where in the indictment the time is laid with a *continuando*, the same certainty which is required in alleging a certain day is required in alleging the divers other days. But where the divers other days are uncertainly alleged, the indictment is still good for the act alleged on the certain day, and is sufficient. *Wells v. Com.*, 12 Gray (Mass.) 326.

Repetition of Allegation.—It is unnecessary, in a second clause of a count in an indictment for keeping a place for the illegal sale of liquor, to repeat the allegation of time. *State v. Brady*, 16 R. I. 51.

Employing Women to Draw Custom.—An information for the offense of

keeping a house where women were employed to draw custom and dance must aver that the women were employed at the same time. *State v. Brown*, 7 Wash. 10.

4. *State v. Wister*, 62 Mo. 592; *U. S. v. Burch*, 1 Cranch (C. C.) 36. But see *Wells v. Com.*, 12 Gray (Mass.), 326.

5. *Com. v. Harrington*, 3 Pick. (Mass.) 26; *Smith v. State*, 6 Gill (Md.) 425.

Where a date is alleged which is remote from the true time, although such a practice is reprehensible, yet such a statement is not ground for error. *People v. Saunders*, 29 Mich. 269.

But see *Com. v. Moore*, 11 Cush. (Mass.) 600, where it was held that where the letting of the house was charged as a single, distinct, and separate transaction, an allegation that the defendant, being in possession of a house, did "then and there" let the same, was insufficient.

Indiana.—Under Rev. Stat. Ind. 1881, § 1994, an indictment alleging that a certain house had theretofore been let to a person named, and that subsequent to the letting the defendant had knowingly permitted it to be kept as a disorderly house, sufficiently states that the house was so let at the date of the offense. *Graeter v. State*, 105 Ind. 271.

6. *Handy v. State*, 63 Miss. 207; *State v. Crogan*, 8 Iowa 523. But see *State v. Nixon*, 18 Vt. 70, where it was held that the offense, being local, must be described as committed in a particular town.

Illustrations.—An indictment charging that defendant, "at and in the county aforesaid, did then and there knowingly keep and suffer his house," etc., sufficiently fixes the locality of the house in the county in question. *State v. Staker*, 3 Ind. 570.

But if it is alleged that the house was kept in a particular place, such allegation must be sustained by proof.¹

4. Names of Frequenters.—It is not necessary to state the names of those who frequent the house, as this may be impossible,² but the names may be given in evidence under the general charge.³

5. Character of Frequenters.—The character of those who frequent the house need not be alleged.⁴

6. Particular Acts.—It is not necessary to allege the particular acts of disorder,⁵ nor is it necessary to particularize the

It is not necessary to describe the street where the house is situated, *State v. Stevens*, 40 Me. 559; *Rex v. Horne*, Cowp. 672; or that any person resided near thereto, or was in the habit of passing thereby. *Handy v. State*, 63 Miss. 207.

Gaming House.—In an indictment under a *New Hampshire* statute for the keeping of a gambling house or place, it is not necessary to set forth a description of such house or place. *State v. Prescott*, 33 N. H. 212.

Massachusetts.—An indictment charging the defendant with keeping and maintaining a nuisance, to wit, a tenement in the city of Boston, by him used, etc., conforms with the usual forms of indictment used for such offenses, and contains a sufficient description of the place. *Com. v. Welsh*, 1 Allen (Mass.) 1.

Indiana.—Act of March, 1875, provides that in obtaining a liquor license the precise location of the house shall be given. Under this act an indictment charging the defendant with keeping a disorderly house which, while averring that defendant had a license, failed to aver the place to which his license was applicable and that the place was kept in a disorderly manner, is insufficient. *Davis v. State*, 52 Ind. 488.

Kentucky.—Under Crim. Code, § 131, the failure to state any location is not a fatal defect. *Harlow v. Com.*, 11 Bush (Ky.) 610.

1. *State v. Crogan*, 8 Iowa 523.

Where it is alleged that the house was located on Sixth street, and it appears by proof that the house was on North street, such a variance is immaterial, as it cannot prejudice the rights of the defendant. *State v. Hendricks*, 15 Mont. 194.

2. *State v. Patterson*, 7 Ired. (N. Car.) 70; *Rex v. Higginson*, 2 Burr. 1232. Dictum of Bullier, J., in *J'Anson v. Stuart*, 1 T. R. 754.

Gambling House.—In an indictment for keeping a gambling house, the names of the persons who played need not be averred. *State v. Prescott*; 33 N. H. 212.

But in *Indiana*, under a statute providing that if any person shall suffer his building to be used for gambling he shall be fined, etc., an information must state the names of the persons permitted to gamble, or show a valid reason for not giving them. *Sowle v. State*, 11 Ind. 492.

House of Ill Fame.—*Massachusetts.*—Under Rev. Stat. Mass., c. 130, § 8, an indictment alleging that the defendant unlawfully kept a house of ill fame, resorted to for the purpose of prostitution and lewdness, follows the wording of the statute, and is sufficient, without alleging that the house was resorted to by divers persons. *Com. v. Ashley*, 2 Gray (Mass.) 356.

3. *State v. Patterson*, 7 Ired. (N. Car.) 70, 45 Am. Dec. 506.

4. *State v. Dame*, 60 N. H. 479, 49 Am. Rep. 331.

In *Washington*, under Gen. Stat., § 2894, an information charging that the defendant kept a house where women were employed to draw custom and to dance should also show the character of the women alleged to have been employed, or the manner of their deportment, and that their acts were such as tended to draw together crowds of disorderly persons or to debauch the morals of those resorting to the place. *State v. Brown*, 7 Wash. 10.

5. *State v. Brunell*, 29 Wis. 435; *Drake v. State*, 14 Neb. 535; *Territory v. Chartrand*, 1 Dakota 363; *Betts v. State*, 93 Ind. 375. But see *Frederick v. Com.*, 4 B. Mon. (Ky.) 7.

Gaming.—Under a *New Hampshire* statute the indictment need not set forth what games were played, nor the amount of money or other thing for

causes of the noise and disturbance.¹

7. Duplicity.—An indictment for keeping a disorderly house is not double because it alleges that the defendant kept a house on a certain day, and on divers other days and times,² nor because it states several distinct acts of disorder,³ nor, under the modern rules of practice, because it contains two counts setting forth the same offense in the same manner with slight verbal variations.⁴

Statement under Videlicet.—In an indictment for a statutory offense, the use, under a videlicet, of phrases which also describe the common-law offense of keeping a disorderly house does not render the indictment bad for duplicity.⁵

8. Use of Certain Phrases.—Where certain phrases are used in the indictment which, although not the proper legal wording and that commonly used, are sufficient to characterize the offense, such irregularity is immaterial.⁶

which the parties played. *State v. Prescott*, 33 N. H. 212.

Receiving Stolen Goods.—As the offense of keeping a house for such a purpose depends on whether the goods were actually stolen, the specific acts which constitute the offense must be shown in the indictment. *Hickey v. State*, 53 Ala. 514.

1. *Thatcher v. State*, 48 Ark. 60.

2. *State v. Prescott*, 33 N. H. 212.

3. *State v. Prescott*, 33 N. H. 212, an indictment for keeping a gaming house.

Jointly and Severally.—An indictment which charged that two persons, both jointly and severally, kept a disorderly house was held not to be erroneous, for, in the words of the judge, "whoever says that both of them did keep, etc., does in truth and consequence say that each of them did so." *Rex v. Dixon*, 10 Mod. 335.

Conjunctively or Cumulatively.—Pub. Stat. R. I., c. 80, § 1, declares "all grog-shops, tippling shops, or buildings, places, or tenements," used for the illegal sale of liquors, etc., to be nuisances. An indictment charging the keeping of "a certain grogshop and tippling shop and building, place, and tenement used for the illegal sale" of liquors, etc.—whether by the use of the terms conjunctively the intention was to charge the keeping of all the places named, or whether the terms were used cumulatively to designate one place—is not bad for duplicity. *State v. Brady*, 16 R. I. 51.

An indictment charging the defendant with keeping a house of ill

fame, resorted to by persons for the purpose of prostitution "or" lewdness, only charges one offense—that of keeping a house of ill fame. *State v. Toombs*, 79 Iowa 741.

4. *State v. Brady*, 16 R. I. 51; *State v. Doyle*, 15 R. I. 527.

5. *Com. v. Hart*, 10 Gray (Mass.) 465.

Such a statement may often be necessary to enable the pleader to fix with certainty what before was general. *Com. v. Hart*, 10 Gray (Mass.) 465.

Massachusetts.—In an indictment under Stat. Mass. 1855, c. 405, § 1, the statement, under a videlicet, of the various purposes for which the house was used does not render the indictment bad for duplicity, and such an indictment is sufficient without alleging that the house was used by the defendant for purposes enumerated. *Com. v. Kimball*, 7 Gray (Mass.) 328.

Surplusage.—An indictment for the common-law offense of keeping a gaming house which concludes with the words "contrary to the form of the statute in such case made and provided" is not bad for inconsistency, as the words "contrary to the statute," etc., will be regarded as surplusage, and not as indicating a prosecution under the statute against gaming houses. *Vanderwerker v. State*, 13 Ark. 700.

6. *State v. Wilson*, 93 N. Car. 608.

"Ill-governed" for "Disorderly."—The use of the phrase "ill-governed house," instead of the more proper phrase "disorderly house," is immaterial. *State v. Wilson*, 93 N. Car. 608.

"Tenement" for "House."—But an indictment alleging that the defendant

Under Special Statute.—The use in the indictment of a word or phrase different from that given in the statute is immaterial when the statutory term includes that used in the indictment.¹

VII. ALLEGATIONS AND PROOF.—Under an indictment for keeping a disorderly house which charges in the same count the various manners in which the house was disorderly, proof of any one of the manners mentioned is sufficient.²

kept "a disorderly tenement" charges no offense known to law. *Com. v. Wise*, 110 Mass. 181.

"Disorderly Bawdy House."—The legal meaning of the words "bawdy house" is clear, and an indictment which alleges the keeping of a "disorderly bawdy house" is sufficiently certain. *Reg. v. Munro*, 24 U. C. Q. B. 44.

"House of Ill Fame."—The phrase "house of ill fame" has a sufficiently legally defined meaning. *Betts v. State*, 93 Ind. 375.

"Bawdy House" and "House of Ill Fame."—The terms "bawdy house" and "house of ill fame" are synonymous. *State v. Boardman*, 64 Me. 523.

"Avocation" for "Vocation."—The use of the word "avocation" for "vocation," in an indictment for keeping a disorderly house, although improper, will not vitiate the indictment where the meaning of the pleader is clear. *Peters v. State* (Tex. Crim. App. 1893), 23 S. W. Rep. 683.

Keepers of Billiard Tables.—Under an act relating to keepers of billiard tables, etc., an indictment charging the defendant with "having the control and management of said saloon in which were kept billiard tables" is not equivalent to the words "having the care, management, or control of any billiard table," which are the words used in the statute. The right to control the saloon might be in one person and the right to control the billiard table in the saloon in another person. *Hanrahan v. State*, 57 Ind. 527.

"Then and There."—The omission of the words "then and there" in the indictment is immaterial. *State v. Doyle*, 15 R. I. 527.

1. *People v. Klock*, 48 Hun (N. Y.) 275.

"Bird or Animal" and "Game Cocks."—Under a statute forbidding the keeping of any house to be used for fighting any "bird or animal," an indictment which uses the words "game cocks" is sufficient. *People v. Klock*, 48 Hun (N. Y.) 275.

"Lewd House."—Under a statute making it an offense to keep a lewd house for the practice of fornication or adultery, a charge that defendant kept and maintained a lewd house is sufficient, without alleging that the place was kept for the practice of fornication or adultery, as such facts are implied in the term "lewd house." *Clifton v. State*, 53 Ga. 241.

"Vagrants" and "Vagabonds."—Under Texas Penal Code, § 339, defining a disorderly house to be, among others, one that is kept as a resort for "vagrants," an indictment following the wording of the statute, but using the word "vagabonds" instead of "vagrants," is defective as to such clause, and evidence as to the presence of vagrants or vagabonds must be excluded. *Johnson v. State*, 28 Tex. App. 562.

"And" and "Or."—The substitution of the word "and" for the word "or," as used in the statute, is immaterial. *State v. Bregard*, 76 Mo. 322.

Place of "Resort" and Place "Used."—Where a statute declares places "where intemperate, idle, dissolute, noisy, or disorderly persons are in the habit of resorting" to be nuisances, an indictment charging the keeping of a place "used" for the habitual resort of such persons is sufficient. *State v. Brady*, 16 R. I. 51.

2. *People v. Carey*, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 238.

But where an indictment has alleged the keeping of a disorderly house, and has set forth the causes of disorder as drinking, tippling, fighting, and misbehaving generally, but has failed to allege that gaming was a cause of disorder, the defendant cannot be convicted on such a charge of keeping a common gaming house. Where the characteristics of the house are thus specified, such characteristics are matters of description, and a case must be proved to answer to at least one of them. *Linden Park Blood-Horse Assoc. v. State*, 55 N. J. L. 557.

Particular Acts.—Where particular acts are alleged, no other acts which in themselves constitute an indictable offense may be proved under such an allegation except those which tend to aggravate the offense already averred.¹

General Charge.—But when the charge is general, evidence of particular facts will be admitted.²

VIII. INSTRUCTIONS.—An erroneous statement by the judge as to what constitutes the offense of keeping a disorderly house in any particular case is not prejudicial error when such statement could not have misled the jury.³ But not so one that may materially affect the case.⁴

IX. VERDICT AND JUDGMENT.—When in an indictment the offense of keeping a disorderly house is laid as a common nuisance, the verdict must show that the house was a nuisance.⁵

1. *Frederick v. Com.*, 4 B. Mon. (Ky.) 7.

Keeping Only Part of a House.—An allegation that a certain house, reputed to be a house of ill fame, was kept by the defendant is supported by proof that the defendant kept but part of the house. *State v. Main*, 31 Conn. 572.

But an indictment under Stat. *Massachusetts* 1855, c. 405, alleging that "a certain building" was used for the illegal sale of intoxicating liquors cannot be sustained by proof that one of several tenements in the building was used for such a purpose. *Com. v. McCaughey*, 9 Gray (Mass.) 296.

Keeping Several Houses.—Under an indictment charging in a single count the keeping of a disorderly house at a certain town, proof cannot be admitted that respondent kept such a house at more than one place in said town. *State v. Plant*, 67 Vt. 454.

2. *Clark v. Periam*, 2 Atk. 339.

Surplusage.—Under an indictment for keeping a house of ill fame, to which defendant permitted persons to resort for purposes of prostitution, and which also averred that prostitution and lewdness were practiced in said house at defendant's solicitation and request, it is not necessary to prove that the unlawful practices were carried on at his solicitation and request. *State v. Schaffer*, 74 Iowa 704.

3. The question for the jury being whether the defendant was the keeper of a disorderly house, a statement in the charge that "lewdness is irregular indulgence," etc., instead of the technically correct phrase "unlawful indulgence," is immaterial. *State v. Toombs*, 79 Iowa 741.

After a correct charge of the law in regard to houses of ill fame the jury could not be misled by the language: "A house of ill fame is a house of bad reputation. I suppose you all well know the meaning of the words 'good reputation.'" *Territory v. Chartrand*, 1 Dakota 363.

4. Where an indictment alleges the keeping of a disorderly house from October 22, 1887, and on each day thereafter, to October 28, 1887, it is error to instruct the jury that the indictment charges the keeping of the house from October 8 to January 31, 1888, as the proof must be confined to the time alleged in the indictment. *Fleming v. State*, 28 Tex. App. 234.

Charging a Distinct Offense.—Under an indictment for keeping a bawdy house, a charge to the jury that the habit of prostitution of the females was a matter to increase their finding is erroneous as constituting a distinct offense. *Frederick v. Com.*, 4 B. Mon. (Ky.) 7.

Instructions Not Confined to Offense Charged.—The *Texas* statutes define a disorderly house to be one where prostitutes resort, and also one where prostitutes are employed and liquors sold. Instructions by the court defining a disorderly house so as to include both of the above definitions is erroneous, where the indictment alleged the house to be one "where prostitutes were permitted to resort and reside," as in such a case the instructions should have confined the jury to the charge contained in the indictment. *Ross v. State* (Tex. Crim. App. 1896), 33 S. W. Rep. 972.

5. *Hunter v. Com.*, 2 S. & R. (Pa.)

Judgment.—Where two or more persons have been jointly indicted and convicted of keeping a disorderly house, the judgment may be several against the defendants.¹

298, where a verdict of "guilty of keeping a disorderly house and disturbing his neighbors" was held to be bad. The court said: "It is not necessary that the jury should find a man guilty of everything charged in the indictment; it is sufficient if they find him guilty of part, provided that part be an indictable offense. The keeping of a disorderly house is not indictable unless it be laid as a common nuisance, because a house may be disorderly without being injurious to any but its inhabitants; and it is the injury done to the public which is the essence of the offense. But the jury have found that he also disturbed his neighbors; that, however, is not the offense charged in the indictment; the charge is that he kept a disorderly house, to the common nuisance, etc. What was their reason for not saying

that it was a common nuisance I know not; but as they did not think proper to find the defendant guilty generally, we must take it that he stands acquitted of everything of which he was not found guilty. They have, in fact, found him guilty of no part of the matter charged in the indictment but the keeping of a disorderly house, which is not alone indictable."

1. *Curd v. Com.*, 14 B. Mon. (Ky.) 310; *Caldwell v. Com.*, 7 Dana (Ky.) 229.

Where three defendants jointly indicted for keeping a disorderly house were convicted, it appearing that one was the keeper, while the two others occupied rooms therein, judgment was affirmed as to the keeper of the house, but reversed as to the occupants. *Moore v. State*, 4 Tex. App. 127.

DISTRESS.

BY PAUL McRAE.

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I. NATURE OF DISTRESS.—At Common Law a distress for rent¹ is not the commencement of a suit; it is a mandate authorized by law to be issued in a proper case, to seize and sell the tenant's goods for the satisfaction of the rent, just as if a judgment had been previously rendered therefor, and it is not returnable into any court,²

1. As distress is most commonly used for the collection of rent, the term is generally so used in this article. Cases relating to the distress of cattle damage feasant are distinguished.

2. *Towns v. Boarman*, 23 Miss. 186; *Canterberry v. Jordan*, 27 Miss. 96; *Keller v. Weber*, 27 Md. 660; *Lapointe v. Stewart*, 16 Ill. 291.

How Made.—No precise act or form of words is essential to a distress, and a distress may be made without actual seizure. Where the landlord went upon the premises demised, and where the tenant's goods were, and made an inventory of the goods and put up a notice of distress on the premises and served the notice of the distress upon

the tenant, it was held that these acts amounted to a distress. *Newell v. Clark*, 46 N. J. L. 363. And see *Furbush v. Chappell*, 105 Pa. St. 187. See, for full discussion of this topic, *Am. and Eng. Encyc. of Law*, art. DISTRESS. **Made in the Night.**—The execution of a distress warrant in the night constitutes a trespass. *Sherman v. Dutch*, 16 Ill. 283.

Parties at Common Law.—If the lessors be joint tenants all must join in the distress, but any one of them may distrain in the names of all. So parcellers, as in law they constitute but one heir, must join in the distress, but in that case also one may distrain in the names of all. But tenants in com-

and if returned into court as other attachments and a judgment be rendered in that proceeding, the judgment will be void.¹

Remedy Enlarged by Statute.—But the statutes of various states have essentially changed the nature of the remedy, the affidavit in some states, and in others the distress warrant, performing the functions of a declaration.² In other jurisdictions the issuing of the distress warrant is the commencement of the suit, but the plaintiff must also file a petition giving the particulars of his demand before the defendant is required to answer.³

Distress Not a Waiver of Other Remedies.—Distress is a concurrent remedy for rent, and where the landlord has distrained and recovered part of the rent due, he may then bring an action for the residue.⁴

Present Use of Remedy.—In a number of the United States this remedy has never been adopted; in others laws allowing it have been repealed.⁵

mon, as they have several titles, may distrain severally, each for his own share of the rent, or one may distrain in the name of all if not forbidden by the others to do so, and may afterwards in replevin avow as to his own moiety and make cognizance as bailiff for his cotenants as to their proportions of the rent. Archbold's Law of Landlord and Tenant 110. *Waring v. Slingluff*, 63 Md. 54.

Tenants in common, who make a joint lease to a tenant for years, may join in making a distress for rent. *Jones v. Gundrim*, 3 W. & S. (Pa.) 531.

Power of Sale Given by Statute.—At common law the landlord, in person or by a private agent, might levy a distress, but the distress so taken was, by the common law, only in the nature of a security for the rent, and could not be sold to make satisfaction. The power of selling is given by statute, and sale can be made only by an officer, that is, one duly qualified as such. *Smith v. Ambler*, 1 Munf. (Va.) 596; *Ferguson v. Moore*, 2 Wash. (Va.) 54.

1. *Canterberry v. Jordan*, 27 Miss. 96.

2. **Florida.**—Under the Florida statute the affidavit performs the functions of a declaration. *Smoot v. Strauss*, 21 Fla. 611.

Illinois.—In this state the distress warrant stands in the place of a declaration. *Hurd's Rev. Stat. Ill.* 922, § 20 (Rev. Stat. 1874, c. 80, § 20); *Holley v. Metcalf*, 12 Ill. App. 141; *Bainter v. Lawson*, 24 Ill. App. 634; *Bartlett v. Sullivan*, 87 Ill. 220.

Summons and Declaration.—Formerly in Illinois a distress warrant was in the nature of both summons and

declaration, and the amount claimed in the warrant fixed the limit of the recovery. *Asay v. Sparr*, 26 Ill. 115.

3. *Bateman v. Maddox*, 86 Tex. 552.

Filing Petition before Appearance Day.—In *Texas*, where the suit is commenced by the issuing of a distress warrant, citation, and return, the petition should be filed before the first appearance day. *Bateman v. Maddox*, 86 Tex. 546; *Braley v. Bailey*, 1 Tex. App. Civ. Cas., § 790. But if filed before the case is dismissed the delay is not a ground for dismissal of the suit. *Bateman v. Maddox*, 86 Tex. 546.

Filing the petition at the return term of the distress warrant, before motion to dismiss or action taken by the court, is, in a suit for rents, a sufficient appearance to give the court jurisdiction. *Maynard v. Lockett*, 1 Tex. Unrep. Cas. 527.

In Georgia the counter affidavit to a distress warrant for rent brings the case into court, and when said affidavit is dismissed on motion of the plaintiff the case passes out of the jurisdiction of the court, and is remanded to the sheriff, by operation of law, there being no longer any case in court. *Girtman v. Stanford*, 68 Ga. 179; *Habersham v. Eppinger*, 61 Ga. 199; *McCulloch v. Good*, 63 Ga. 519.

4. *Cornell v. Lamb*, 20 Johns. (N. Y.) 407.

5. **Colorado.**—It seems that a landlord cannot distrain for rent in the absence of an express agreement. *Herr v. Johnson*, 11 Colo. 393.

Massachusetts.—In *Wait's Case*, 7 Pick. (Mass.) 100, *Parker, C. J.*, ex-

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II. THE AFFIDAVIT.—The affidavit¹ to obtain a distress warrant is not required to be technically precise, so as to exclude every possible meaning that under any circumstances other than those of the real case it might be made to bear.²

Jurisdictional Facts.—The affidavit must, however, clearly allege all jurisdictional facts.³

presses the opinion that there is no right of distress in Massachusetts.

Minnesota.—Prior to Laws 1877, c. 140, abolishing distress for rent, the landlord's common-law right of distress for rent, as modified by 2 Wm. & M., c. 5, allowing property distrained to be sold, existed in Minnesota. *Dutcher v. Culver*, 24 Minn. 584.

Missouri.—The right of distress does not exist in Missouri. *Crocker v. Mann*, 3 Mo. 472.

North Carolina.—The process of distraint has never been adopted in this state: *Dalglish v. Grandy*, Cam. & N. (N. Car.) 22; *Kornegay v. Collier*, 65 N. Car. 69; *Harrison v. Ricks*, 71 N. Car. 7; *Smithdeal v. Wilkerson*, 100 N. Car. 52.

New York.—The act abolishing distresses for rent, and substituting therefor the remedy by re-entry, is not unconstitutional as to existing leases. *Van Rensselaer v. Snyder*, 13 N. Y. 299, 9 Barb. (N. Y.) 302; *Conkey v. Hart*, 14 N. Y. 22; *Guild v. Rogers*, 8 Barb. (N. Y.) 502.

Wisconsin.—The common-law right of distress for rent existed in this state in 1864, *Coburn v. Harvey*, 18 Wis. 147; but has been abolished by statute (c. 74, Laws 1866; § 2181, Rev. Stat. 1878).

1. It is not intended in this article to treat of the affidavit except when it is part of a direct proceeding in court, though a few other cases are used by way of illustration.

2. *Jenkins v. Pell*, 17 Wend. (N. Y.) 418, affirmed 20 Wend. (N. Y.) 456. For an affidavit held sufficient, see *Berry v. Powell*, 77 Ga. 79.

The statute prescribing the form of affidavit need not be literally pursued; it is sufficient if it be substantially followed. *Cross v. Tome*, 14 Md. 247.

Illustrations.—Where by the terms of the lease a quarter's rent became due on the 1st day of February, an affidavit which alleged that the amount claimed was "for one quarter's rent due the first day of February last" was held sufficient. *Jenkins v. Pell*, 20 Wend. (N. Y.) 450.

Where a statute requires an affidavit to specify the amount due and the time for which it accrued, an affidavit stating the amount due as being the balance of one year's rent of a certain farm, etc., said year's rent ending in the month of January, A. D. 1840, was held to state the time with sufficient certainty. *Smith v. Fyler*, 2 Hill (N. Y.) 648.

Against Administrator.—An affidavit for a distress warrant which charges that "A, administrator of B," is indebted, etc., is good to charge A in his representative capacity, the words "administrator of B" being not merely a *descriptio personæ*, but showing in what capacity the rent is due. *Smith v. Bobb*, 12 Smed. & M. (Miss.) 322.

3. *Dawson v. Garland*, 83 Ga. 304; *Bryant v. Mercier*, 82 Ga. 409; *Cohen v. Candler*, 88 Ga. 207; *Sharp v. Palmer*, 31 S. Car. 444; *Pate v. Shannon*, 69 Miss. 372.

A mere description in the affidavit and distress warrant of the rented property will not serve as a substitute for alleging the tenant's residence in the county or the presence of his property therein as a jurisdictional fact. The description relied upon and held insufficient was in these terms: "That W. J. Fletcher and Sarah E. Fletcher are indebted to him in the sum of \$95.00 for rent of the building on Main street now occupied by said parties and known as 'Fletcher's Saloon,' in the city of Gainesville, Hall county, Ga." *Cohen v. Candler*, 88 Ga. 207.

Return of Papers to Wrong Court.—Where, to a general distress warrant for rent, the tenant files a counter affidavit with the levying officer, the papers should be returned for trial of the issue to the court having jurisdiction in the county of the tenant's residence; and if the return is made not to that court but to another, and after judgment of dismissal in the primary court, an appeal is taken to the Superior Court, the discretion of the latter court in allowing the case to be withdrawn and the papers to be

An Assignee of a rent contract must set out or describe in the affidavit both the contract and the assignment.¹

Demand.—In *Georgia* the affidavit to obtain a distress warrant for rent, whether on a general or special lien, need not allege demand.²

Disclaiming Bad Motive.—In *Texas* the affidavit for a distress warrant should state that the amount sued for is for rent which is due, and that the warrant is not sued out for the purpose of vexing and harassing the defendant.³

Counter Affidavit.—In *Georgia* a counter affidavit is required to bring the distress proceeding into court, and when the counter affidavit is dismissed the case is out of court and judgment for plaintiff is improper.⁴

III. DISTRESS WARRANT.—The warrant of distress,⁵ when it

returned to the proper court in the county of the defendant's residence will not be controlled. Such a disposition of the case is equivalent to dismissing it finally from the court having no jurisdiction, and granting leave to the landlord to return the papers to the court which has jurisdiction. *Dawson v. Garland*, 83 Ga. 304.

If a claim is interposed, and is returned to the district in which the defendant resides, and the claimant goes to trial there without objection to the jurisdiction, he waives objection. That the warrant is returnable to another district does not entitle him to have the levy dismissed. *Almand v. Scott*, 83 Ga. 402.

Objection to Jurisdiction—How Raised.—A plea by the tenant that the city court "ought not to have and maintain jurisdiction in said cause because the writ is not returnable by law to this court, and this he is ready to verify," does not raise the question whether in the city of Savannah a distress warrant for more than one hundred dollars can be issued by, or upon an affidavit sworn to before, a justice of the peace. The mode of raising such question would be by motion to dismiss the levy or to quash the warrant. *State Bldg., etc., Assoc. v. Owens*, 88 Ga. 224.

Waiver of Irregularities.—A motion to dismiss a warrant of seizure for irregularities in the affidavit comes too late after the tenant has filed his notice of contest and the issue has been made and referred to a master for his report. *Garlington v. Gilliam*, 31 S. Car. 333.

1. *Lathrop v. Clewis*, 63 Ga. 282.

2. *Colclough v. Mathis*, 79 Ga. 394; *Almand v. Scott*, 83 Ga. 402.

Demand is unnecessary now by express provision of statute. Acts of 1887, p. 34; *Almand v. Scott*, 83 Ga. 402.

3. *Murry v. Blanchard*, 2 Tex. App. Civ. Cas., § 479.

An affidavit that a distress warrant is not sued out for the purpose of "injuring or harassing" the defendant fulfils practically the statutory requirement that affidavit shall be made that the warrant was not sued out for the purpose of "vexing or harassing." *Biesenbach v. Key*, 63 Tex. 79.

4. *Anders v. Blount*, 67 Ga. 41; *McCulloch v. Good*, 63 Ga. 519; *Wright v. Hawkins*, 68 Ga. 828.

A Motion to Dismiss a Counter Affidavit in a distress proceeding takes precedence of a motion to dismiss the warrant. But if the counter affidavit was sufficient, a failure to hear such motion first is not prejudicial error. *Drake v. Dawson*, 66 Ga. 174.

Sufficiency of Counter Affidavit.—When the affidavit of the landlord alleges that the rent is due, it is sufficient for the counter affidavit of the defendant simply to state that the sum or some part thereof is not due. *White v. Mandeville*, 72 Ga. 705; *Anders v. Blount*, 67 Ga. 41; *Girtman v. Stanford*, 68 Ga. 178; *Holland v. Brown*, 15 Ga. 113.

A Counter Affidavit is Filed Too Late after levy and sale of the property. *Smith v. McPherson*, 78 Ga. 84.

5. It is not the intention in this article to treat of the warrant except when there is a direct proceeding in court upon it, where the warrant is in the nature of a declaration; but a few

stands under the statute for a declaration, must aver all matters which the plaintiff seeks to prove,¹ and the amount to be recovered is limited to the amount fixed in the warrant.²

Description of Premises.—In *Illinois* it is held that a description of the premises is not a necessary part of a distress warrant and may be treated as surplusage.³

The Action Is for Rent, and unless the defendant opens the door to the investigation of other matters by interposing a set-off, the rent alone is the proper subject-matter of the controversy, and to that the proceedings should be confined.⁴

In Name of State.—A distress warrant has been held to be within the constitutional provision that all writs and other processes shall run in the name of the state.⁵

Citation to the Defendant.—In *Texas* the citation to the defendant

other cases are given by way of illustration.

1. *Bainter v. Lawson*, 24 Ill. App. 634.

Thus where a distress warrant contains no allegation or charge that the defendant, by good husbandry, might have made a better crop and thereby increased the amount of rent to be received by plaintiff, evidence to that effect is inadmissible. *Bainter v. Lawson*, 24 Ill. App. 634.

2. *Asay v. Sparr*, 26 Ill. 115.

3. Thus if inserted it makes no difference whether it is correct or incorrect. *Alwood v. Mansfield*, 33 Ill. 452.

In *Central Land Co. v. Calhoun*, 16 W. Va. 361, it is said that a distress warrant ought not to be quashed for uncertainty where the description was: "A certain messuage and tenement situated in the city of Huntington, Cabell county, W. Va., rented by the Central Land Co. to F. J. Calhoun."

Though Warrant Quashed, Action may Survive.—In distraining for rent, though the distress proceedings may be quashed, yet the plaintiff showing a cause of action is entitled to foreclosure of the landlord's lien. *Brown v. Collins*, 77 Tex. 159.

4. *Cox v. Jordan*, 86 Ill. 564.

In *Georgia* a distress warrant cannot be resisted by a set-off which has no connection with the rent or the demised premises. *Jones v. Findley*, 84 Ga. 52.

Illinois—Set-off by Tenant.—The statute gives the tenant the right to "avail himself of any set-off or other defense which would have been proper if the suit had been for the rent in any

form of action, and with like effect." *Cox v. Jordan*, 86 Ill. 564.

Set-off by Plaintiff.—The plaintiff has not the right to recover judgment against defendant for any demands or claims other than his claim for rent. But claims and demands other than for rent can be pleaded and proven by the plaintiff as a defense against the defendant's set-off. *Cox v. Jordan*, 86 Ill. 567.

The remedy by distress is for the rent, and damages and interest cannot be included. The party never avows but for the rent. *Lansing v. Rattoone*, 6 Johns. (N. Y.) 43.

Damages Due instead of Rent Due.—A distress warrant authorizing the bailiff to distrain for a certain amount as "damages due * * * for the nonperformance of the conditions of the lease" is not, under the *Illinois* statute, void on its face, as the damages referred to may be for rent due. *Craig v. Merime*, 16 Ill. App. 214.

Attorneys' Fees, though embraced in a promissory note given for rent, are not collectible by distress warrant, and the surety on a replevy bond growing out of a levy of the distress warrant is not liable for such fees. If they are included in a judgment entered up against him when the issue on the warrant was disposed of, the judgment may be purged of the same on motion, but the whole judgment will not be set aside because of such error as to a part, the judgment showing on its face how much of it was erroneous. *Jones v. Findley*, 84 Ga. 52.

5. *Nashville v. Pearl*, 11 Humph. (Tenn.) 249; *Beach v. O'Riley*, 14 W. Va. 55.

must issue simultaneously with the warrant.¹

IV. AMENDMENTS.—When the distress warrant or the affidavit forms the basis of a proceeding in court it is amendable.² But when, as at common law, distress is not a judicial proceeding and is not returnable to any court, in an action to recover the property the affidavit is not amendable.³

V. GENERAL RULES OF PROCEDURE.—It may be stated as a general rule that where the distress proceeding is a case in court, the general rules of pleading and practice are to a great extent followed,⁴ but all the special statutory provisions should be carefully

1. *Jones v. Stone*, 2 Tex. App. Civ. Cas., § 358; *Miles v. Sprague*, 3 Tex. App. Civ. Cas., § 199.

Rev. Stat. Texas, art. 3119, require a justice of the peace, at the time the distress warrant is issued, to issue a citation to the defendant requiring him to answer, etc., and a failure to issue the citation is fatal to the proceedings. *Randall v. Rosenthal* (Tex. Civ. App. 1894), 27 S. W. Rep. 906; *Jones v. Stone*, 2 Tex. App. Civ. Cas., § 358.

Warrant Not Void though Citation Not Issued.—A failure of a justice of the peace to issue the citation at the same time he issues the distress warrant may be such an irregularity as upon proper motion would vacate the warrant, but it does not render the warrant void, and it is not subject to attack in a collateral proceeding. *Jacobs v. Daugherty*, 78 Tex. 682.

2. Under the *Georgia* statute, Acts of 1887, p. 59, an affidavit for distress warrant is amendable to the same extent and with the same consequences as in case of ordinary declarations, and this right of amendment includes the supplying of vital and necessary averments omitted from the original affidavit. *Bryant v. Mercier*, 82 Ga. 409; *Reese v. Walker*, 89 Ga. 72; *Freeny v. Hall*, 93 Ga. 706.

So a distress warrant in *Illinois* stands for a declaration and is amendable as other declarations. *Bartlett v. Sullivan*, 87 Ill. 220; *Walker v. McDonald*, 28 Ill. App. 643; *Bainter v. Lawson*, 24 Ill. App. 634; *Hurd's Rev. Stat. Ill.* 922, § 20; *Rev. Stat.* 1874, ch. 80, § 20.

Amendment Relates Back.—Though the amendment is not made until after the return of the papers to the proper court, it relates back so as to heal defects both of issuing and returning the proceedings. *Bryant v. Mercier*, 82 Ga. 409.

Amendment after Levy.—An amendment after levy will not cause the levy to fall, the main object of the statute in allowing the amendment being to uphold the levy. Therefore, where a claimant of the property levied on went to trial in the justice's court without objection to the sufficiency of the affidavit, and upon verdict against him appealed to the Superior Court, where the affidavit was amended before trial, a motion to dismiss the levy because of such amendment was properly overruled. *Reese v. Walker*, 89 Ga. 72.

Where Defendant Pleads Set-off.—But the plaintiff has not the right so to amend his declaration as to make it embrace claims and demands not covered by his claim for rent as a ground of recovery, although defendant has pleaded a set-off, but he may set up such claims by way of replication as a matter of defense against the tenant's set-off. The prayer for judgment in such replication should be for judgment as claimed in the declaration. *Cox v. Jordan*, 86 Ill. 567.

Amendment of Judgment.—The court cannot, on the application of the plaintiff in a distress warrant to which a counter affidavit was filed, enter judgment *nunc pro tunc* against the defendants' sureties after a lapse of several years, when the judgment was entered by the judge without the verdict of a jury, by the consent of the parties, and without the knowledge or consent of the sureties. *Willis v. Bivins*, 76 Ga. 748.

3. *Pate v. Shannon*, 69 Miss. 372.

4. **Affidavit of Claim Requires Affidavit of Merits.**—Thus it is held in *Illinois* that where the plaintiff files with his distress warrant an affidavit of claim, section 37, chapter 110, of the Practice Act is applicable, and the defendant must file his affidavit of merits. *Bartlett v. Sullivan*, 87 Ill. 220.

observed.¹ It has been said that the remedy by distress is stringent and summary in its character and all the statutory

Should be Docketed.—In *Illinois* the case should be docketed and stand for trial upon the docket as other cases at law, in the manner provided by the Practice Act. *Fergus v. Garden City Planing Mill, etc.*, Mfg. Co., 71 Ill. 51.

But in *Georgia* the Registry Act of October 1, 1889, does not contemplate or require that a distress warrant for rent shall be entered upon the general execution docket provided for by section 2 of that act. *Jones v. Howard* (Ga. 1895), 22 S. E. Rep. 291.

Another Suit Pending.—In *Georgia* it has been held that, where a distress warrant has been taken out, a counter affidavit made, and the proceedings returned into court for trial, the defendant may plead another suit pending if the plaintiff also brings a simple action to recover the rent. *Chisholm v. Lewis*, 66 Ga. 729.

Judgment by Default.—A distress proceeding for rent stands for trial just as any other case upon the law docket, and the defendant making no appearance within the time prescribed by the rule of court may be defaulted as in other actions. *Fergus v. Garden City Planing Mill, etc.*, Mfg. Co., 71 Ill. 51.

Appeal.—The finding and certificate formerly required by the *Illinois* statute constituted a final judgment within the meaning of the Practice Act, from which an appeal would lie to the Supreme Court. *Wade v. Halligan*, 16 Ill. 507; *Fergus v. Garden City Planing Mill, etc.*, Mfg. Co., 71 Ill. 52.

From the justice's court an appeal lies to the Circuit Court. *Kimball v. Riter*, 25 Ill. 276.

Giving Number of Case in Citation.—In *Texas* a citation returnable to the District or County Court need not state the number of the suit as required in other cases. *Biesenbach v. Key*, 63 Tex. 79.

Warrant Reviewed on Certiorari.—It has been held in *Tennessee* that the warrant is a "process" in the legal sense, and in the sense of the Constitution, and may be reviewed on certiorari under the practice of that state. *Nashville v. Pearl*, 11 Humph. (Tenn.) 252.

Earlier Practice in Illinois.—For decisions under the earlier practice in *Illinois* see the following cases: *Alwood v. Mansfield*, 33 Ill. 452; *Lapointe v. Stewart*, 16 Ill. 293; *Sketoe*

v. Ellis, 14 Ill. 75; *In re Joslyn*, 2 Biss. (U. S.) 235; *Storing v. Onley*, 44 Ill. 123; *Wade v. Halligan*, 16 Ill. 507; *Kruse v. Kruse*, 68 Ill. 188.

1. In Illinois Same as in Attachment.—In *Illinois* by statute the rules of practice applicable to proceedings by attachment are adopted and made applicable to proceedings against a tenant by distress warrant, and such action survives upon the death of the tenant and may be prosecuted against his administrator or executor. *Rauh v. Ritchie*, 1 Ill. App. 188.

Costs.—Any expense of the case and custody of property distrained is to be defrayed, under the *Illinois* statute, in the same manner as expenses in case of attachment, and so taxed as costs by the clerk or by the court. *Poppers v. Meager*, 33 Ill. App. 20.

Judgment.—Formerly a special judgment was rendered in *Illinois* authorizing the sale of the property, but now a general judgment as in other cases is given. *Hurd's Rev. Stat. Ill.* 922, §§ 22, 23; *Bartlett v. Sullivan*, 87 Ill. 220.

In *Kruse v. Kruse*, 68 Ill. 188, the court, by Walker, J., said: "In the cases of *Alwood v. Mansfield*, 33 Ill. 452, and *Storing v. Onley*, 44 Ill. 123, it was held that in case of distress for rent the court can only ascertain whether the relation of landlord and tenant exists, and find the amount of rent due, and have it certified to the bailiff who levied upon the property—which certificate constituted his warrant for selling it and applying the proceeds to the payment of the rent thus found to be due. In those cases it was also held to be error for the court to render judgment on the finding, and to award special execution. In that respect this case is like those, and must be governed by them." And see *Morgan v. Campbell*, 22 Wall. (U. S.) 381.

Judgment Final.—It is provided by section 22, chapter 80, Rev. Stat. Ill. 1874, that "when the defendant has been served with process or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons, and execution may issue thereon, not only against the property distrained, but also against the other property of the defendant;" a judgment so rendered is

requirements must be strictly followed,¹ but this rule has been held to apply to all that is done for seizing the property, but not to a subsequent pleading.²

VI. REMEDIES FOR WRONGFUL OR IRREGULAR DISTRESS—1. In General.—There are various actions which may be maintained by a tenant against his landlord for a wrongful distress.³ By statute he may bring an action of trespass or upon the case for the actual damage sustained by any irregularity or unlawful act in making the distress;⁴ and a court of chancery has jurisdiction to award a

final, and conclusive between the parties as to all matters that should have been determined in that proceeding, the chief of which is whether rent was due, and, if so, what amount. *Clevenger v. Dunaway*, 84 Ill. 369.

Defect in Levy Will Not Prevent Recovery.—In *Illinois* the statute provides that the proceedings in distress shall be the same as in attachment cases, so that where there is a personal appearance and a defense upon the merits, a defect in the levy, while it defeats the lien, does not prevent a recovery. *Holley v. Metcalf*, 12 Ill. App. 141.

Verdict in Georgia.—Under Code Ga., § 3561, providing that verdicts are to have a reasonable construction, and are not to be avoided unless from necessity, in a suit where a distress warrant has issued, and defendant has filed a counteraffidavit, a verdict that the jury "find the warrant proceed" is not void for uncertainty. In such case the proceeding becomes an action for rent with the warrant answering for the declaration and the counteraffidavit for a plea, and the verdict, when construed with the pleadings, is sufficient to support a judgment for the amount claimed in the warrant. *Seifert v. Holt*, 82 Ga. 757.

1. *Sharp v. Palmer*, 31 S. Car. 444; *Jones v. Stone*, 2 Tex. App. Civ. Cas., § 358; *Braley v. Bailey*, 1 Tex. App. Civ. Cas., § 790; *Dudley v. Harvey*, 59 Miss. 38; *Nashville v. Pearl*, 11 Humph. (Tenn.) 249. See *Newsom v. Hart*, 14 Mich. 233; *Hasceig v. Tripp*, 20 Mich. 216.

2. *Bateman v. Maddox*, 86 Tex. 553. And see *supra*, IV. *Amendments*.

3. Thus it has been said that the plaintiff has his election to bring replevin, trespass, or case. *Com. v. Colgan*, 5 B. Mon. (Ky.) 487.

In *Connah v. Hale*, 23 Wend. (N. Y.) 465, Cowen, J., says: "There can

be no doubt that in all cases of taking goods without right at the time, whether by officers or others, trover, trespass *de bonis*, and in general replevin are concurrent remedies. * * * I want an authority that for a taking originally tortious, whether under color of distraining or anything else, either trover or trespass will not lie."

Case a Proper Remedy.—In *Skidmore v. Ensign*, 6 J. J. Marsh. (Ky.) 577, it was held that an action on the case is an appropriate remedy against a landlord for causing an illegal distress of the goods of his tenant.

Trover Will Lie for goods wrongfully taken as a distress. *Drew v. Spaulding*, 45 N. H. 478, and cases cited.

4. By statute 11 Geo. II., c. 19, § 19, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not therefore be deemed unlawful, nor the party making it deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity shall recover full satisfaction for the special damage he shall have sustained, and no more, in an action of trespass or on the case, with full costs.

Construction of Statute.—The provision of the statute 11 Geo. II., c. 19, § 19, that the plaintiff may bring action of trespass or upon the case for any irregularity in the distress, does not mean that either action may be brought indiscriminately; but the remedy is brought which is suited to the nature of the irregularity. *Messing v. Kemble*, 2 Campb. 115.

Applies Only to Rent.—The provision of the statute 11 Geo. II., c. 19, applies only to distress for rent, and not to beasts taken damage feasant, and in such case a simple action of trespass may be brought. *Sackrider v. M'Donald*, 10 Johns. (N. Y.) 257.

perpetual injunction to restrain an illegal distress on payment into court of the rent due, where the demised premises are underlet to numerous tenants whose possession will be disturbed and their goods subjected to a levy by such wrongful distress.¹

2. For Distraining when No Rent Was Due.—For a distress made when no rent was in arrear and due, the tenant may bring an action of trespass or case under the statute to recover double the value of the goods,² or he has his option to bring an ordinary action of trespass, trover,³ or re-

Variance in Name of Person to Whom Rent Was Due.—In case for an irregular distress it is necessary to state correctly to whom the rent distrained for was due; and a variance in this respect is fatal. *Ireland v. Johnson*, 1 Bing. N. Cas. 162, 27 E. C. L. 341.

1. *Coit v. Horn*, 1 Sandf. Ch. (N. Y.) 1.

But in *Best v. Drake*, 11 Hare 369, it is held that a court of equity has no jurisdiction, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on the property of his tenants.

2. Pennsylvania.—The 3d section of the Pennsylvania Act of March 21, 1772, Brightly's Purdon's Dig. 1162, gives the right to recover, in an action of either trespass or case, double the value of the goods and chattels distrained and sold where no rent was due and in arrear. *Fretton v. Karcher*, 77 Pa. St. 425; *Richards v. McGrath*, 100 Pa. St. 397.

England.—This was the provision of the English statute of 2 W. & M. Sess. 1, c. 5, § 5.

New Jersey.—The New Jersey statute is a transcript of this section. *Hugill v. Reed*, 49 N. J. L. 300.

Declaration must be Drawn under the Statute.—In order to recover the penalty allowed by these statutes, the plaintiff must declare under the statute, and not as at common law. *Fretton v. Karcher*, 77 Pa. St. 425; *Rees v. Emerick*, 6 S. & R. (Pa.) 288; *Hugill v. Reed*, 49 N. J. L. 300.

Cannot Recover Less than Statutory Amount.—When the plaintiff declares under the statute, if he does not show a right to recover double damages the action fails. There is no discretion in the assessment. *Peters v. Newkirk*, 6 Cow. (N. Y.) 103.

May Waive the Trespass and Bring Case.—In *Olinger v. M'Chesney*, 7 Leigh (Va.) 668, it was held that where

a distress is made for rent pretended to be due, and the goods distrained, but not sold, the remedy is by action at common law, and trespass may be maintained; but the party suing is not obliged to bring trespass; he may waive the trespass and bring case.

Must Show Relation of Landlord and Tenant.—In an action on the statute, 1 Rev. Code Va., c. 113, § 5, for wrongful distress for rent when none was in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and defendant; and if it does not, the declaration is bad on general demurrer. *Jones v. Murdaugh*, 2 Leigh (Va.) 447.

3. *Hugill v. Reed*, 49 N. J. L. 300; *Rees v. Emerick*, 6 S. & R. (Pa.) 288; *Richards v. McGrath*, 100 Pa. St. 397.

Declaration in Trespass.—A declaration in trespass for a wrongful distress should specify the goods taken and sold. *Jones v. Murdaugh*, 2 Leigh (Va.) 447; *Wyat v. Essington*, 1 Stra. 637; *Bertie v. Pickering*, 4 Burr. 2455.

Declaration need Not Set out the Demise.—In an action for a wrongful distress, when the rent was not due, it is sufficient for the plaintiff to charge that the defendant unlawfully, and with force and arms, took and seized his goods in the name of a distress for rent, upon a demise of the land (averring that no rent was due), without specifying the particulars of the demise itself. *Olinger v. M'Chesney*, 7 Leigh (Va.) 668; *Salter v. Brunsden*, 4 Mod. 231.

But if Alleged must be Proved.—But if the plaintiff undertakes to set out those particulars, he is required to prove them substantially as laid. *Olinger v. M'Chesney*, 7 Leigh (Va.) 668; 2 Chitty on Pldgs. (16th Am. ed.) 505.

Thus if a plaintiff alleges that he held under lease for five months for twenty dollars payable in repairs and labor, and at the trial it appears that the

plevin.¹ And also in a code state it was held to be within the discretion of the party injured to declare under the statute for the penalty allowed or to pursue his common-law right.²

It has been held that the tenant may join a count at common law with one under the statute.³

3. For an Excessive Distress.—A special action for an excessive distress was given by the English statute of Marlbridge,⁴ and

lease was for twelve months, for a money rent for sixty-five dollars, the variance is fatal. *Olinger v. M'Chesney*, 7 Leigh (Va.) 660.

1. It is said in 1 Chitty on Pldgs. (16th Am. ed.) 184, that replevin "may be brought to try the legality of a distress for rent, provided there were no sum whatever in arrear; but if any sum, however small, were due, and the distress were for a greater sum, or excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by action on the case." This rule was approved in *Hare v. Stegall*, 60 Ill. 383; *Lindley v. Miller*, 67 Ill. 244.

2. *Bell v. Norris*, 79 Ky. 48. It was also held in this case that if the plaintiff declares for the damages allowed by statute he must recite the statute or conclude contrary to the form of the statute.

3. *Hugill v. Reed*, 49 E. C. L. 300; 2 Chitty on Pldgs. (16th Am. ed.) 505.

Contra.—But in *Smith v. Meanor*, 16 S. & R. (Pa.) 377, it was held that case for taking the distress would lie at common law, with which trover might be joined, because there the judgment would be the same, but that a count in trover cannot be joined with an action under the statute to recover double damages, for the verdict would be different. And in *Hoare v. Lee*, 12 Jur. 356, 5 D. & L. 765, it is said that the court would not allow a count in trespass *de bonis asportatis* to be joined with a count under the statute.

Judgment and Verdict.—In a declaration in an action by a tenant for unlawful distress there was a count for double value of goods under section 11 of the *New Jersey* act concerning distresses, to which was added a count designed to recover damages for injury to tenant's business. The jury returned, as single damages, a sum as to the value of the goods distrained and sold, and a separate sum for injury to tenant's business. It was held that the plaintiff could not recover both sums;

but, as the first finding was clearly under the first count, there was no waiver of the claim for double damages by the second count and second finding. It was held, also, that the last sum should be struck from the verdict, and judgment entered for double the value of the goods found by the jury. *Hugill v. Reed*, 49 N. J. L. 300.

4. Marlbr., 52 H. III., c. 3; 3 Black. Com. 12.

The declaration was required to be drawn under the statute. *Hutchins v. Chambers*, 1 Burr. 590; *Crowther v. Ramsbottom*, 7 T. R. 654; 3 Black. Com. 12.

Need Not Allege or Prove Precise Amount Due.—In an action for an excessive distress for rent, the plaintiff need not allege or prove the precise amount of rent due, the substantial allegation being that more was distrained for than was actually due. *Sells v. Hoare*, 1 Bing. 401, 8 E. C. L. 567.

Averments as to Sale of Property.—Under a count in the common form for taking an excessive distress, framed on the statute of Marlbridge, containing no averments as to a sale of the property for less than its fair value, the question of an improper sale cannot be raised. *Thompson v. Wood*, 7 Jur. 303, 4 Q. B. 493, 45 E. C. L. 493.

Plea that the Whole Amount Was Due.—To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue. It was held that, on this issue, defendant was not precluded from insisting on certain arrears by the fact that since they became due other arrears had become due and had been distrained for; and this although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued, and although, on the second

neither trespass¹ nor replevin² is a proper remedy for this wrong. The action is a personal one and does not survive.³

4. For Distraining for More Rent than Was Due.—A special action on the case also lies for distraining for more rent than was due, whereby the tenant has been obliged to pay a larger sum than was justly due,⁴ and it seems that a count for distraining for more rent than was due may be added to a declaration for an excessive distress.⁵ But it has been said that if a landlord distrains for more rent than is due, the tenant's proper course is to tender the amount really due, and if the landlord refuses to accept that sum, to replevy the goods and try the disputed question of amount in an action of replevin.⁶ Trespass does not lie.⁷

5. For Failure to Have Property Appraised.—Either trover or trespass is a proper remedy where no statute provides otherwise for a failure to have property appraised as required by statute,⁸ but where a tenant replevies the property any irregularity in the appraisement is waived by the replevin.⁹

distress, the defendant stated that it was for rent due since the last distress. *Gambrell v. Falmouth*, 4 Ad. & El. 73, 31 E. C. L. 30.

1. *Hutchins v. Chambers*, 1 Burr. 590.

A simple action of trespass did not lie at common law in such case, for at common law the landlord might distract for more than the rent in arrear, so as to make it to the party's interest to redeem the goods by paying the rent. *Lynne v. Moody*, 2 Stra. 851.

Exception.—The case of *Moir v. Munday*, cited in *Hutchins v. Chambers*, 1 Burr. 590, is an exception to the general rule. And that was an action of trespass, where six ounces of gold and one hundred ounces of silver were taken for six shillings eight pence, which was held to be an excessive distress, and judgment was given for the plaintiff. But that appeared upon the pleadings to be excessive, in that it was a distress of gold and silver, which are of a certain known value. But in this case it was held that "in all other cases of goods or other things of arbitrary and uncertain value, it must be an action upon the statute."

2. *Hare v. Stegall*, 60 Ill. 383; *Lindley v. Miller*, 67 Ill. 244.

3. *O'Donnell v. Seybert*, 13 S. & R. (Pa.) 54.

4. *Jones v. Murdaugh*, 2 Leigh (Va.) 447; *Richards v. McGrath*, 100 Pa. St. 397; *McElroy v. Dice*, 17 Pa. St. 163; *Taylor v. Henniker*, 12 Ad. & El. 488, 40 E. C. L. 105. And see *Fern-*

wood Masonic Hall Assoc. v. Jones, 102 Pa. St. 307; and *supra*, VI. 3. *For an Excessive Distress*; as the terms "excessive distress" and "distraining for more rent than is due" are often used synonymously.

5. In *Spencer v. Clinefelter*, 101 Pa. St. 219, plaintiff was allowed to amend his declaration for an excessive distress by adding a count for distraining for more rent than was due.

6. 2 Chitty on Pldgs. (16th Am. ed.) 505, note 1, citing *Glynn v. Thomas*, 11 Exch. 870, 25 L. J. Exch. 125.

7. *Richards v. McGrath*, 100 Pa. St. 389.

8. Trespass.—*Richards v. McGrath*, 100 Pa. St. 399.

Trover.—In *Tripp v. Grouner*, 60 Ill. 474, *Sheldon, J.*, says: "The statute, in giving this power to make sale, regulates the mode of its exercise; and it prescribes, as one regulation, that this appraisement shall be had. We regard a compliance with this requirement of the statute as essential to authorize a sale, and that a sale of the distrained goods without such appraisement subjects the party making it to liability in an action of trover as for a wrongful disposition of the property."

Contra.—The cases to the contrary seem to be cases arising under the statute of 11 Geo. II., c. 19, § 19, and other similar statutes, taking away this species of action for an irregularity in the disposition of a distress. *Tripp v. Grouner*, 60 Ill. 476.

9. *Smoyer v. Roth* (Pa. 1888), 13

6. For Refusing a Tender of the Rent.—Where the tender of the rent is before seizure, trespass or trover is the correct form of action, but even in such instances the tenant may waive the trespass and sue for any excess or irregularity. And trover, replevin, or case lies for a detention or sale after a tender made subsequently to the seizure and before impounding.¹

7. For Making a Second Distress Needlessly.—When a landlord abandons his first distress without justifiable cause or the consent of his tenant, and levies a second, the tenant's remedy for the taking under the latter is trespass, case, or trover;² or where under the first distress the landlord has taken a sufficient amount of goods and chattels to satisfy his claim, but needlessly makes a second distress, the tenant has his remedy by an action of trespass or case.³

8. For Levying upon Property Exempt by Statute.—Where a distress warrant is levied upon property which is exempt by statute, if the injured party declares in the common form of action of trespass, without any reference to the statute, he is only entitled to recover simple damages for the trespass, but if he claims the penalty he should declare specially on the statute.⁴

9. Assumpsit Not Maintainable.—It has been held that assumpsit cannot be maintained for money paid out for the release of property wrongfully taken by distress, as there are specific remedies provided for testing the legality of a distress.⁵

10. In Some Cases Replevin Only Remedy.—Replevin is the most common and in some cases the only remedy which the owner of the property has to test the legality of the distress.⁶ Replevin

Atl. Rep. 191. And see *Sheriff v. Sel- don*, Litt. Sel. Cas. (Ky.) 485.

1. 2 Chitty on Pldgs. (16th Am. ed.) 511. And see *Branscomb v. Bridges*, 1 B. & C. 145, 8 E. C. L. 63.

2. *Everett v. Neff*, 28 Md. 186; *Smith v. Goodwin*, 4 B. & Ad. 413, 24 E. C. L. 89; *Dawson v. Cropp*, 1 C. B. 961, 50 E. C. L. 961.

3. *Lear v. Caldecott*, 4 Q. B. 123, 45 E. C. L. 123. See *Quinn v. Wallace*, 6 Whart. (Pa.) 452.

4. *Race v. Oldridge*, 90 Ill. 250. See *Pace v. Vaughn*, 6 Ill. 30.

5. "The proprietor of cattle wrongfully distrained damage feasant, who has paid money for the purpose of having them redelivered to him, cannot recover back that money in this action [assumpsit], because such mode of proceeding would impose great difficulties on the defendant, by not apprising him of what he was to defend; and the law has provided specific remedies for trying the legality of a distress, viz., replevin, trespass, or trover."

1 Chitty on Pldgs. (16th Am. ed.) 113, citing *London v. Hooper*, Cowp. 414; *Shipwick v. Blanchard*, 6 T. R. 298. See *Marshall v. Hopkins*, 15 East 309.

6. Mississippi.—If property which was not liable to be distrained for the rent has been taken, the statute provides that the owner of such property shall not have the benefit of the exemption unless he replevies the same before it is sold under the distress warrant; no other form of action is allowed in such case. *Gibson v. Lock*, 58 Miss. 298; *Paine v. Hall Safe, etc., Co.*, 64 Miss. 175.

In Mississippi the writ of replevin for the goods which have been distrained is not the writ provided for in the general action of replevin, but is a special one provided by statute, and the procedure must be in accordance with that statute. *Maxey v. White*, 53 Miss. 80; *Kendrick v. Watkins*, 54 Miss. 495. See *Gibson v. Lock*, 58 Miss. 298; *Towns v. Boar-*

lies also for an illegal distress taken damage feasant; and when the party in possession of the land has no title thereto this action is preferable to trespass for seizing the cattle, in order to put in issue the title of the party distraining.¹

man, 23 Miss. 186; Parkhurst v. Dunlap, 6 How. (Miss.) 577.

Pennsylvania.—It seems that where the owner of the goods has had actual notice of the distress before the sale, and had the opportunity to pursue the statutory remedy of replevin and declined to do so, he cannot afterward bring an action of trespass or trover. *Esterly Mach. Co. v. Spencer*, 147 Pa. St. 466; *Caldcleugh v. Hollingsworth*, 8 W. & S. (Pa.) 302.

But where the owner has had no notice of the distress, and consequently no opportunity to replevy the goods within the statutory time, he may bring trespass. *Brown v. Stackhouse*, 155 Pa. St. 582, and cases cited.

1. 1 Chitty on Pldgs. (16th Am. ed.) 184; *Mellor v. Spateman*, 1 Saund. 346e, note 2.

For Distress of Cattle Taken Damage Feasant.—In *Michigan*, at least, the only method of testing the legality of the distress of cattle taken damage fea-

sant is by replevin. *Johnson v. Wing*, 3 Mich. 163; *Hamlin v. Mack*, 33 Mich. 103.

Under Special Statute.—If the defendant has in good faith taken the cattle damage feasant, the plaintiff must bring his action of replevin under the special statute. *Campau v. Konan*, 39 Mich. 362; *Marx v. Woodruff*, 50 Mich. 361; *Hamlin v. Mack*, 33 Mich. 103; *Johnson v. Wing*, 3 Mich. 163; *Cox v. Chester*, 77 Mich. 494.

But where there is a mere claim that beasts have been distrained when in fact they have not been, the owner may maintain the general action of replevin. *Campau v. Konan*, 39 Mich. 362.

And it was held that where the defendant had not acted in good faith in making the distraint, but had himself given opportunity for the trespass by his own negligence in failing to build his portion of the line fence, the general action of replevin was a proper remedy. *Cox v. Chester*, 77 Mich. 494.

DISTRIBUTION.

See articles *EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES.*

DISTRICT ATTORNEYS.

See article *PROSECUTING ATTORNEYS.*

DISTRINGAS, WRIT OF.

BY PAUL McRAE.

- I. DEFINITION, 33.
- II. TO COMPEL APPEARANCE OR ANSWER, 33.
- III. TO COMPEL PERFORMANCE OF ORDER OR DECREE, 35.
- IV. TO ENFORCE PAYMENT OF COSTS, 36.
- V. TO ENFORCE JUDGMENTS FOR PERSONAL PROPERTY, 36.
- VI. AGAINST SHERIFFS, 36.

I. DEFINITION.—A writ of distringas, now almost entirely obsolete, is a writ directed to an officer, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him by the court.¹

II. TO COMPEL APPEARANCE OR ANSWER.—The writ of distringas was formerly extensively used in England to compel an appearance.² If the defendant, on being attached, still neglected to appear, the plaintiff might formerly have proceeded in all cases to compel his appearance by distringas.³

1. 1 Bouv. Law Dict. 548; Anderson's Law Dict. 368; 4 Minor's Inst. 892.

Distringas Nuper Vice Comitum is a writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Bouv. Law Dict. 548; 1 Tidd's Pr. 313.

Distringas Juratores.—A writ commanding the sheriff to have the bodies of

the jurors, or to distrain them by their lands and goods, that they may appear upon the day appointed. 3 Black. Com. 354. It issues at the same time with the venire, though in theory afterwards, founded on the supposed neglect of the juror to attend. 1 Bouv. Law Dict. 548; 3 Steph. Com. 590.

2. For a full treatment of its use at common law, for this purpose, see 1 Tidd's Pr. 110 *et seq.*

3. 1 Tidd's Pr. 110.

Corporation.—The proceedings to compel a corporation to appear to any suit by attorney are, at common law, always by distress on its goods and the profits of its lands after a summons has been executed and not obeyed,¹ and in equity the process to compel either an appearance or an answer by a corporation aggregate, which, having been duly served with a subpoena issued out of chancery, fails to appear in court, may be by *distringas*, to distrain it by its goods and chattels, rents and profits, till it obeys the summons.²

Bill need Not Pray for Writ.—In equity the bill need not contain a prayer for the writ of *distringas* in order that it be granted.³

1. 1 Tidd's Pr. 121; 1 Black. Com. 477; 1 Minor's Inst. (3d ed.) 644; State v. Western North Carolina R. Co., 89 N. Car. 584, 22 Am. & Eng. R. Cas. 58; Newell v. Great Western R. Co., 19 Mich. 345. And see M'Queen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 5.

2. 1 Dan. Ch. Pr. & Pl. (6th Am. ed.) 477; 3 Black. Com. 445; Barton's Suit in Eq. 74, 75; Angell & Ames's Corp., § 667.

In the case of a corporation aggregate, not answering within the time limited, the plaintiff may issue the same writs of *distringas* successively, and in the same manner as it is before stated may be done to compel appearance; and should the corporation stand out process till the order absolute for sequestration issues, then the plaintiff, upon obtaining such order, may move, as of course, to have the bill taken *pro confesso*. 1 Dan. Ch. Pr. (6th Am. ed.) 492.

Distringas Instead of Attachment.—"If a corporation occupies the position of defendant, and due service of the subpoena has been effected upon it, then, upon proof of such service, a writ of *distringas*, instead of the writ of attachment, should be prepared, directed to the sheriff or other officer having jurisdiction in the district of the corporation, commanding him to distrain the land, goods, and chattels of the corporation, so that they may not possess them till the court shall make other order to the contrary, and that in the meantime he (the sheriff) do answer to the court for what he so distrains, so that the defendant may be compelled to appear in chancery and answer the contempt." 1 Dan. Ch. Pl. & Pr. (2d Am. ed.) 552.

The form of the writ is substantially

the same in law as in equity. McKim v. Odom, 3 Bland (Md.) 426.

How Indorsed.—It is indorsed thus: "By the court at the suit of A B, for want of an appearance (or answer, as the case may be)." McKim v. Odom, 3 Bland (Md.) 426.

How Levied in England.—"Upon this writ, if the corporation has property, the sheriff usually levies forty shillings only, and makes his return accordingly; and if this execution does not procure the obedience of the corporation, an *alias* *distringas*, which is a writ commanding the sheriff again to distrain the goods and chattels, lands and tenements, of the corporation, may be obtained. Upon this writ the sheriff usually levies four pounds, and if after that the corporation still continue disobedient, a *pluries* *distringas* issues. There must be fifteen days between the *teste* and return of each of these writs. If the last mentioned *distringas* fails of effect, upon the *pluries* *distringas* being returned by the sheriff, a commission of sequestration may be obtained against the corporation." 1 Dan. Ch. Pl. & Pr. (2d Am. ed.) 553.

In America.—"I can, therefore, feel myself at liberty to make no other alteration than to settle the amount in reference to the present value of money, and to declare that upon the first *distringas* to compel an appearance or answer, the sheriff shall take issues or personal property of the corporation, to the amount of twenty dollars; and upon the *alias* *distringas* he shall levy forty dollars; and on the *pluries* *distringas* he shall distrain the whole of the personal estate, together with the rents and profits of the lands." Bland, C., in McKim v. Odom, 3 Bland (Md.) 427.

3. Bill need Not Contain Prayer for Dis-

In Criminal Cases.—Distringas has also been held applicable to compel the appearance of a corporation against which an indictment has been found,¹ but the necessity for its use in such a case has been obviated by statute in many jurisdictions.²

III. TO COMPEL PERFORMANCE OF ORDER OR DECREE.—The same process of distringas (with sequestration) issues to compel the performance of an order or decree against a corporation as to compel an answer. Upon service of the writ of execution of the decree

tringas.—“In the case of a corporation aggregate, where the answer is under the common seal, the bill must pray that a writ, called a writ of distringas, may issue under the great seal, which is for the purpose of distraining them by their goods and chattels, rents and profits, until they obey the summons or direction of the court.” Coop. Eq. Pl. 16.

But in *McKim v. Odom*, 3 Bland (Md.) 425, Bland, C., says: “What is here said, however, as to the prayer of the bill, is certainly wrong; the authorities cited warrant no such assertion.”

And in Story’s Eq. Pl. (10th ed.), § 44, note 3, referring to the statement of Cooper, it is said: “From this language it would seem indispensable, in a suit against such a corporation, to insert a prayer for such a writ. But I cannot find any sufficient authority for such a position. It seems no more necessary than it would in common cases to pray for an attachment and other processes, when the party does not appear and answer; and this is never done. The right to the ulterior processes results from the general authority of the court to compel obedience to its own commands. The distringas is to compel the corporation to answer as well for the contempt as to the bill. *Harvey v. East India Co.*, 2 Vern. 395, Prec. Ch. 129, cited by Mr. Cooper, does not support his doctrine, but only the modified doctrine above stated.”

1. *Reg. v. Birmingham, etc.*, R. Co., 9 C. & P. 469, 38 E. C. L. 187.

In *Union Bank v. Lowe*, Meigs (Tenn.) 225, Turley, J., says: “A corporation can only be forced to appear by a distringas.”

2. *Indiana*.—In *State v. Ohio, etc.*, R. Co., 23 Ind. 362, Gregory, J., referring to the statutory law of that state, says: “Distringas as a means of compelling an appearance in a crim-

inal case is a writ unknown to our law.”

New Hampshire.—In New Hampshire a summons is the only process to be issued to a corporation to appear and answer to an indictment, and when duly served, judgment may be rendered against the corporation by default. The writ of distringas is unknown to the practice of that state. Boston, etc., R. Co. v. State, 32 N. H. 215.

New Jersey.—Section 80 of the New Jersey Criminal Procedure act. provides that when the summons or notice to the corporation shall be returned, summoned, or served, the corporation shall be considered as in court and as appearing to said indictment, and the court shall order the clerk to enter an appearance for said corporation and indorse the plea of not guilty upon said indictment. This statute applies only to involuntary appearances by corporations. *State v. Passaic County Agricultural Soc.*, 54 N. J. L. 261.

New York.—“Provision was made under the Revised Statutes (2 Edm. Stat. at Large, p. 772, § 35), after the finding of an indictment against a corporation, to compel its appearance by the issuing of a distringas, but these provisions were expressly repealed by chapter 593 of the Laws of 1886; and I have been unable to find any statutory provision compelling the appearance of a corporation after indictment.” *Per Smyth*, Recorder, in *People v. Equitable Gas-Light Co.* (County Ct. of Gen’l Sess.), 5 N. Y. Supp. 19.

North Carolina.—In North Carolina it is held that the common-law method by distringas has been abrogated by statute, and that the proper method to bring into court a corporation charged with a criminal offense is by summons upon one of its officers or agents. *State v. Western North Carolina R. Co.*, 89 N. Car. 584, 22 Am. & Eng. R. Cas. 58.

and default, a distringas issues without order.¹ The form is the same as that of a distringas to compel appearance or answer, but the indorsement explains the purpose.²

IV. TO ENFORCE PAYMENT OF COSTS.—Payment of costs might be enforced against a corporation by the same process as the decree, except that a subpoena issues in the first instance instead of a writ of execution.³

V. TO ENFORCE JUDGMENTS FOR PERSONAL PROPERTY.—The writ may be used in *Virginia* to enforce a judgment for personal property.⁴

VI. AGAINST SHERIFFS.—The writ has also been used against

1. 1 Dan. Ch. Pl. & Pr. (1st ed.) 194, citing 1 Har. 149; Harvey v. East India Co., 2 Vern. 395, Prec. Ch. 129.

"If a distringas, sequestration, or other form of process should become necessary to the due and complete execution of a decree against a corporation, this court is authorized by the statute [defining the chancery jurisdiction] to devise and issue such process." *Per* Parker, C. J., in *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 511.

2. 1 Dan. Ch. Pl. & Pr. (1st ed.) 194, citing *Lowten v. Colchester*, 3 Meriv. 543.

Alias or Pluries Unnecessary.—"Upon the return of the distringas an order may be obtained for a sequestration as of course, without suing out an *alias* or a *pluries* as upon mesne process. In such case, however, the order is only an order *nisi* in the first instance, and may be had upon a motion of course. If there is any irregularity in the form of the proceedings, the defendants may avail themselves of it on showing cause against making the order absolute, and not by moving to appear to the distringas, and then moving to discharge the sequestration. If no irregularity is shown in the process, the order is made absolute upon motion." 1 Dan. Ch. Pl. & Pr. (1st ed.) 194.

3. 1 Dan. Ch. Pl. & Pr. (1st ed.) 194. In *Worden v. Orange County Bank*, 1 Wend. (N. Y.) 310, to compel the payment of costs, the court directed a rule that the president, directors, and company of the bank pay the costs or show cause, by the first day of the next term, why a distringas should not issue to compel the payment.

4. *Virginia*.—In *Virginia* no writ of distringas shall be issued, except on a

judgment for specific personal property. Code Va. 1887, § 3581.

What Writs may Issue on Judgment for Personal Property.—When the judgment is for personal property, the plaintiff may, at his option, have a *fi. facias* for the alternative value, instead of a writ of possession, and the damages and costs, or he may have a writ of distringas. Code Va. 1887, § 3585.

How Distringas may be Superseded and Executed for Value—How Value Ascertained.—If a distringas issues, the court, on the motion of either party, may order it to be superseded as to the specific thing, and to be executed in lieu thereof for the alternative value. Such value, if not fixed in the judgment, may be ascertained by a jury, to be forthwith impaneled. Code Va. 1887, § 3586.

Notice of a motion to supersede a distringas, or for a *ca. sa.* or *fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Garland v. Bugg*, 5 Munf. (Va.) 167.

After a distringas upon a judgment in detinue has been returned executed, but without satisfaction, if the court, on the plaintiff's motion, directs the distringas to be superseded, so far as it related to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems the plaintiff may have a new distringas, to be executed as to such value. *Garland v. Bugg*, 5 Munf. (Va.) 166.

Cannot Distrain Property for Which Execution Issued.—On a distringas *fi. fa.* the sheriff cannot distrain the very property for which the execution issued; nor can he seize and sell it to pay the damages mentioned in the execution. *Jordan v. Williams*, 3 Rand. (Va.) 501.

sheriffs to compel them to sell property in their possession.¹

1. A distringas directed to the coroner will lie against a sheriff while in office, to compel a sale of goods levied upon; but where the goods levied on had been irregularly taken out of the sheriff's hands by virtue of a replevin, the court, under the circumstances, quashed the distringas. *Zane v. Cowperthwaite*, 1 Dall. (Pa.) 312.

No distringas lies against the executors of a deceased sheriff, to oblige

them to sell property taken by him in his lifetime, under a writ of *feri facias*. *Harrison v. Tomkins*, 1 Call (Va.) 295.

A person suing out a *fi. fa.* a second time after return of the levy discharges the levy, and is not entitled to a distringas against the sheriff to compel him to sell the property. *Scott v. Hill*, 2 Murph. (N. Car.) 143; *Den v. Backhouse*, 3 Murph. (N. Car.) 63; *Smith v. Spencer*, 3 Ired. (N. Car.) 256.

DISTURBING MEETINGS.

BY S. R. PERRY.

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I. AT COMMON LAW.—The offense of disturbing a religious meeting or other lawful assembly is indictable at common law;¹ and a statute defining the offense and providing another remedy does not take away the common-law remedy by indictment.²

II. UNDER STATUTES—1. **Jurisdiction.**—Various statutory provisions have been made in regard to the jurisdiction of the offense of disturbing meetings, and in such cases of course the jurisdiction is dependent on them.³

2. **The Indictment**—a. **GENERALLY.**—The indictment or information for the offense of disturbing meetings will in general be drawn under a statute, and it should charge the offense

1. **Religious Meetings.**—*State v. Jasper*, 4 Dev. (N. Car.) 323; *People v. Degey*, 2 Wheel. Cr. Cas. (N. Y. Ct. of Gen'l Sess.) 135; *People v. Crowley*, 23 Hun (N. Y.) 412.

"The disturbance of public worship is an act tending to destroy the public morals and to excite a breach of the peace, and it is a common injury to an indefinite number of persons, neither of whom could sue alone, unless, as in the case of nuisance, he should have received some special and peculiar damage over and above the common injury sustained by the others; it is, therefore,

an offense within the principles before stated, and liable to be prosecuted by indictment at the common law." *U. S. v. Brooks*, 4 Cranch (C. C.) 427.

Town Meetings.—*Com. v. Hoxey*, 16 Mass. 385.

Meetings of School Directors.—*Campbell v. Com.*, 59 Pa. St. 266.

2. *People v. Degey*, 2 Wheel. Cr. Cas. (N. Y. Ct. of Gen'l Sess.) 135; *People v. Crowley*, 23 Hun (N. Y.) 412.

3. See *Com. v. Jennings*, 3 Gratt. (Va.) 595; *People v. Fuller*, 17 Wend. (N. Y.) 211; *Henry v. Hamilton*, 7 Blackf. (Ind.) 506.

substantially in the language of the statute.¹ It is not necessary, however, to charge it in the very words of the statute, if equivalent words be used.² But if the language of the statute be followed, the indictment or information will always be sufficient.³

b. DUPLICITY.—In charging the offense of disturbing meetings, as in all other cases, duplicity is to be carefully avoided, and the indictment will be bad if more than one distinct offense be joined in the same count.⁴ An indictment, however, is not objectionable

1. *Disturbing "Congration."*—Under Rev. Code Mo. 1845, p. 404, an indictment charging that the defendant did "wilfully and contemptuously disturb a 'congration' of people met for religious worship" is bad for the reason that the language of the statute is not followed in describing the offense, in that the word "congration" is not an English word. *State v. Mitchell*, 25 Mo. 420.

Disturbing School while in Session.—Under Act Conn. 1857, making it a criminal offense wilfully to interrupt or disturb a school, etc., while the same is in session, a complaint is fatally defective which fails to allege that the school was in session at the time of the disturbance. *State v. Gager*, 28 Conn. 232.

2. *State v. Yarborough*, 19 Tex. 161.

3. *State v. Stubblefield*, 32 Mo. 563; *State v. McDaniel*, 40 Mo. App. 356; *Kindred v. State*, 33 Tex. 67.

Indiana.—In *State v. Oskins*, 28 Ind. 364, an information charging the defendants with disturbing a meeting met as a singing school, by forcing their way into the house against the rules, and making a great noise by loud and boisterous talking, was held a good information, sufficiently charging the offense under Act Ind. March 3, 1859.

But see *Marvin v. State*, 19 Ind. 181, in which it was held that the words in the above act "if any person shall disturb any religious society, or any member thereof, when met or meeting together for public worship" are void for uncertainty, so far as they attempt to create and define a crime or misdemeanor, and consequently an indictment under that act charges no offense.

An indictment for unlawfully disturbing an assembly, charged that the defendant at, etc., on, etc., unlawfully interrupted, molested, and disturbed the lawful assemblage of persons met together to transact certain matters pertaining to the business of a certain

church, by "talking in a loud and boisterous manner" and charging said meeting with being a mob, etc. It was held, on motion to quash, that the indictment was sufficient, under 2 Rev. Stat. Ind. 1876, p. 472. *Kidder v. State*, 58 Ind. 68.

An affidavit in a prosecution for disturbing a religious meeting, under the Act Ind. March 3, 1859, 2 Rev. Stat. 1876, p. 472, must allege, and it must be proved upon the trial, that the meeting disturbed was a collection of inhabitants of the state. *Cooper v. State*, 75 Ind. 62.

Texas.—In an indictment for disturbing a religious meeting, under Hart's Dig. Texas, art. 481, it is not necessary to charge that the congregation was engaged at the time in any religious service or ceremony, or had commenced such service or ceremony at the time of the disturbance; but it is sufficient to charge that the congregation was assembled for religious worship at a place designated in the statute. *State v. Yarborough*, 19 Tex. 161.

Statute in the Disjunctive.—Under art. 284 of the Penal Code of Texas, as amended by the Act of April 24, 1873 (Gen. Laws of 1873, p. 43), providing that "any person who, by loud or vociferous talking or swearing, or by any other noise, wilfully disturbs any congregation," etc., an indictment alleging that the defendants "then and there, by loud talking and laughing, and by other indecent and obscene noises, did then and there disturb said congregation aforesaid," is sufficient, since the statute is in the disjunctive, and it is sufficient to charge any one of the acts mentioned in the statute. *Copping v. State*, 7 Tex. App. 61.

4. *Disturbing Worship and Behaving Rudely.*—A charge for disturbing public worship and for behaving rudely in a meeting house cannot be joined in one count of the indictment, since

for duplicity because several of the disturbing acts are charged in the same count, each of the acts being a constituent of the entire offense of disturbance.¹

c. ALLEGATIONS OF NATURE OR KIND OF MEETING.—Where indictments are drawn under statutes particularly specifying the kinds of meetings protected from disturbance, it is necessary to allege that the meeting was of the kind mentioned in the statute.²

d. ALLEGATIONS OF PLACE.—(1) *Place of Disturbing Acts.*—Under a statute prohibiting the doing of disturbing acts at or within the place of meeting or worship, an allegation that the disturbance was created at or within that place is necessary.³

these are distinct offenses under the statute. *Com. v. Symonds*, 2 Mass. 163.

Surplusage.—But under section 1894 of Mansf. Dig. Ark., an indictment for disturbing religious worship "by talking and laughing" and by indecent gestures is not bad for duplicity; it charges but one offense; the words "by talking and laughing" being merely surplusage. *State v. Bledsoe*, 47 Ark. 233; *State v. Horn*, 19 Ark. 578.

1. *State v. Stubblefield*, 32 Mo. 563. See also *State v. Edwards*, 32 Mo. 548.

Two Offenders.—Where two are charged in one count of the same indictment, in order to convict both the evidence of guilt must apply to one and the same transaction. Two independent transactions on the same day at the same church will not support the indictment, one of the accused having disturbed the congregation at twelve o'clock and the other at one o'clock, and there being no concert or connection between the two offenders. *Jackson v. State*, 87 Ga. 432.

2. **School.**—Under a statute providing against the interrupting or disturbing of public, private, or select schools, while the same are in session, the complaint must allege such a gathering to be a school and not merely an assemblage met "for culture and improvement in sacred and church music." *State v. Gager*, 28 Conn. 232.

Religious Assembly.—An indictment charging a person with disturbing "a religious assembly, commonly called quarterly meeting conference," cannot be supported. The indictment should charge that the assembly had met for "divine worship," "divine service," "religious worship or service," or something of the same import, to come within the statute. *State v. Fisher*, 3 Fred. (N. Car.) 111.

Any Meeting for Lawful Purpose.—Un-

der a statute providing against the molesting or disturbing of any religious meeting, agricultural fair or exhibition, or "any meeting of inhabitants of this state, met together for any lawful purpose," etc., an affidavit was drawn charging certain persons with disturbing a singing school, but failing to allege that the singing school was met for a lawful purpose. The affidavit was held fatally defective in the omission of this averment, since the school might have been met for an unlawful purpose, as for singing indecent or bawdy songs, etc. *State v. Zimmerman*, 53 Ind. 360.

But under Rev. Stat. Ind. 1881, § 1988, providing against the disturbance of religious meetings, etc., or "any meeting of inhabitants of this state met together for any lawful purpose," an indictment is sufficient if it states that the purpose of the meeting was lawful, without more specifically alleging the purpose. *Howard v. State*, 87 Ind. 68.

Name of Society.—In an indictment under the statute for disturbing a religious society, it is not necessary that the name of the society be stated. *Henry v. Hamilton*, 7 Blackf. (Ind.) 506.

3. Under a statute providing against the disturbance of religious meetings, etc., by making a noise, etc., "within the place of worship," an indictment must allege that the place where the disturbance was created was the place of worship of the congregation. *State v. Schieneman*, 64 Mo. 386.

But an information for disturbing a religious assembly sufficiently charges that the disturbance was done at the place of worship by saying "within the place of meeting, to wit, at the Methodist Episcopal Church," etc., by assaulting one S., a person then and there being, etc. *State v. Karnes*, 51 Mo. App. 293.

Where, however, the statute provides against the disturbing of religious assemblages "at or near" the place of worship, the indictment need not allege the disturbing acts to have been done "at or near" the place of worship.¹

(2) *Place of Meeting*.—If a statute designates a particular place at which a religious meeting must not be disturbed, then it is essential that the indictment charging the disturbance should allege that the congregation was assembled at one of the places mentioned in the statute.² But under a statute not particularizing the place of meetings, the indictment need only allege the county in which was the assembly, so as to give the court jurisdiction.³

e. ALLEGATIONS OF DISTURBANCE—(1) *Generally*.—The gist of the offense being the disturbance, the indictment should in general allege a disturbance to have been created.⁴

Whether a disturbance charged was committed at the "Methodist Episcopal Church," or the "Methodist Episcopal Church, South," is a question of fact that does not arise in determining the question of the sufficiency of the information. *State v. Karnes*, 51 Mo. App. 293.

1. The allegation "at or near" is unnecessary, since these words are intended to enlarge the operation of the act, and meant to prevent disturbance not only at, but anywhere within disturbing distances of, an assembly for religious worship. *Warren v. State*, 3 Heisk. (Tenn.) 269, *overruling State v. Doty*, 5 Coldw. (Tenn.) 33.

2. *Stratton v. State*, 13 Ark. 688.

Thus, under a statute providing "that if any person or persons shall maliciously disturb any congregation assembled for religious worship, and conducting themselves in a peaceable and orderly manner, in and about any church, chapel, meeting house, encampment or camp meeting inclosure, mosque, synagogue, or temple, while attending any protracted or other religious meeting," etc., an indictment which charges that the defendant "did then and there, by loud and obscene language and disorderly conduct, maliciously disturb a congregation of people assembled for religious worship at the Black Jack Spring, in the county aforesaid," etc., is bad in that it does not charge the meeting to have been held at any of the places mentioned in the statute. *State v. McClure*, 13 Tex. 23.

But it is not necessary that the very words of the statute be used, it being held that an indictment charging that

the congregation was assembled for the purpose of religious worship, in a certain house for religious worship, was equivalent to a charge that the congregation was assembled for the purpose of religious worship in a meeting house. *State v. Yarborough*, 19 Tex. 161.

3. *State v. Smith*, 5 Harr. (Del.) 490.

Under the act of Texas April, 1873 (General Laws, Thirteenth Legislature 43), an indictment alleging that the accused, "in the county of H. aforesaid, did wilfully disturb a congregation assembled for religious worship," etc., was held sufficiently to allege the locality at which the congregation was assembled. It was said further in this case that this statute was essentially different from the provisions contained in Hart's Dig. Tex. under which the decision in *State v. McClure*, 13 Tex. 33, was made. *Corley v. State*, 3 Tex. App. 412. See also *Bush v. State*, 5 Tex. App. 64.

4. Thus an indictment for the disturbance of a meeting which sets out that the disturbance was "by openly refusing to comply with the rules and regulations of the said Methodist Protestant congregation, and acting in disobedience to an announcement then and there made by the Rev. E. R. McGregor, then and there pastor of the congregation, that there should be no choir singing that night, and in the face of said announcement taking possession of the seats of the choir and insisting upon singing as a choir," is insufficient, since there is no averment that the parties were not the choir, nor is there any averment of any sort of disturbance occasioned thereby. *Com. v. McDole*, 2 Pa. Dist. Rep. 370.

(2) *Manner and Means of Disturbance.*—Under the statutes in most of the states, the manner and means or the particular acts by which the disturbance of a meeting was effected must be stated in the indictment.¹ A general statement, however, as that the

But an information for disturbing a religious meeting is complete without the allegation that the parties' conduct was to the disturbance of certain persons named, and such an allegation may be rejected as surplusage. *Hull v. State*, 120 Ind. 153.

Statutes Prohibiting Traffic, to Prevent Disturbance of Meeting.—Under Gen. Stat. N. H., c. 255, § 9, prohibiting unusual traffic within two miles of any public assembly convened for public worship, an indictment need not allege that the traffic disturbed the assembly or its worship, the gist of the offense being the trafficking and not the disturbing. *State v. Cate*, 58 N. H. 240.

Section 4854 of the Code of *Tennessee* makes it a misdemeanor to "expose to sale or gift any spirituous or other liquors, or any provisions or other articles of traffic," within one mile of the place of a worshipping assembly, and not at the person's usual place of business. Section 4855 forbids the selling, or offering to sell, within one mile of a worshipping assembly, any article of traffic whatsoever, in such a manner as to disturb such assembly. The two offenses described in these sections are distinct, and an indictment under the first section will be good without an averment as to the disturbance of the assemblage, which would be necessary in an indictment under the second section. Nor under the first section need the indictment specify the particular articles of traffic sold. *Riggs v. State*, 7 Lea (Tenn.) 475.

1. *State v. Minyard*, 12 Ark. 156; *Fletcher v. State*, 12 Ark. 169; *State v. Butcher*, 79 Iowa 110; *Conerly v. State*, 66 Miss. 96; *State v. Bankhead*, 25 Mo. 558; *Com. v. McDole*, 2 Pa. Dist. Rep. 370; *Thompson v. State*, 16 Tex. App. 159.

Texas.—In *Kindred v. State*, 33 Tex. 67, it was held that since the indictment for disturbing a religious meeting was in the exact words of the statute (Pasc. Dig. Texas, art. 1104), the particular acts constituting the disturbance need not be alleged.

In *Thompson v. State*, 16 Tex. App. 159, it was said that the statute in force

when the case of *Kindred v. State*, 33 Tex. 67, was decided and the statute now in force (Penal Code Texas, art. 280) are materially different, and that the *Kindred* case is no longer authority upon the question.

But an indictment for the offense of disturbing a congregation assembled for religious worship, whether tested by art. 284 of the Criminal Code of Texas, as it stood when the indictment was found, or by the same article 284, as amended by the act of April, 1873 (General Laws, 13 Leg. 43), is not vitiated by the words "by loud and vociferous talking and swearing," they being merely a description of the means of disturbance, though not embraced in the article of the code before its amendment. *Lockett v. State*, 40 Tex. 4.

Georgia—General and Special Demurrer.—In an indictment for disturbing religious worship, under the Code of Georgia, one of the counts charged that the defendants committed the misdemeanor "in a tumultuous and boisterous manner, and by indecently acting," so as to "disturb a congregation of persons lawfully assembled for divine service at the First African Baptist Church in Savannah," and the second count charged that defendants "did then and there indecently act and attempt to prevent the administration of the holy sacrament of the Lord's Supper." The indictment was demurred to generally, and it was insisted in the argument that the indictment should have set out the particular act which was tumultuous and boisterous in the first count and the particular act of indecency in the second count. The court said that perhaps if the demurrer had been special the defendants would have been entitled to have the acts particularized, but held that since the demurrer was general the acts were stated specifically enough and the indictment was good. *Hicks v. State*, 60 Ga. 464.

Nebraska.—Though the general rule is that the manner of the disturbance should be alleged, as by talking, laughing, or profane swearing, etc., yet the charge that certain persons, at certain

disturbance was caused by talking, laughing, swearing, whistling, etc., is all that is necessary, without entering into details.¹

f. ALLEGATIONS OF INTENT.—Since the intent with which a meeting is disturbed is usually a constituent part of the offense, an allegation of intent is in general necessary, as that the disturbance was wilfully, maliciously, or contemptuously done.²

dates, "did wilfully, maliciously, and unlawfully interrupt, molest, and disturb a religious society, to wit, the Welsh Presbyterian Church, and the members thereof, while said members were met to perform the duties enjoined upon them," etc., states an offense under the statute of Nebraska. *Jones v. State*, 28 Neb. 495.

Virginia.—An indictment for disturbing a religious congregation need not set out the means by which the disturbance was effected, under Virginia statute. *Com. v. Daniels*, 2 Va. Cas. 402.

1. *Thompson v. State*, 16 Tex. App. 159; *State v. Minyard*, 12 Ark. 156.

Thus, in an indictment for disturbing a religious congregation by profanely swearing, it is not necessary to charge the particular language used by defendant. *State v. Ratliff*, 10 Ark. 530; *State v. Hinson*, 31 Ark. 638.

2. Under Code of *Tennessee*, providing a penalty if any person wilfully disturbs or disquiets any religious assembly, etc., a presentment for disturbing such an assemblage which does not charge the act committed to have been "wilfully" done is bad. *State v. Townsell*, 3 Heisk. (Tenn.) 6.

Under a statute declaring that "every person who shall wilfully, maliciously, or contemptuously disquiet or disturb

any congregation or assembly of people met for religious worship," etc., shall be punished, an indictment is bad which fails to allege that the disturbance was wilfully, maliciously, or contemptuously done. *State v. Bankhead*, 25 Mo. 558.

So an indictment which charges that the defendants did unlawfully disturb, etc., is insufficient, since the disturbance must be charged to have been done wilfully, maliciously, or contemptuously. *State v. Hopper*, 27 Mo. 599.

Equivalent Allegation.—The wilfulness of defendant's acts are sufficiently shown by charging that, in a room then being used for religious purposes, he "did use loud and profane language, and did smoke a cigarette, and did refuse to leave said room when requested so to do by the officer" in charge thereof. *State v. Stuth*, 11 Wash. 423.

Statute in the Disjunctive.—But under Rev. Stat. Mo., § 8785, containing provisions similar to the above statutes, an information charging that the defendants "did unlawfully and wilfully disquiet and disturb," etc., a congregation, etc., is sufficient, without alleging that the disturbance was maliciously or contemptuously done, the statute being in the disjunctive. *State v. Karnes*, 51 Mo. App. 293.

DIVISION OF OPINION.

By S. B. FISHER.

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CROSS-REFERENCE.

As to Certifying Cases and Questions to a Higher Court where the Judges are Divided in Opinion, see article *CERTIFIED CASES*, vol. 3, p. 918.

I. EFFECT ON JUDGMENT APPEALED FROM—1. The General Rule.—

It was formerly the practice at common law that when there was an equal division of the judges upon a question of law, no judgment should be given.¹ This, however, has been changed, and it is now the general rule that where a cause comes up from a lower court on a question of law, either by exception or by appeal, and there is an equal division of the judges, the judgment of the lower court is, as a rule, affirmed.² It has been argued, in at least one

1. *Durant v. Essex Co.*, 8 Allen (Mass.) 103; *Van Dyck v. Van Beuren*, 2 Cai. (N. Y.) 103; *Procter's Case*, 12 Coke 118; *Deane v. Clayton*, 7 Taunt. 489, 2 E. C. L. 489; *Thornby v. Fleetwood*, 1 Stra. 384; *Boulton v. Bull*, 2 H. Bl. 500; *Peacock v. Bell*, 1 Saund. 69; *Outram v. Morewood*, 3 East 358; *Atkins v. Drake*, 1 McClel. & Y. 214; *Goddard v. Coffin*, *Davies* 381; *Vin. Abr.*, art. Court 1; 3 Com. Dig. 233; 2 *Tidd's Pr.* 390; 3 *Co. Com. Dig.*, § 439, p. 476.

2. 5 *Dan. Ch. Pl. & Pr.* 1707; 2 *Dan. Ch. Pr.* 1471; *How. Anno. Stat.*, c. 243, p. 1663; 1 *Tidd's Pr.* 127.

California.—*Frankel v. Deidesheimer*, 93 Cal. 73; *Lakeside Ditch Co.*

v. Crane, 80 Cal. 181; *Luco v. De Toro*, 88 Cal. 26; *McCauley v. Brooks*, 16 Cal. 11; *Providence Tool Co. v. Prader*, 32 Cal. 634.

Florida.—*Fraser v. Willey*, 2 Fla. 116; *Williams v. Moseley*, 2 Fla. 359.

Illinois.—*Kerr v. Whiteside*, 1 Ill. 390; *Claffin v. Dunne*, 30 Ill. App. 84, 129 Ill. 241; *Auditor v. Hall*, 1 Ill. 392.

Iowa.—*Richards v. Burden*, 59 Iowa 754; *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83; *Zeigler v. Vance*, 3 Iowa 528.

Kentucky.—*Blanchard v. Harler*, 6 T. B. Mon. (Ky.) 393; *Maupin v. Goodloe*, 6 T. B. Mon. (Ky.) 409; *Yoder v. Atterburn*, 7 T. B. Mon. (Ky.) 491; *Letcher v. Commonwealth Bank*, 1

case, that while the effect of an equal division of opinion upon a motion to set aside a judgment or discharge a rule is as has been stated, it should not be so in the case of an appeal or writ of

Dana (Ky.) 82; Faris *v.* Shanks, 7 T. B. Mon. (Ky.) 133; Lipscomb *v.* Grubbs, 3 Bibb (Ky.) 392; Sterritt *v.* Lockhart, 7 J. J. Marsh. (Ky.) 554.

Maryland.—Partridge *v.* Dorsey, 3 Har. & J. (Md.) 302; Gregg *v.* Baltimore, 14 Md. 479; Baltimore *v.* Leferman, 4 Gill (Md.) 425, 45 Am. Dec. 145; Chapman *v.* Dixon, 4 Har. & J. (Md.) 527; Hammond *v.* Ridgely, 5 Har. & J. (Md.) 284; Lee *v.* Tinges, 7 Md. 215.

Massachusetts.—Durant *v.* Essex Co., 8 Allen (Mass.) 103, 85 Am. Dec. 685.

Michigan.—McPherson *v.* Ryan, 59 Mich. 33; Mitchell *v.* Mitchell, 49 Mich. 68; McCutcheon *v.* Homer, 43 Mich. 483; Nester *v.* Swift, 50 Mich. 42; Dutch Reformed Church Cases, 52 Mich. 329; State Tax-Law Cases, 54 Mich. 350; Penniman *v.* Perce, 9 Mich. 509; Smith *v.* Lloyd, 76 Mich. 619; Lyon *v.* Ingham Circuit Judge, 37 Mich. 378.

Minnesota.—Gran *v.* Spangenberg, 53 Minn. 42.

New Hampshire.—Northern R. Co. *v.* Concord R. Co., 50 N. H. 178.

New Jersey.—Flavell *v.* Flavell, 22 N. J. Eq. 599; Voorhees *v.* Thorn, 21 N. J. L. 80; Huncke *v.* Francis, 27 N. J. L. 55. Compare Elizabethtown *v.* Springfield, 3 N. J. L. 70.

New York.—Mason *v.* Jones, 3 N. Y. 375, 5 How. Pr. (N. Y.) 118; Bridge *v.* Johnson, 5 Wend. (N. Y.) 342; Morse *v.* Gould, 11 N. Y. 281; Foot *v.* Tracy, 1 Johns. (N. Y.) 46; Van Dyck *v.* Van Beuren, 2 Cai. (N. Y.) 103.

North Carolina.—Durham *v.* Richmond, etc., R. Co., 113 N. Car. 240.

Pennsylvania.—Beltzhoover *v.* Daragh, 16 S. & R. (Pa.) 329; *In re* Strauss's Estate, 14 Pa. Co. Ct. Rep. 593, 34 W. N. C. (Pa.) 478.

Virginia.—Com. *v.* Beaumarchais, 3 Call (Va.) 122; Martin *v.* Welch, 4 Munf. (Va.) 60.

Wisconsin.—Yates *v.* Shepardson, 27 Wis. 238; Lathrop *v.* Knapp, 37 Wis. 307.

United States.—The Antelope, 10 Wheat. (U. S.) 66; Washington Bridge Co. *v.* Stewart, 3 How. (U. S.) 413; Reeside *v.* U. S., 8 Wall. (U. S.) 38; Bauer *v.* Texas, etc., R. Co., 131 U. S.

430; Moffitt *v.* Miller, 34 L. Ed. (U. S.) 539; Texas, etc., R. Co. *v.* Gentry, 57 Fed. Rep. 422, 13 U. S. App. 531; Bingham *v.* Cabbot, 3 Dall. (U. S.) 19; Benton *v.* Woolsey, 12 Pet. (U. S.) 29; Etting *v.* U. S. Bank, 11 Wheat. (U. S.) 59; Strout *v.* Foster, 1 How. (U. S.) 89; Ellis *v.* Jones, 1 How. (U. S.) 197; Lessieur *v.* Price, 12 How. (U. S.) 59; Albany Bridge Case, 2 Wall. (U. S.) 403; Holmes *v.* Jennison, 14 Pet. (U. S.) 540; U. S. *v.* Worrall, 2 Dall. (U. S.) 396; Ellis *v.* Jones, 1 How. (U. S.) 201; Mobile *v.* Emanuel, 1 How. (U. S.) 95; Durant *v.* Essex Co., 7 Wall. (U. S.) 107.

England.—Catherwood *v.* Caslon, 13 M. & W. 262; Thornby *v.* Fleetwood, 1 Stra. 384; Deighton *v.* Greenville, Cruise on Fines 222, Irish ed. 118; Warburton *v.* Loveland, 1 Huds. & B. 725; Iveson *v.* Moore, 1 Salk. 17; Reg. *v.* Millis, 10 Cl. & F. 907; Finnie *v.* Glasgow, etc., R. Co., 2 Macq. H. L. Cas. 177; Rochester *v.* Pierce, 1 Campb. 468.

When the court is equally divided it cannot change the decree of the Circuit Court, nor exercise its discretionary power to allow interest; for this would have been a new decree. Hemmenway *v.* Fisher, 20 How. (U. S.) 255.

In a Capital Case, where the court is equally divided in opinion on a writ of error as to granting a new trial, it must order the prisoner to be executed. Walton *v.* State, 1 West. L. J. 256.

Effect on Question Presented on Bill of Exceptions.—Where the court is equally divided in opinion upon a question presented on a bill of exceptions, the exceptions are overruled. Shannon *v.* Shannon, 10 Allen (Mass.) 249.

Effect on Question of Sustaining Demurrer.—Where there is an equal division of opinion of the court upon the question of sustaining a demurrer, the demurrer is overruled. Putnam *v.* Rees, 12 Ohio 21.

Affirmance in Part.—Where there is an equal division of opinion in the higher court as to part of the decree appealed from, such decree will be affirmed as to so much. If the judges or a majority of them concur that there is error in the residue of the decree, so

error.¹ This contention, however, has met with no general support.

Practice Based upon Expediency.—This rule is based upon expediency and the desirability of putting an end to the litigation.²

2. Conclusiveness of Affirmance.—The affirmance of the judgment or decree of the lower court upon an equal division of the judges of an appellate court is conclusive upon the rights of the parties.³

much of it will be reversed. *Com. v. Beaumarchais*, 3 Call (Va.) 122.

Dissenting Judges about to Retire.—It is held in *California* that a motion to affirm a judgment because of an equal division of opinion among the judges qualified will be denied where it appears that before the time for the next term of court, when the cause can be heard, several of the dissenting judges will be succeeded by others, who may assist in deciding the case on its merits. *Luco v. De Toro*, 88 Cal. 26.

1. "What the legal effect of an equal division on the bench is has frequently become a question. And the not attending strictly to the subject-matter under consideration, in the various cases wherein such division has been recorded, has created some perplexity. On a motion to set aside a judgment or discharge a rule, if there be an equal division of the court, the judgment or rule remains in full force, and hence it has been argued that the same thing would take place on an appeal or writ of error. But this is not so. For, in the first case, the judgment or rule being once entered, it must have its full force, unless set aside or discharged by a judgment of the court, which, upon an equal division, never can be rendered. But in cases of appeal or error it is otherwise. There the effect of the judgment below is wholly superseded by the writ itself. Nothing can be done until there is a new judgment, either upon the merits in appeal, or of affirmance or reversal in error, as the case may be. The judgment can neither affirm nor reverse itself. The court must pass upon it. And to this effect is the decision in 1 Stra. 318, in the case of the Duke of Hamilton and Branden. There, indeed, there was an affirmance by the request of the party against whom it was, in order that the matter might be carried up to a higher tribunal. And court ordered a special note to be made to that effect. I am satisfied, therefore, that this judgment of affirmance is unlawfully entered and

must be quashed." *Per Kirkpatrick, C. J.*, in *Elizabethtown v. Springfield*, 3 N. J. L. 70.

2. *Frankel v. Deidesheimer*, 93 Cal. 73.

"The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the judges who were in favor of a reversal should waive any insistence of opinion and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case." *Luco v. De Toro*, 88 Cal. 26.

3. *The Antelope*, 10 Wheat. (U. S.) 66; *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 59; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Lessieur v. Price*, 12 How. (U. S.) 59; *Krebs v. Carlisle Bank*, 2 Wall. Jr. (C. C.) 51.

The Judgment Is That of the Entire Court, and is as binding in every respect as if rendered upon the concurrence of all the judges. *Hartman v. Greenhow*, 102 U. S. 672; 2 Black on Judgments, § 528; *Bigelow on Estoppel* (4th ed.), p. 59; *Clark v. Kean*, 1 Del. Ch. 114; *Lyon v. Ingham Circuit Judge*, 37 Mich. 378; *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1; *Elizabethtown v. Springfield*, 3 N. J. L. 70; *Lathrop v. Knapp*, 37 Wis. 307; *Durant v. Essex Co.*, 101 U. S. 555; *Brown v. Aspden*, 14 How. (U. S.) 28; *Atty.-Gen. v. Windsor*, 8 H. L. Cas. 369.

"The record has all the elements of a final decree. It purports to order, adjudge, and decree that the decree of the Circuit Court be affirmed with costs. In its substance it would not have been different if the judges had agreed in every point unanimously. We do not understand the statement that it was rendered by a divided court to mean that they were divided as to the ques-

3. Judgment Not a Precedent.—Where the judgment of the lower court is affirmed upon an equal division of opinion in the appellate court, such judgment stands only as the decision in the case in question and not as an obligatory precedent.¹

Opinions need Not Be in Writing.—Although it is provided by statute in many of the states that written opinions must be delivered by the courts in all cases, such provision is held not to apply to the affirmance of a judgment by an equal division of opinion.²

II. EFFECT ON MOTIONS.—If an equal division of opinion among the judges occurs on a motion for a new trial,³ a motion in arrest

tion whether it should be rendered, but merely as to the questions of law which had been involved in it." *Durant v. Essex Co.*, 8 Allen (Mass.) 103.

Subject to Rehearing.—Where the judgment on appeal is affirmed by reason of an equal division of opinion in the appellate court, such affirmance is subject to reconsideration or rehearing and does not differ in this regard from any other judgment. *Zeigler v. Vance*, 3 Iowa 528.

1. Am. and Eng. Encyc. of Law, tit. *Stare Decisis*; *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 59; *Benton v. Woolsey*, 12 Pet. (U. S.) 27; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Reese v. U. S.*, 8 Wall. (U. S.) 38; *Hartman v. Greenhow*, 102 U. S. 676; *Durham v. Richmond, etc.*, R. Co., 113 N. Car. 240; *Durant v. Essex Co.*, 8 Allen (Mass.) 108; *Morse v. Goold*, 11 N. Y. 281; *People v. New York*, 25 Wend. (N. Y.) 252.

"But such a formal affirmance, although it leaves the law of the Supreme Court undisturbed, cannot be considered as settling the law in this court, except so far as relates to the particular cause in which the decision is made. The maxim *stare decisis, et non quæta movere*, cannot be applicable to such a case, where the question never has, in fact, been decided by this court." *Bridge v. Johnson*, 5 Wend. (N. Y.) 372.

2. *Louisville, etc., R. Co. v. Sharp*, 91 Ky. 411; *Groverman v. Spencer*, 7 Md. 214; *Albany Bridge Case*, 2 Wall. (U. S.) 403.

"It seems clear that the opinions of the justices as a court are to be written, and if there should not be a majority of the court agreeing on one side of the question, there can be no decision. There must be something decided before the statute applies, and if the

court is divided can there be, in the nature of things, a decision? The lexicographers tell us that the term 'decided' implies 'decision, something that is unequivocal, that puts an end to doubt.' Suppose the court stand opposed two to two, are there any doubts removed? Is not the case left in the same situation in which it came up, leaving the questions of law involved in it as open questions and subject to future adjudication? Can the opinion of the court be cited as authority in any future controversy? Certainly not, because there is a perfect mathematical balance, with no preponderance on either side." *Fraser v. Willey*, 2 Fla. 118.

3. *Ayres v. Bensley*, 32 Cal. 633.

In the case of *Cahill v. Benn*, 6 Binn. (Pa.) 99, there was a verdict for the plaintiff in the court below, but upon a motion for a new trial the judges were equally divided. There was afterwards a motion for judgment for the plaintiff, two judges being present. One ordered the judgment to be entered, and the other objected to the entry. The clerk entered judgment. It was held that this was a good judgment. The court presumed that the dissenting judge intended only to enter his dissent on the record and not to arrest the regular course of law by prohibiting the making of a proper entry.

"The rule seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division; but where the motion is in arrest of the progress of the action, an equal division is equivalent to a denial of the motion, and the case proceeds as if the motion had not been made." *Ayres v. Bensley*, 32 Cal. 633. See also *Goddard v. Coffin*, *Davies* 381.

of judgment,¹ a motion for a recount of ballots in a contested election case,² a motion for a reargument,³ or an application for mandamus,⁴ the motion will fail.

III. EFFECT ON ADMISSION OF TESTIMONY.—The decisions differ as to the effect of an equal division of the bench regarding the admission of testimony. By some authorities it is held that the testimony should be admitted and by others that it should be excluded.⁵

IV. EFFECT ON QUESTION OF JURISDICTION.—Where there is an equal division on the question of jurisdiction, the jurisdiction must be sustained and the case decided on its merits.⁶

V. IN COURTS OF CHANCERY.—Where a court of equity is equally divided upon the question of the relief to be granted the bill will be dismissed.⁷

1. *U. S. v. Worrall*, 2 Dall. (U. S.) 384; *Durant v. Essex Co.*, 7 Wall. (U. S.) 107; *Chapman v. Lamphire*, 3 Mod. 155.

2. In a contested election case, a motion for a recount of ballots will be denied where there is an equal division of opinion of the court. *Thompson v. Ewing*, 1 Brews. (Pa.) 98.

3. If the court is divided upon a motion for a reargument the motion fails. *Stevenson v. Lawrence*, 1 Brews. (Pa.) 126.

4. An application for a mandamus will not be granted where there is an equal division of opinion of the court. *People v. Regents*, 18 Mich. 483.

5. **Testimony Admissible.**—*Campbell v. Wallace*, 3 Yeates (Pa.) 572; *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *East-erday v. Kilborn*, Wright (Ohio) 345.

Testimony Excluded.—*Ayres v. Bensley*, 32 Cal. 633. And see *McPherson v. Ryan*, 59 Mich. 33.

6. *State v. Hays*, 30 W. Va. 107.

7. *Waddle v. U. S. Bank*, 2 Ohio 336; *U. S. Bank v. Schultz*, 2 Ohio 471. See also *Madlem's Appeal*, 103 Pa. St. 584.

Compare Northern R. Co. v. Concord R. Co., 50 N. H. 166, wherein it was held that when, in equity upon a hearing on the merits, the court was regularly divided on the question whether the bill should be dismissed, no judgment could be entered, but that the cause should remain pending and that receivers appointed to hold the property during the pendency of the suit should remain in possession.

In the United States Circuit Court, if the court is equally divided upon a hearing in equity, it is said to be the common course to dismiss the bill without costs to either party—see opinion of Story, J., in *Veazie v. Williams*, 3 Story (U. S.) 632—but it would seem that the decree of dismissal is entered “so that the parties aggrieved may, if they think proper, bring up the question” to the Supreme Court, “on appeal for review from the final decree.” *Northern R. Co. v. Concord R. Co.*, 50 N. H. 178. And see opinion of Nelson, J., in *Silliman v. Hudson River Bridge Co.*, 1 Black (U. S.), 585.

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CROSS-REFERENCES.

As to Alimony, Costs, Suit Money, Counsel Fees, in Suits for Divorce, see article *ALIMONY*, vol. 1, p. 407.

Injunction, Creditor's Bill, Writ Ne Exeat, in Suits for Divorce, see article *ALIMONY*, vol. 1, pp. 440-445.

I. NATURE OF THE DIVORCE SUIT—1. In General.—At Common Law the suit for divorce was a proceeding in the ecclesiastical courts, which had exclusive jurisdiction over divorce and matrimonial causes.¹ The divorce suit was not originally an action at law or a suit in equity,² although it resembled the latter in some respects.³

In the Ecclesiastical Courts the libel was framed like a bill in equity, for the double purpose of averment and for searching the conscience of the defendant.⁴ The answer was not a pleading, but was more in the nature of answers by the defendant to the interrogatories of the plaintiff, and could be introduced by the plaintiff as evidence, if he or she desired, but not by the defendant.⁵ The defendant might obtain the same affirmative relief as a plaintiff

1. *Sharon v. Sharon*, 67 Cal. 208.

2. In *Whitmore v. Hardin*, 3 Utah 121, it was said: "A case of divorce is not intrinsically a law case, for it was unknown to the common law; it is not intrinsically a chancery case, for it was unknown to equity jurisprudence."

3. See *infra*, XI. 7. *Trial by Jury*; XI. 10. *Conduct of the Court*; V. *Cross-bill or Cross-petition*.

4. See allegations of cruelty set out in the opinion in *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Ec. 310.

The allegations were similar in the courts of equity in *New York* before the adoption of the code. *Beach v. Beach*, 11 Paige (N. Y.) 161; *Casey v. Casey*, 2 Barb. (N. Y.) 59.

5. The defendant's answers were not

confined to a mere affirmation or denial of the averments of the libel, as were the answers of the witnesses. The defendant was allowed to explain the circumstances at sufficient length to place the transaction in its true light. *Oliver v. Heathcote*, 2 Add. Ec. 35. As explained in *Maxwell v. Maxwell*, Milward 290, "More indulgence is allowed in such cases than in the case of a witness extra-artificially deposing; for though the personal answer, if read, makes the answerer a witness, this is entirely and merely at the choice of the opposite party, who is not to make the answer evidence unless he pleases; whereas, the testimony of a witness is capable of affecting the party against his will, as his opponent may read it."

by filing an allegation in the nature of a cross-bill, regardless of the nature of the relief prayed for by the plaintiff.¹ The trial was similar to that in the court of chancery, being to the court without a jury and upon the depositions of witnesses.²

In the United States the suit for divorce is a statutory proceeding in a court of equity or in a court having jurisdiction in law and equity, and is generally classed as a suit in equity or an action under the code.³ Where the service is constructive, and the defendant does not appear, the suit for divorce is classed as a proceeding *in rem*.⁴ The divorce suit, however, cannot be accurately denominated a suit in equity or a civil action, for it is governed by peculiar principles and is a proceeding *sui generis*.⁵

The suit is not accurately described as an action on contract,⁶

1. See *infra*, V. Cross-bill or Cross-petition.

In a suit for divorce the defendant may allege the misconduct of the plaintiff, and obtain a divorce if the plaintiff fails in his proofs. *Best v. Best*, 1 Add. Ec. 411.

The defendant could obtain a decree of divorce where the plaintiff prayed for a restitution of conjugal rights. *Dysart v. Dysart*, 1 Rob. Ec. 106; *Anichini v. Anichini*, 2 Curt. Ec. 210.

2. See *infra*, XI. 7. Trial by Jury.

3. See *infra*, I. 2. As a Suit in Equity, and I. 3. As a Civil Action Under the Codes; *Sharon v. Sharon*, 67 Cal. 193.

4. *Roth v. Roth*, 104 Ill. 35; *In re Newman's Estate*, 75 Cal. 213; *Bunnell v. Bunnell*, 25 Fed. Rep. 214; *Thoms v. King*, 95 Tenn. 60; *Hansford v. Hansford*, 34 Mo. App. 262; *Dunham v. Dunham*, 57 Ill. App. 475; *Dillon v. Starin*, 44 Neb. 881; *Kline v. Kline*, 57 Iowa 386; *Ellison v. Martin*, 53 Mo. 575; *Gould v. Crow*, 57 Mo. 200. See *contra*, *McCreery v. Davis*, 44 S. Car. 195.

In New York it is held that there must be personal service or an appearance by the defendant, or no valid decree of divorce can be rendered. A suit for divorce must be *in personam* and not *in rem*. "The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of

the proceeding given without the jurisdiction of the court where the proceeding is pending." *Per Andrews, J.*, in *Jones v. Jones*, 108 N. Y. 415. To the same effect, see *Williams v. Williams*, 130 N. Y. 193; *Van Cleef v. Burns*, 118 N. Y. 549; *De Meli v. De Meli*, 120 N. Y. 485; *Cross v. Cross*, 108 N. Y. 628; *Hunt v. Hunt*, 72 N. Y. 217; *Munson v. Munson*, 60 Hun (N. Y.) 189.

5. *Mangels v. Mangels*, 6 Mo. App. 481.

"A suit for divorce and alimony is a proceeding *sui generis*, founded on the violation of the duties which the law enjoins, and always sounding in tort and for the redress of private wrongs." *Swan v. Harrison*, 2 Coldw. (Tenn.) 534.

In Indiana the divorce suit was early considered a special proceeding, and not a civil action within the meaning of the code. *Ewing v. Ewing*, 24 Ind. 468; *Morse v. Morse*, 25 Ind. 156; *Musselman v. Musselman*, 44 Ind. 106. But for the later rule, see *Powell v. Powell*, 104 Ind. 18, and see *infra*, I. 3. As a Civil Action Under the Codes.

6. "It is not an action on a contract, for, as is correctly said by Mr. Bishop (Bishop's Mar. and Div.), it is inconvenient, if not inaccurate, to speak of marriage as a contract when speaking of the state of marriage, which the action is brought to dissolve, and not of the agreement over the threshold of which the parties enter into that state. Laws changing the duties and rights of the married parties have never been held to come within the purview of constitutional provisions against the violation of a contract. Nor is the action for divorce an action of tort. It is not, therefore, to be taken for

but in many respects resembles an action in tort.¹ It is, however, a civil action, and not a proceeding to punish a crime.²

2. As a Suit in Equity.—Although the divorce suit is a proceeding *sui generis*, it is substantially a suit in equity, the pleadings, method of trial, and nature of the decree being similar.³ In many states the divorce statutes expressly provide that the process, practice, and proceedings shall be the same in suits for divorce as in other causes in equity or chancery suits.⁴

granted that the legislature, when speaking of actions in general in the practice act, meant always to embrace this peculiar action, which stands entirely alone." *Mangels v. Mangels*, 6 Mo. App. 481.

In *Mott v. Mott*, 82 Cal. 413, it was held that a cause for divorce was in effect a breach of contract. "As in the case of any other kind of contract, the cause of action, if there be one, is not the contract itself, but the violation of some duty or obligation imposed by the contract, which violation constitutes in law a breach of the contract. It is that breach which gives the cause of action. So here the contract of marriage creates a status, as does also a contract of partnership, although a different one, by reason of which the law imposes upon each party to the contract certain duties and obligations, the violation of which constitutes a breach of the contract and gives a cause of action."

1. *Swan v. Harrison*, 2 Coldw. (Tenn.) 534.

In *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9, it was held that a cause for divorce was a violation of duties enjoined by law, and therefore resembled an action in tort, and was not an action on contract.

2. The rules of evidence and the principles of criminal law are not applicable to suits for divorce. *Allen v. Allen*, 101 N. Y. 658; *Poertner v. Poertner*, 66 Wis. 644; *Best v. Best*, 161 Pa. St. 515; *Baker v. Baker*, 5 Prob. Div. 142; *Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. App. 374.

In the early cases the divorce statutes were considered rather in the nature "of the criminal than of the civil code, and apply not so much to the contract between the individuals as to the personal relation resulting from it and to the relative duties of the parties to their standing and conduct in the society of which they are members; and these are regulated with a prin-

cipal view to the public order and economy, the promotion of good morals, and the happiness of the community." *Barber v. Root*, 10 Mass. 260, approved in *Matchin v. Matchin*, 6 Pa. St. 332; *Dickinson v. Dickinson*, 3 Murph. (N. Car.) 327; *O'Bryan v. O'Bryan*, 13 Mo. 16; *Stafford v. Stafford*, 41 Tex. 111.

A Divorce for Cruelty is not to inflict punishment or impose a fine, but to prevent further injury. *Smith v. Smith*, 40 N. J. Eq. 582; *Moyler v. Moyler*, 11 Ala. 620; *Shores v. Shores*, 23 Ind. 546; *Burton v. Burton*, 52 N. J. Eq. 215; *Robinson v. Robinson*, 66 N. H. 600.

3. The jurisdiction to grant divorce was usually conferred upon courts of equity in the United States and this to a great extent fixed the nature of the action. In many states the divorce suit is regarded as a suit in equity, although the divorce statutes do not expressly declare it to be such. In *California* it was said: "It would seem there could be little doubt that, when marriage has been deprived of its quality of indissolubility, and no special tribunal has been created for divorce cases, courts of equity should assume cognizance of such actions. Courts of equity have always exercised an analogous jurisdiction; their modes of procedure are adapted to the inquiries involved, and their decrees are more specific and flexible than the ordinary law judgments. It is therefore not surprising that this court should have uniformly regarded actions of divorce as 'cases in equity.'" *Sharon v. Sharon*, 67 Cal. 185.

"A bill for divorce partakes so much of the nature of a proceeding in chancery that it must be governed, to a great extent, by the rules in chancery cases." *Bowman v. Bowman*, 64 Ill. 75.

4. *Alabama*.—Anonymous, 35 Ala. 226; *Lovett v. Lovett*, 11 Ala. 763; *Hansford v. Hansford*, 10 Ala. 561.

Arkansas.—*Bauman v. Bauman*, 18 Ark. 320.

In some instances, however, the chancery practice is inapplicable, as a decree *pro confesso* cannot be rendered without satisfactory proof of the cause for divorce;¹ the trial is generally in open court and not upon depositions, or on the report of a referee;² the court may, on its own motion, examine the parties and their witnesses on matters not within the issues, and may dismiss the suit where it appears that the plaintiff is not entitled to a divorce.³ In other instances, to be noticed hereafter, the procedure differs from the chancery practice when the principles of the divorce law render the latter inapplicable.

3. As a Civil Action Under the Codes.—In the states where codes of procedure have been adopted, which to some extent abolish the distinctions between actions at law and suits in equity, the suit for divorce is called a civil action and is governed by the rules of the reformed procedure unless they are inapplicable or inadequate.⁴ In many of the code states the divorce statutes expressly

Florida.—Rev. Stat. 1891, § 1482.

Illinois.—Lawrence v. Lawrence, 73 Ill. 577; Sterl v. Sterl, 2 Ill. App. 223; Shillinger v. Shillinger, 14 Ill. 147; Clark v. Clark, 29 Ill. App. 257.

Maryland.—J. G. v. H. G., 33 Md. 401; Keerl v. Keerl, 34 Md. 21.

Mississippi.—Fulton v. Fulton, 36 Miss. 517; Dewees v. Dewees, 55 Miss. 315.

Montana.—Black v. Black, 5 Mont. 15; Beck v. Beck, 6 Mont. 318.

New Jersey.—Flavell v. Flavell, 20 N. J. Eq. 211; Fairchild v. Fairchild, 43 N. J. Eq. 473; Harrison v. Harrison, 46 N. J. Eq. 75; Stone v. Stone, 28 N. J. Eq. 409.

New York.—Before adoption of the code. Devanbakh v. Devanbakh, 5 Paige (N. Y.) 554; Mulock v. Mulock, 1 Edw. Ch. (N. Y.) 14; Hoffmire v. Hoffmire, 7 Paige (N. Y.) 60; Dunn v. Dunn, 4 Paige (N. Y.) 425; Phelps v. Phelps, 7 Paige (N. Y.) 150; Graves v. Graves, 2 Paige (N. Y.) 62.

The provisions of the code are generally applicable to suits for divorce. Roe v. Roe, 14 Hun (N. Y.) 612.

Tennessee.—Richmond v. Richmond, 10 Yerg. (Tenn.) 343.

Virginia.—Latham v. Latham, 30 Gratt. (Va.) 312; Bailey v. Bailey, 21 Gratt. (Va.) 43.

West Virginia.—Martin v. Martin, 33 W. Va. 701; Hitchcox v. Hitchcox, 2 W. Va. 435.

1. Latham v. Latham, 30 Gratt. (Va.) 312. See also *infra*, XI. 2. *Default*.

2. See *infra*, XI. 3. *Reference*.

3. See *infra*, XI. 10. *Conduct of the Court*.

4. R. F. H. v. S. H., 40 Barb. (N. Y.) 9; Roe v. Roe, 14 Hun (N. Y.) 612; Dodd v. Dodd, 14 Oregon 338; Wadsworth v. Wadsworth, 81 Cal. 182; Wuest v. Wuest, 17 Nev. 217; Warner v. Warner, 11 Kan. 121; Burdick v. Burdick, 7 Wash. 533; Calvert v. Calvert, 15 Colo. 390.

"An action for divorce is a civil proceeding, and the pleadings in it are to be construed by the ordinary laws governing a civil action." Prather v. Prather, 26 Kan. 275; Callen v. Callen, 44 Kan. 370.

The early cases in *Indiana* held that a divorce suit was a special proceeding and was not a civil action within the meaning of the code. Ewing v. Ewing, 24 Ind. 468; Musselman v. Musselman, 44 Ind. 106, and cases cited.

In a later case these cases are distinguished and in effect overruled. "To hold that a divorce proceeding is in no sense a 'civil action,' and that, therefore, no provisions of the civil code are applicable thereto, would be, practically, to overthrow the divorce act. It cannot be enforced without reference to the civil code. It provides for a petition, cross-petition, and answer, but makes no provision for a reply or the amendment of pleadings; it makes no provision for a demurrer, a motion for a new trial, for exceptions, or bills of exceptions, or appeal to the Supreme Court; nor is there any provision for a continuance or for a change from the judge. For all these the

provide that the process, practice, or proceedings shall be the same in suits for divorce as in other civil actions.¹ In the absence of such provisions practice generally conforms to the procedure prescribed by the code rather than to the chancery practice which is now superseded by the codes.² A reference to the states in which the divorce suit conforms to the code of civil procedure is given here,³ and the instances in which the provisions of the code are

court must go, and have always gone, to the civil code." "Divorce cases * * * are clearly 'civil actions,' in such a sense, at least, that the rules of pleading and practice therein provided will apply to them, except to the extent that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the legislature intended otherwise." *Powell v. Powell*, 104 Ind. 18.

1. *Georgia*.—Code, § 1717.

Iowa.—Section 3823, McLain's Ann. Code 1888, provides that service may be made by publication, as in other actions, if defendant is a nonresident.

Kansas and Oklahoma.—A summons may be issued on a verified petition, "and shall be served, or publication made, as in other cases."

Minnesota.—The divorce statute provides that "if personal service cannot well be made, the court may order service of the summons by publication as in other actions."

Missouri.—Section 4501, Rev. Stat. 1889, provides that "like process and proceedings shall be had in such causes as are had in other civil suits, except the answer of the defendant shall not be under oath."

Nebraska.—Section 1426, Cobbe's Stat. 1893, provides that "when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure."

Washington.—Section 776, 2 Hill's Ann. Stat. 1891, provides that "the practice in civil actions shall govern all proceedings in the trial of actions for divorce, except that trial by jury is dispensed with."

See also similar provisions relating to service of summons in *Texas*, *Utah*, and *Wyoming*.

2. In applying the rules of code pleading to a petition for divorce the court said: "The facts required by the code to be stated are issuable facts, essential to the cause of action or defense, and not those which merely go to es-

tablish such essential facts. This is now the universal rule, whether the action be one which under the former practice would have been an action at law, or one in equity. * * * The old chancery practice of pleading mere matters of evidence which might be material in establishing the general allegations of the bill is not now proper under the code." *Vermilye v. Vermilye*, 32 Minn. 499.

3. *California*.—*Wadsworth v. Wadsworth*, 81 Cal. 182; *Mott v. Mott*, 82 Cal. 413; *Blakely v. Blakely*, 89 Cal. 324; *Kirsch v. Kirsch*, 83 Cal. 633.

Colorado.—*Sylvis v. Sylvis*, 11 Colo. 331; *Calvert v. Calvert*, 15 Colo. 390.

Idaho.—*Wyatt v. Wyatt*, 2 Idaho 219.

Indiana.—*Powell v. Powell*, 104 Ind. 28; *Musselman v. Musselman*, 44 Ind. 106; *Armstrong v. Armstrong*, 27 Ind. 186.

Iowa.—*Wilson v. Wilson*, 40 Iowa 230; *Sherwood v. Sherwood*, 44 Iowa 192; *Gilruth v. Gilruth*, 20 Iowa 225; *Barney v. Barney*, 14 Iowa 189; *Blair v. Blair*, 74 Iowa 311.

Kansas.—*Warner v. Warner*, 11 Kan. 121; *Callen v. Callen*, 44 Kan. 370; *Prather v. Prather*, 26 Kan. 275; *Earls v. Earls*, 26 Kan. 178; *Lewis v. Lewis*, 15 Kan. 181.

Maryland.—*Thomas v. Thomas*, 57 Md. 504.

Minnesota.—*Vermilye v. Vermilye*, 32 Minn. 499.

Missouri.—*Mangels v. Mangels*, 6 Mo. App. 481; *Ficke v. Ficke*, 62 Mo. 335.

Montana.—*Simpkins v. Simpkins*, 14 Mont. 386; *Morrison v. Morrison*, 14 Mont. 8.

Nebraska.—*O'Connell v. O'Connell*, 10 Neb. 390; *O'Brien v. O'Brien*, 19 Neb. 584; *Aspinwall v. Aspinwall*, 18 Neb. 463; *Smithson v. Smithson*, 37 Neb. 535.

Nevada.—*Wuest v. Wuest*, 17 Nev. 217; *Kelly v. Kelly*, 18 Nev. 49.

New York.—*Robertson v. Robertson*, 9 Daly (N. Y.) 44; *Roe v. Roe*, 14 Hun (N. Y.) 612; *Clay v. Clay*, 21 Hun

held to be inapplicable to divorce suits will be noticed under the various subdivisions in this article.

4. Ecclesiastical Practice—When Followed.—The divorce suit is a statutory proceeding and is, of course, governed in all matters of practice by the special provisions of the divorce statutes.¹ Such statutes do not, however, provide a complete code of procedure;² and where the practice is not regulated by the statute the divorce suit conforms to the procedure of the court having jurisdiction of divorce.³ In all cases the suit for divorce is governed by considerations of public policy requiring the interposition of the court wherever the evidence is not satisfactory or for other reasons the parties are not entitled to the relief demanded, and therefore the procedure of the court in other suits will not be followed where it is inapplicable and contrary to public policy.⁴ In such cases the courts apply the rules and principles of the ecclesiastical law, following the practice of the ecclesiastical courts so far as necessary.⁵ The ecclesiastical practice is also followed where the

(N. Y.) 609; *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9; *Kaiser v. Kaiser*, 16 Hun (N. Y.) 602; *Bihin v. Bihin*, 17 Abb. Pr. (N. Y. Supreme Ct.) 19; *Conger v. Conger*, 77 N. Y. 432; *Amory v. Amory*, 6 Robt. (N. Y.) 514.

North Dakota.—*Yorke v. Yorke*, 3 N. Dak. 343.

Ohio.—*Tappan v. Tappan*, 6 Ohio St. 64.

Oklahoma.—*Irwin v. Irwin*, 3 Okla. 186.

Oregon.—*Dodd v. Dodd*, 14 Oregon 338; *Rice v. Rice*, 13 Oregon 337; *Eggerth v. Eggerth*, 15 Oregon 626.

South Dakota.—*Beach v. Beach*, 6 Dakota 371; *Grant v. Grant*, 5 S. Dak. 1.

Texas.—*Hare v. Hare*, 10 Tex. 355.

Utah.—*Tufts v. Tufts*, 8 Utah 142.

Virginia.—*Cralle v. Cralle*, 79 Va. 182.

Washington.—*Burdick v. Burdick*, 7 Wash. 533.

Wisconsin.—*R. v. R.*, 20 Wis. 331; *Moe v. Moe*, 39 Wis. 309.

1. *Jones v. Jones*, 90 Hun (N. Y.) 414; *Ewing v. Ewing*, 24 Ind. 468; *Tappan v. Tappan*, 6 Ohio St. 64; *Lovett v. Lovett*, 11 Ala. 763; *Simons v. Simons*, 107 Ind. 197; *Evans v. Evans*, 105 Ind. 204; *Kelley v. Kelley*, 161 Mass. 111.

2. The divorce statutes do not usually contain provisions concerning the process, pleadings, evidence, or the conduct of the trial, continuances, change of venue, security for costs, or appeal, and the practice usually con-

forms to that of a chancery suit or a civil action under the code.

In *New York* the divorce statutes are said to "constitute a comprehensive and detailed" code of divorce procedure, and the courts are "confined altogether to the exercise of such express and incidental powers as are conferred by the statute." *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

3. See *supra*, I. 2. *As a Suit in Equity*, and I. 3. *As a Civil Action Under the Codes*.

4. The specific instances in which the general procedure of the court is held applicable or inapplicable to divorce suits will be noticed under the various subdivisions of this article. It is clear that all agreements of the parties as to the decree of divorce must receive the approval of the court and that the decree cannot be entered by agreement without proof. The code provisions relating to confession of judgment, etc., are not applicable to decrees of divorce.

5. The principles of the ecclesiastical law are applied in suits for divorce except in so far as they are unsuited to our courts, or in conflict with specific constitutional or statutory provisions, or the general spirit of our laws. *Bauman v. Bauman*, 18 Ark. 320; *Jeans v. Jeans*, 2 Harr. (Del.) 42; *J. G. v. H. G.*, 33 Md. 401; *Southwick v. Southwick*, 97 Mass. 327; *Head v. Head*, 2 Ga. 191; *Le Barron v. Le Barron*, 35 Vt. 365.

In *Wuest v. Wuest*, 17 Nev. 217, it was held that the ecclesiastical practice was adopted as part of our common

divorce statutes and the procedure of the court afford no adequate remedy, as our courts may exercise such incidental and inherent powers as are necessary to the proper administration of justice,¹ and the general rule is that the ecclesiastical practice may be followed where the provisions of the divorce statutes and the general procedure of the court are inadequate or inapplicable.²

law. But the ecclesiastical practice is not followed where the ordinary procedure of the court is applicable and adequate. *Wilson v. Wilson*, 2 Dev. & B. (N. Car.) 377; *Parsons v. Parsons*, 9 N. H. 309; *Brown v. Westbrook*, 27 Ga. 102.

The practice of requiring a party to answer interrogatories, as in the ecclesiastical practice, is not followed in *Indiana*, where the suit for divorce is regarded as an ordinary civil action. *Simons v. Simons*, 107 Ind. 197; *Barr v. Barr*, 31 Ind. 240.

1. *Alimony*.—Where there is no statutory provision for temporary alimony, the courts having the jurisdiction to grant divorce have also the incidental power to allow such alimony to the wife, according to the practice in the ecclesiastical courts. *Petrie v. People*, 40 Ill. 334; *Groves's Appeal*, 68 Pa. St. 143; *McGee v. McGee*, 10 Ga. 478; *Melizet v. Melizet*, 1 Pars. Eq. Cas. (Pa.) 78; *Banes v. Banes*, 8 Phila. (Pa.) 250; *Ryan v. Ryan*, 9 Mo. 539; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Ex p. Smith*, 34 Ala. 455; *North v. North*, 1 Barb. Ch. (N. Y.) 241; *Frith v. Frith*, 18 Ga. 273; *Vroom v. Marsh*, 29 N. J. Eq. 15; *Ford v. Ford*, 41 How. Pr. (N. Y. Super. Ct.) 169. But see *contra*, *Wilson v. Wilson*, 2 Dev. & B. (N. Car.) 377; *Shannon v. Shannon*, 2 Gray (Mass.) 285; *Sanford v. Sanford*, 2 R. I. 64; *Harrington v. Harrington*, 10 Vt. 505; *Parsons v. Parsons*, 9 N. H. 309; *Rowell v. Rowell*, 63 N. H. 222; *Whipp v. Whipp*, 54 N. H. 580.

And see generally article ALIMONY, vol. 1, p. 407.

The Power to Allow Attorneys' Fees is also an incident of the power to render divorce. *Lake v. Lake*, 16 Nev. 363; *Black v. Black*, 5 Mont. 15; *Lamy v. Catron* (N. Mex. 1890), 23 Pac. Rep. 773.

Medical Examination.—Where the divorce statute confers jurisdiction to grant divorce for impotence, the court will have the incidental power to compel the defendant to submit to a medical examination. In *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 554,

Chancellor Walworth said: "When the legislature conferred this branch of its jurisdiction upon the court of chancery it was not intended to adopt a different principle from that which had theretofore existed in England, and, indeed, in all Christian countries, as to the nature and extent of the physical incapacity which would deprive one of the parties of the power to contract matrimony. And the court is, by necessary implication, armed with all the usual powers which, in that country from which our laws are principally derived, are deemed requisite to ascertain the fact of incapacity, and without which it would be impossible for any court to exercise such a jurisdiction."

This case was approved in *Vermont*. In *Le Barron v. Le Barron*, 35 Vt. 365, the court, in deciding the same point, said: "When the legislature establish a tribunal to exercise this jurisdiction, * * * such tribunal becomes entitled, and it is their duty, to exercise it, according to the general principles of the common law of the subject and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute. * * * In thus conferring jurisdiction of this subject upon the court it must be intended that all incidental powers necessary to make its exercise effectual are also given, and that this is to be done in accordance with the principles and practice of the English courts."

2. In *Wuest v. Wuest*, 17 Nev. 217, it was contended that the practice act did not permit a cross-bill for affirmative relief in a divorce suit, and therefore affirmative relief could not be granted to a defendant. The court said: "The law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statutes. * * * The statute of this state is silent as to the right of defendants to affirmative relief. In the absence of express legislation upon the matter a defendant may

II. PARTIES—1. Plaintiffs.—As a general rule no parent, guardian, or other third person can maintain a suit for divorce, as it is the right of the innocent and injured party to elect whether the injury or misconduct shall be condoned or made a cause for separation or divorce.¹ The right to maintain a suit for divorce is generally restricted by the statutes to one or either of the parties to the marriage.² And the right to obtain divorce is sometimes restricted to the “innocent” or “injured” party.³ Where the statutes require the petition to be verified by the plaintiff,⁴ a suit cannot be maintained by others.⁵

2. Defendants.—In a suit for an absolute divorce, in which the custody of children will not be involved and no alimony is to be granted, the guilty party is the only necessary or proper party defendant, and no third person will be allowed to intervene. The ecclesiastical courts permitted any person to intervene in the nullity suit or in the suit for separation. But in the suit for a dissolution of the marriage no third person is so directly affected by the decree as to become a necessary party.⁶

have such relief as the practice of the English courts would have afforded him, upon the ground that such practice has been adopted as part of our law.”

The same question arose in *New York*, and affirmative relief was denied because there was no provision of the code applicable to such case. *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9. See also *Spahn v. Spahn*, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 169. This defect was remedied by subsequent legislation. See *Van Benthuyzen v. Van Benthuyzen* (Supreme Ct.), 17 N. Y. St. Rep. 978, 15 Civ. Pro. Rep. (N. Y.) 234.

1. *Mohler v. Shank* (Iowa, 1895), 61 N. W. Rep. 981; *Birdzell v. Birdzell*, 33 Kan. 433; *Worthy v. Worthy*, 36 Ga. 47.

In the Ecclesiastical Courts a parent could maintain a suit for divorce if the child was a minor and residing elsewhere. In *Morgan v. Morgan*, 2 Curt. Ec. 679, the court permitted a father to maintain a suit for separation, it appearing that the son was absent in the East Indies and that if the son's consent was required certain valuable evidence might be lost by the delay. The court heard the evidence but withheld the decree until the son ratified the proceedings.

A father could maintain a suit to annul the marriage of his daughter on the ground of incest, although she was of age. *Ray v. Sherwood*, 1 Curt. Ec. 193, reversing 1 Curt. Ec. 173.

2. The *Maryland* statute provides that the suit can be brought by either party. *Ridgely v. Ridgely*, 79 Md. 298.

3. See the statutes referred to in the following cases: *Nagel v. Nagel*, 12 Mo. 53; *Ryan v. Ryan*, 9 Mo. 539; *Hoffman v. Hoffman*, 43 Mo. 547; *Ristine v. Ristine*, 4 Rawle (Pa.) 460.

4. *Burdick v. Burdick*, 7 Wash. 533; *Philbrick v. Philbrick*, 27 Vt. 786; *Daniels v. Daniels*, 56 N. H. 219; *Ex p. Bruce*, 6 Prob. Div. 16; *People v. McCaffrey*, 75 Mich. 115; *Daly v. Wayne* Circuit Judge, 102 Mich. 392; *Holcomb v. Holcomb*, 100 Mich. 421; *Anable v. Anable*, 24 How. Pr. (N. Y. Supreme Ct.) 92; *Farace v. Farace*, 61 How. Pr. (N. Y. Supreme Ct.) 61.

5. *Mohler v. Shank* (Iowa, 1895), 61 N. W. Rep. 981; *Birdzell v. Birdzell*, 33 Kan. 433.

6. **The Rights of the Parents** may be determined after divorce. In this case it was said that the suit “does not affect any rights which may accrue to the parents under the stipulations of the contract, and there was no necessity for making them parties.” *D'Auvilliers v. Her Husband*, 32 La. Ann. 605.

The Children of the Parties are interested in the result of the suit, but such interest, although pecuniary, does not render it necessary or proper for them to be joined as parties. *Baugh v. Baugh*, 37 Mich. 59; *Faulk v. Faulk*, 23 Tex. 653.

The court will provide for the maintenance and custody of the children of

Ancillary Relief of Wife.—But in a suit for divorce the wife is entitled to ancillary relief and may attach the husband's property or restrain him from making fraudulent conveyance of his property, and if other persons have entered into a conspiracy with the husband to defeat the claims of the wife, such persons are proper, and sometimes necessary, parties.¹

The Paramour.—In a suit for divorce for adultery the paramour or *particeps criminis* cannot be joined as a party. In some instances the statutes may permit such persons to intervene, but in the divorce suit such persons do not have such an interest in the result of the suit or in the relief demanded as to make it necessary or proper to join them as parties.²

3. Intervention.—No person can intervene in a suit for divorce to show collusion or to prevent a finding in the decree that such person has been guilty of adultery with one of the married parties.

A Creditor will not be allowed to intervene to show that the parties are in collusion to obtain a divorce for the purpose of defeating his judgment against the husband. In such case the creditor may expose the fraud by appearing as a witness or as *amicus curiæ*.³

the parties if an absolute divorce is granted, and may do so on its own motion without a prayer for such relief. See *infra*, XV. *Custody and Maintenance of Children*.

1. *Damon v. Damon*, 28 Wis. 510; *Gibson v. Gibson*, 46 Wis. 449; *Busenbark v. Busenbark*, 33 Kan. 572; *Handlan v. Handlan*, 37 W. Va. 486; *Uhl v. Irwin*, 3 Okla. 388; *Thurston v. Thurston*, 58 Minn. 279; *Vermilye v. Vermilye*, 32 Minn. 499; *Monroy v. Monroy*, 1 Edw. Ch. (N. Y.) 382; *Kashaw v. Kashaw*, 3 Cal. 312; *Feigley v. Feigley*, 7 Md. 537; *Laughery v. Laughery*, 15 Ohio 404. See also article ALIMONY, vol. I, p. 440 *et seq.*

Where lands are held by the husband and wife as an estate by the entirety, the wife may obtain a division of the property, and all persons claiming an adverse interest in the lands may be made parties and their rights adjudicated. *Harrer v. Wallner*, 80 Ill. 197.

2. *Burke v. Burke*, 5 Misc. Rep. (N. Y. Supreme Ct.) 319. See also *infra*, II. 3. *Intervention*, as to the right of paramour to intervene.

In England, under the statutes now in force, the paramour may be joined as a defendant in a suit for divorce on the ground of adultery. *Cornish v. Cornish*, 15 Prob. Div. 131; *Wheeler v. Wheeler*, 14 Prob. Div. 154; *Long*

v. Long, 15 Prob. Div. 218; *Cox v. Cox*, L. R. 2 P. & D. 201; *Hulse v. Hulse*, L. R. 2 P. & D. 357; *Mason v. Mason*, 7 Prob. Div. 233; *Nelson v. Nelson*, L. R. 1 P. & D. 510; *Conradi v. Conradi*, L. R. 1 P. & D. 163; *Lyne v. Lyne*, L. R. 1 P. & D. 508; *Hancock v. Peaty*, L. R. 1 P. & D. 335; *Hawks v. Hawks*, 1 Prob. Div. 137.

But the court may, in its discretion, proceed under certain circumstances without the correspondent. *Jinkings v. Jinkings*, L. R. 1 P. & D. 330; *Pitt v. Pitt*, L. R. 1 P. & D. 464; *Jeffers v. Jeffers*, 2 Prob. Div. 90; *Curling v. Curling*, 14 Prob. Div. 13.

3. *Stearns v. Stearns*, 10 Vt. 540.

In *Y. v. Y.*, 1 Swab. & T. 598, the wife instituted a suit for the dissolution of marriage on the ground of the husband's desertion and adultery. No appearance was entered by the husband, and the suit was about to be determined upon the evidence adduced by the wife, when a third person, having no relation to the parties and no interest of a legal character in the result of the suit, applied to intervene and set up the wife's adultery in recrimination. The court inquired of counsel, "Can you mention any case in which an *amicus curiæ* has been allowed to suggest a fact not raised by the issues to be tried?" Answer, "I cannot."

The Paramour has no legal interest in the result of a suit for divorce on the ground of adultery although it is alleged in the pleadings that the defendant has committed adultery with such paramour, and such person will not be allowed to intervene, even to defend his or her character.¹

4. **Coverture.**—The divorce statutes generally authorize the wife to sue for divorce or defend such suit in her own name. In the absence of any express permission, her right to maintain the action may be inferred from the nature of the action and the general provisions of the acts relating to the rights of married women. In the ecclesiastical courts the wife could sue or defend without the intervention of a *prochein ami*, and in the absence of statute such practice will be followed. In some states the suit for divorce was considered a suit in equity, and, in the absence of any statute permitting the wife to sue alone, it was held that the wife must sue by a competent *prochein ami* under the rules of the chancery practice in order that the attorney could be properly authorized to sue, and that some responsible person would be liable for costs in case the action was dismissed.² But under modern statutes the incapacity arising from coverture is removed by express provisions

The court, although directed by the divorce act to follow the ecclesiastical practice, held that such practice would not permit an intervention in such case. "If the suspicions of the court are aroused it has jurisdiction to summon parties before it and examine them."

The rule announced in this case was changed by 23 and 24 Vict., c. 144, § 7, and by 41 and 42 Vict., c. 19, § 2, permitting "any person" to intervene. See *Wilson v. Wilson*, L. R. 1 P. & D. 180; *Dering v. Dering*, L. R. 1 P. & D. 531; *Vivian v. Vivian*, L. R. 2 P. & D. 100.

Where the Validity of a Second Marriage is Contested on the ground that there is a prior marriage undissolved, and the wife attempts to have the prior marriage annulled by collusion with her former husband, the heirs of the second husband will be allowed to intervene and contest the suit. *Tilby v. Hayes*, 27 Hun (N. Y.) 251.

1. In *Clay v. Clay*, 21 Hun (N. Y.) 609, the court denied the paramour's petition to intervene, but directed notice to be given her counsel of proceedings to take testimony, and permitted her to introduce the testimony of witnesses in her behalf.

But such relief will be denied the paramour where the husband is in contempt for failure to pay temporary ali-

mony, and it appears that the application was not made by the paramour or in her behalf, but for the husband. *Quigley v. Quigley*, 45 Hun (N. Y.) 23.

The ecclesiastical practice as to the intervention of parties will not be followed. But it is said that the paramour "may attend the trial, and, if not called, may offer himself as a witness, and, the ground of divorce being adultery, it is not likely that the court will decline to receive any light he may be able to throw on the issues to guide its action." *Burke v. Burke*, 5 Misc. Rep. (N. Y. Super. Ct.) 319.

Massachusetts.—Pub. Stat. of Massachusetts, c. 146, § 10, provides that "in all libels for divorce, where the cause alleged is adultery, and where the adverse party does not appear, or is defaulted, the person alleged to be *particeps criminis* with the libellee may, in the discretion of the court, be allowed to appear and contest the libel."

2. *Wood v. Wood*, 8 Wend. (N. Y.) 357, affirming 2 Paige (N. Y.) 108; *Peltier v. Peltier*, Harr. (Mich.) 19; *Meldora v. Meldora*, 4 Sandf. (N. Y.) 721; *Hunt v. Booth*, Freem. (Miss.) 215; *Kirby v. Kirby*, 1 Paige (N. Y.) 261; *Edwards v. Edwards*, 30 Ala. 394.

The objection that the wife has not brought the suit for divorce through the intervention of a *prochein ami* is

or by requiring all civil actions to be brought by the real party in interest.¹

5. Infancy.—In general an infant can only sue and be sued by a guardian or next friend. This is the rule in all civil suits, whether at law or in equity, and such was the rule in the ecclesiastical courts as to divorce suits.² If the wife is a minor she cannot answer by an attorney. The answer must be by her guardian.³ But the divorce statute may be in such general terms as to permit any wife to sue for divorce, although she is a minor.⁴

If the Statute Requires a Guardian, and the objection is raised by the defendant before decree, it is clear that a guardian will be appointed by the court,⁵ or the plaintiff may amend and sue by guardian.⁶

6. Guardians—Right to Sue for Ward.—The general rule that suits in behalf of all persons under guardianship must be brought by the guardian does not apply to suits for divorce, unless the statutes permit such proceedings. The right to sue for divorce is a personal right, requiring the volition and election of the injured party, and a guardian cannot exercise such right for his ward.⁷ The husband

waived unless raised by demurrer. *Kenley v. Kenley*, 2 How. (Miss.) 751.

1. *Kashaw v. Kashaw*, 3 Cal. 312; *Shore v. Shore*, 2 Sandf. (N. Y.) 715; *Wright v. Wright*, 3 Tex. 168; *Jones v. Jones*, 18 Me. 308; *Amos v. Amos*, 4 N. J. Eq. 171; *Hawkins v. Hawkins*, 4 Sneed (Tenn.) 105; *Sprayberry v. Merk*, 30 Ga. 81; *Anonymous*, 3 Code Rep. (N. Y. Super. Ct.) 18; *Newman v. Newman*, 3 Code Rep. (N. Y. Supreme Ct.) 183. But see *contra*, *Forrest v. Forrest*, 3 Code Rep. (N. Y. Supreme Ct.) 254; *Coit v. Coit*, 2 Code Rep. (N. Y. Supreme Ct.) 94.

2. *Bowzer v. Ricketts*, 1 Hag. Con. 213.

In *Barham v. Barham*, 1 Hag. Con. 5, it is held that, although the wife may sue the husband for divorce, the suit must be brought in the name of the guardian where she is a minor. If the suit is brought by the guardian without just foundation he will be liable for costs. *Brown v. Brown*, 2 Rob. Ec. 302.

3. *Wood v. Wood*, 2 Paige (N. Y.) 108.

4. In *Jones v. Jones*, 18 Me. 308, it was said: "The language of the statute * * * regulating divorces of this description is general, enabling any wife, without exception as to age, to file her libel and obtain relief."

Where a statute provides that a marriage of a minor may be declared void for want of age "on application of the incapable party," the suit must be

in the name of the minor and not of his guardian. *Pence v. Aughe*, 101 Ind. 317.

In *Besore v. Besore*, 49 Ga. 379, it was said: "If the wife is of sufficient age to enter into a marriage contract, no good reason occurs to us why she may not maintain an action in the courts to dissolve it. * * * The complainant in this case was of lawful age to contract marriage and to make a marriage settlement, and such contracts made by infant females being as binding upon them as if made by adults, it would seem that they would be as competent to maintain an action to dissolve the marriage contract, for any of the causes authorized by law, as an adult married woman would be."

5. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

6. A suit need not be dismissed for failure to sue by guardian or next friend, as the defect may be cured by amendment. *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Fitch v. Fitch*, 18 Wend. (N. Y.) 513.

Waiver.—The failure to sue by a guardian or next friend, or to have such a guardian appointed for a minor defendant, is a mere irregularity not affecting the jurisdiction of the court, and may be waived by failure to object before a decree is rendered. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

7. See *infra*, II. 7. *Insanity—Right of Guardian to Sue for Divorce.*

can sue for divorce in his own name, and without the intervention of a guardian appointed because the husband is a drunkard or a spendthrift.¹

Property Rights Affected.—But where alimony or a division of property is sought in a suit for divorce the guardian should be joined as a party with his ward, otherwise an order for alimony cannot be enforced against the husband's estate.²

7. Insanity—Right of Guardian to Sue for Divorce.—The right to sue for an absolute divorce is a personal right, and requires the intelligent election of the injured party. A guardian of an insane person cannot therefore maintain a suit for an absolute divorce in favor of his ward.³

1. In *Richardson v. Richardson*, 50 Vt. 119, the husband was permitted to sue in his own name, although a guardian had been appointed under the provisions of a statute relating to spendthrifts. It was said that "the rule * * * that suits in behalf of all persons under guardianship must be brought by the guardian is limited in its application to cases where the want of legal capacity in the ward necessitated the appointment of a guardian. The statute requires that every libel shall be signed by the libellant, if of sound mind and of the age of legal consent; and the fair inference is that it was intended that the party who was required to sign the libel, and is made responsible for what is alleged in it, should have the legal right to prosecute it. The right to bring the petition is strictly personal, and under the volition and control of the party, and the libellee could not question the right of the libellant to prosecute his petition in his own name."

2. In *Tiffany v. Tiffany*, 84 Iowa 122, a guardian *ad litem* was appointed for the defendant husband, who was insane. The guardian of the insane person was not made a party to the suit, and did not enter his appearance. The guardian, however, complied with the order for alimony. It was said: "The order, not being made in the exercise of jurisdiction, was void, and should not have been obeyed by the guardian. It affords him no protection for the payment of the money."

In *Gregg v. Gregg*, 48 Hun (N. Y.) 451, the court permitted the guardian of a habitual drunkard to assist the defendant husband in his defense, and continued the case for this purpose. The suit was for a decree of separation and alimony. It was held that

the appointment of a guardian did not prevent the court from making an order for alimony to be paid by the guardian out of the husband's estate, as the court could direct the guardian in the divorce suit as well as on a motion to direct the guardian with reference to the estate.

3. *Worthy v. Worthy*, 36 Ga. 45; *Birdzell v. Birdzell*, 33 Kan. 433.

In *Mohler v. Shank* (Iowa 1895), 61 N. W. Rep. 981, the reason assigned was that such proceeding was not authorized by the statute, and otherwise the right to sue for divorce was purely personal. The statutes, it was said, contained no such provision, either expressly or by implication. "On the contrary, we think that they plainly imply that such a proceeding is not authorized. Section 2222 of the code requires that the petition for divorce 'must be verified by the oath of the plaintiff.' It is true that this requirement is not jurisdictional. * * * But the fact that the statute requires the oath of the plaintiff, and provides for no substituted verification, as in other cases, tends strongly to show that the legislative intent was that an action for divorce should be prosecuted by the injured party in his or her personal capacity."

Reason of the Rule.—The guardian has not such accurate knowledge of the personal relations of his ward with the defendant that he can deny that his ward has not consented to or forgiven the offense, or that the ward is not guilty of conduct constituting a cause for divorce. Nor can the ward present a proper defense to a charge in recrimination. While the guardian is authorized to bring any suit necessary to enforce any legal rights of his ward, such authority extends to property rights of the ward, which are always

Annulment Suit.—It is clear that the guardian of an insane person can maintain a suit to annul the marriage of his ward, on the ground of incapacity to assent to the marriage.¹

Suit for Alimony without Divorce.—It seems that the guardian of an insane wife may maintain a suit for alimony without divorce.² But this is not permitted where in such suit it is necessary to establish a cause for divorce, and the defendant may interpose recrimination or other defenses as in a suit for divorce.³

The English Divorce Act contains no reference to lunatics, and it is held that the guardian of an insane person may prosecute or defend a suit for divorce in the same manner as in other civil actions. The words of the act relating to parties refer in general terms to "any husband" or "any wife," and this is held to include insane persons, whether petitioner or respondent.⁴

for his best interest. Thus in *Birdzell v. Birdzell*, 33 Kan. 433, in dismissing a suit brought by the guardian of an insane person, the court said: "The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong. * * * Whether a party who is entitled to a divorce shall commence proceedings to procure the same or not is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person."

In Ecclesiastical Courts.—The guardian of an insane person could obtain a decree of separation in the ecclesiastical courts, the reason being that a lunatic lost no rights by reason of his incapacity and that the wife was not released from the duties of the marriage vow. The decree was granted to protect him and his estate from the maintenance of a spurious issue. In such case the guardian could determine the necessity of such separation. *Woodgate v. Taylor*, 2 Swab. & T. 512.

In *Parnell v. Parnell*, 2 Hag. Con. 169, it was said: "In these proceedings the wife can sustain no injury, as the lunatic will have the power of condonation, if he recovers, or he may stand on what has been done for him."

1. *Waymire v. Jetmore*, 22 Ohio St. 271; *Brown v. Westbrook*, 27 Ga. 102; *Crump v. Morgan*, 3 Ired. Eq. (N. Car.) 91; *Hancock v. Peaty*, L. R. 1 P. & D. 335.

2. *Mims v. Mims*, 33 Ala. 98.

3. The *Kansas* statute provides that the wife may obtain alimony without divorce for any of the causes for divorce, and the husband may make any defense which he might in a suit for divorce, and may, for sufficient cause, obtain a divorce from his wife in such action (Civil Code, § 649). It was said: "Can a husband obtain a divorce from an insane wife? Can a guardian defend for her? She has a right to testify in a divorce case. Could her guardian supply this testimony? A part of the grounds for divorce and alimony in the present case existed before the plaintiff became insane. Can the guardian say that she did not condone the wrongs upon which these grounds rest? * * * There are better remedies to enforce * * * support than the strange one resorted to in the present case. There are all the common-law remedies, and there are the still further remedies furnished by * * * the General Statutes." *Birdzell v. Birdzell*, 33 Kan. 433.

4. *Baker v. Baker*, 5 Prob. Div. 142, affirmed 6 Prob. Div. 12, followed by *Fry v. Fry*, 15 Prob. Div. 50. In *Baker v. Baker*, 5 Prob. Div. 142, the committee of an insane husband was permitted to institute a suit for a dissolution of marriage, on the ground that the wife had committed adultery. It was alleged that the husband was a person of unsound mind, so found by inquisition, and that there was no present prospect of his recovery. After discussing some dicta in the decisions, the court proceeded to determine the question as one of first impression, as follows: "The difficulties which are presented in the case of a lunatic petitioner are indeed different in character,

The Statutes of Some States authorize the guardian of an insane person

but they do not appear to me to be more formidable, than those to which I have adverted in the case of a lunatic respondent. If the proceedings are in the one case to be put on the same footing as other civil proceedings, I can see no reason why they must not be so in the other. If an insane respondent must defend herself as best she may by means of a guardian *ad litem*, I do not see where the act has indicated that an insane petitioner may not institute a suit for divorce through his committee, as he might sue for the breach of an ordinary contract. The only provision which has been pointed to as having such an effect is the 41st, which requires the petitioner to verify his or her petition by affidavit, so far as he or she is able to do so, but, as Lord Hatherley has pointed out, this section is equally applicable to suits for nullity and judicial separation, which could, undoubtedly, before the Act of 1857, be instituted on behalf of a lunatic by his committee. It cannot be supposed that it was intended, by the mere provision that the facts should be verified by the petitioner's affidavit, to prevent for the future such suits being instituted. I entertain no doubt that I have power in such cases to allow the husband's committee, who would, in fact, be the petitioner on the lunatic's behalf, to make the required affidavit, and that is what has been done in this case, without objection on the part of the respondent. Another argument has been urged to which undoubtedly great moral weight must be allowed, that the right to sue for a divorce is personal and cannot be exercised by any but the individual himself who has been wronged. He might, if he were sane, condone his wife's offense; he might be conscious of matrimonial offenses committed by himself which would legally debar him from obtaining a decree, which his conscience might therefore prevent his asking for. But these arguments are equally applicable to suits for judicial separation, which it is conceded may be maintained on behalf of lunatics. It has, however, been urged, and for this the great authority of Lord Stowell has been invoked, that in these cases the lunatic, if he recovered his senses, might forgive his wife and take her back,

whereas in case of dissolution the mischief, if he should regard it as such, might be irreparable, for his divorced wife might have married some one else; but this argument should rather be addressed to the discretion of the Lords Justices, without whose consent these proceedings cannot be taken, than urged on this occasion, for it is to be observed that proceedings for judicial separation would in some cases be productive of as great a personal hardship to a lunatic husband as a dissolution of his marriage. * * * On the other hand it cannot be denied that, if reasons of expediency are to be regarded, great wrong might arise from holding that no proceedings for divorce can be maintained against the adulterous wife of a lunatic. She might be left in possession of property settled on her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic. * * * The consideration which has most pressed upon me in support of the respondent's contention is this: It is well known that it is a part of the religious faith of all Roman Catholics, and of many members of the Church of England, that the bond of marriage is indissoluble. It is certainly startling that if a member of the Roman Catholic or of the Anglican Church, believing in his conscience that the dissolution of a marriage is unlawful in the sight of God, should have the misfortune to become insane, the committee of his estate might be authorized, on account of some question of money, to obtain a decree dissolving his marriage. * * * But this and all other considerations of a like kind appear to me to be overpowered by the decision of the House of Lords [*Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. App. 374], which seems to amount in substance to this: That as proceedings for divorce are civil, though no provision for the case of lunatics is contained in the act, recourse must be had in such a case to the ordinary forms of civil courts where lunatics are litigants. I am unable to see any distinction between the cases of lunatic petitioners and lunatic respondents, and I adopt the language of Lord Penzance: 'I say lunatic petitioners as well as respondents, for there is no distinction

to sue for an absolute divorce as well as for a decree annulling the marriage.¹

8. Insane Defendants—Whether Divorce Granted Against.—The suit for divorce is a civil suit and not a proceeding to punish a crime. The insanity of the defendant is not, therefore, a defense to a suit for divorce, unless it is made to appear that a cause for divorce was committed while insane. Insane persons are liable on contracts entered into before insanity and for torts committed while sane, and no good reason has been given why supervening insanity should prevent the courts from granting relief to the injured party. The insanity of the defendant is, however, a serious obstacle to a proper trial of the case, as a guardian cannot always acquire the same knowledge of the facts as the ward would possess if sane. For this reason the court may, on its own motion, continue the case if there is a probability that the defendant's reason will be restored.²

made in the act. The words throughout are quite general, and there is no middle ground between the two opposite opinions that these words include lunatics or exclude them altogether."

In *Mohler v. Shank* (Iowa, 1895), 61 N. W. Rep. 981, the above case was *disapproved*, as follows: "It is to be conceded that the English law of divorce is much like our own statute, and that in the cited case it was held that a guardian of an insane person might maintain an action for divorce in behalf of his ward. We have given the case a careful examination, and have to say that we cannot bring ourselves to approve the rule therein announced."

1. *Thayer v. Thayer*, 9 R. I. 377.

Massachusetts.—Under Rev. Stat., c. 76, § 12, a libel for divorce may be filed and prosecuted in behalf of an insane person, either by the guardian of the party or by a next friend appointed by the court for that purpose. *Denny v. Denny*, 8 Allen (Mass.) 311; *Little v. Little*, 13 Gray (Mass.) 264.

In *Cowan v. Cowan*, 139 Mass. 377, the husband deserted the wife before she became insane. After the desertion the wife inherited property, and her guardian brought suit to cut off the husband's interest in it. The proceedings were brought at the request of relatives and heirs of the ward. The facts were held sufficient for granting an absolute divorce where such relief was permitted by the statute.

In *Garnett v. Garnett*, 114 Mass. 379, both parties were insane when the libel

for divorce was filed, but the decree *nisi* was rendered while both were in sound mind. An application to make the decree absolute was made while both parties were insane, and both guardians consented to the absolute decree. The court refused to enter the decree and reserved the case for further hearing.

General Statutory Provisions as to Guardians.—The provisions of the codes and statutes relating to the appointment of guardians *ad litem* in civil suits may be in such general terms as to include suits for divorce and thus authorize a suit to be maintained by such guardian for his ward. In *Mohler v. Shank* (Iowa, 1895), 61 N. W. Rep. 981, it was held that no provision of the *Iowa* code permitted such proceedings. As the decision of this case is based upon the rule of estoppel it is suggested that other points determined may be regarded as dicta.

2. In *Stratford v. Stratford*, 92 N. Car. 297, the lower court refused to grant the husband a divorce for adultery, because the wife was insane, and ordered the cause continued for two years, or until the wife became restored to her reason. The Supreme Court, in affirming this order, referred to the conflict in the authorities and said: "In this unsettled condition of the practice, we do not feel called upon to say more than that we are inclined to the opinion that in case of a permanent and incurable loss of mind the plaintiff ought not to be debarred his right to have the marriage relation dissolved

Insanity after Suit Commenced.—The court, however, cannot dismiss the case or refuse to take any action in the matter because the defendant became insane after the suit was commenced or after she was guilty of a cause for divorce.¹

Statutes Permitting or Not Prohibiting.—If the divorce statutes permit a divorce against an insane defendant, or do not expressly prohibit such relief, the courts cannot refuse a divorce. In such case, if a cause for divorce is established, the decree is a matter of right and cannot be refused at the discretion of the court.²

9. The State as a Party—Appearance by Prosecuting Attorney.—The state is not a party to the divorce suit, as in criminal proceedings,

for an act of adultery committed by the wife when sane and responsible for her acts. Supervening insanity, it would seem, ought not to be allowed to absolve the faithless wife from the consequences of her own voluntary disregard of her marital obligations. But at the same time we are clearly of opinion that no undue haste should be permitted, and that the suit should await a reasonable time, till hopes of the delinquent's restoration have vanished."

Notice of Application for Appointment of Guardian.—Where it is not alleged in the petition that the defendant is insane, notice of the application for the appointment of a guardian *ad litem* must be given the plaintiff. *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194.

1. This question first arose in *Bawden v. Bawden*, 2 Swab. & T. 417, and it was held that a suit for absolute divorce must be dismissed if it appeared that the defendant was insane at the time of the trial. This case was followed by *Mordaunt v. Mordaunt*, L. R. 2 P. & D. 103, and on a hearing before the full court (L. R. 2 P. & D. 109) it was ordered that no further proceedings should be taken until the defendant recovered her mental capacity. Later, the suit was dismissed to enable the husband to appeal (L. R. 2 P. & D. 382). On appeal, three of the judges consulted were of the opinion that an absolute divorce could be decreed on behalf of or against a lunatic, and two of the judges were of the opinion that the insanity of one of the parties was an absolute bar to divorce. *Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. App. 374.

In *Rathbun v. Rathbun*, 40 How. Pr. (N. Y. Supreme Ct.) 328, a guardian *ad litem* set up the insanity of defend-

ant as a defense and relied upon *Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. App. 374, in its earlier stages and before it was reversed on appeal. The court *disapproved* that decision, and granted a divorce. "The action of the courts," it was said, "is not arrested in civil cases touching the rights and liberties of persons of unsound mind. * * * They are liable upon all contracts entered into prior to the insanity. They are liable to respond in damages for their tortious acts committed while insane. * * * The investigation or trial proceeds, and the ordinary remedies are applied, notwithstanding the insanity of the party. * * * The law has made ample provision for the protection of the rights of the lunatic by the appointment of persons to make defense. Why may not the rights of one charged with adultery prior to his lunacy be in like manner protected?" See also *Douglass v. Douglass*, 31 Iowa 421.

2. In *Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. App. 374, the majority of the judges consulted held that as no provision of the statute prohibited such relief, the court must proceed to hear the evidence and render a decree. The act provided that "in case the court shall be satisfied on the evidence that the case of the petitioner has been proved, then the court *shall* pronounce a decree declaring such marriage to be dissolved." "What power or right" it was inquired, "has any court of law of this country, without the authority of Parliament, to interpose in a suit thus instituted a prohibition to the suitor to proceed further; to refuse to receive evidence of facts, as to which the legislature has declared that it shall be its duty to satisfy itself, and that if satisfied it shall pronounce a decree; and having thus denied to

and does not appear as a party in the pleadings. But the state has an interest in every suit for divorce, which must be protected by the court. Generally, the court protects the interests of the state by examining the witnesses, by making such orders on its own motion as will prevent fraud or collusion, and by refusing a divorce in all cases where the plaintiff is not an innocent party or the evidence is not satisfactory.¹ In some states the divorce statutes make it the duty of the prosecuting attorney or other officer to appear and defend as an attorney for the state.²

III. PETITION OR COMPLAINT—1. Allegation of Residence.—The petition must contain an allegation showing the residence of the plaintiff, or one of the parties, within the state, for a period equal to or exceeding the time required by the statute. This allegation should conform to the language of the statute as to the nature and duration of the residence, but will be sufficient if facts are set out showing the required residence.³ The facts alleged should show that the period of residence was continuous and immediately prior to or next preceding the commencement of the suit.⁴

the suitor a right expressly granted to him by act of Parliament, proceed at once to dismiss the suit?"

1. See *infra*, XI. 10. *Conduct of the Court*. See also *infra*, IV. *The Answer*.

2. See statutes cited in *State v. Brineman*, 120 Ind. 357; *Eggerth v. Eggerth*, 15 Oregon 626; *Scott v. Scott*, 17 Ind. 309; *Creamer v. Creamer*, 36 Ga. 618; *Willcox v. Wayne* Circuit Judge, 83 Mich. 1. See also statutes of *Kentucky, Louisiana, Washington, Colorado*.

Under the English Divorce Act, the queen's proctor may appear and contest the case where collusion is suspected. *Butler v. Butler*, 14 Prob. Div. 160, 15 Prob. Div. 32, 15 Prob. Div. 161.

3. *Coulthurst v. Coulthurst*, 58 Cal. 239; *Bennett v. Bennett*, 28 Cal. 600; *Gredler v. Gredler*, 36 Fla. 372.

Under a statute requiring the action to be brought in the county where the plaintiff "usually resides," an allegation that the plaintiff "now resides, and for some while has resided, in this * * * county" is sufficient. *Lochnane v. Lochane*, 78 Ky. 467.

Where the statute requires the plaintiff to be "an actual *bona fide* inhabitant of the state, and shall have resided in the county where the suit is filed six months next preceding the filing of the suit," an allegation that plaintiff "is a *bona fide* citizen of the county

of Bell and State of Texas, and has been for more than six months before the filing of this petition," is not sufficient. *Haymond v. Haymond*, 74 Tex. 414.

In *Pate v. Pate*, 6 Mo. App. 49, it was said: "It is not enough, however, that jurisdiction in a divorce suit appears from the whole record; the libel itself must allege every fact the existence of which is, by statute, made necessary to the granting of the divorce, and when this is not done in the petition, substantially as required by statute, the bill should be dismissed. * * * Where a jurisdictional fact does not appear on the face of the petition, it follows that the court can take no valid step."

But in a later case it was held that a decree would not be vacated because the jurisdictional facts were not all stated in the decree, as it was sufficient if such facts might be gathered from the entire record. *Smith v. Smith*, 48 Mo. App. 612.

4. An allegation that the plaintiff "is now and has for more than one year prior to the filing of this petition been a resident" is not sufficient where the statute requires a residence of "one whole year next before filing of the petition." It was said: "The residence must not be made up of different periods which together will aggregate a year; but it must be for one whole year. More than this, the year cannot

Residence in state and in County.—If the statute requires that the plaintiff must have resided in the state for a certain period and in the county for a certain period prior to the commencement of the suit, both periods of residence must be alleged to show the jurisdiction of the court.¹ But where statute merely requires that the action must be tried in the county where the parties or one of them reside, the petition is sufficient if a residence in the state is alleged.²

2. Allegation of Other Jurisdictional Facts—Place of Offense and Marriage.—In addition to the residence of one or both parties in the state the statutes of some of the states require the petition to show that the offense was committed in the state or while one or both parties resided in the state, or that the marriage took place therein. Such facts must be alleged to show the jurisdiction of the court.³ In some states the plaintiff may obtain divorce without the residence required by the statute if it is alleged in the petition that the offense was committed within the state or while one or both parties resided therein.⁴

be any whole year prior to the commencement of the action, but must be a particular year; that is, the year *next* before filing the petition. The allegation of the petition in this case may all be conceded to be true and yet not fill a single requisite of the statute. The allegation in the petition could be true and yet the residence be in fact made up of a year or parts of years long since passed." Judgment reversed and cause remanded. *Collins v. Collins*, 53 Mo. App. 470.

Where the statute requires a residence of "two years prior to the time of such application," an allegation that "the complainant is, and has been for more than two years, a resident of this state," and that the parties were married "at Jacksonville, in this state," according to law, in April, 1862, "where the parties have ever since lived," is defective, both as to residence and marriage. *Burns v. Burns*, 13 Fla. 369.

Affidavit of Residence.—The statutes of *Indiana* and *Oklahoma* require, in addition to the usual allegation of residence, that the plaintiff shall file *with* his petition, "an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the state, and stating particularly the place, town, city, or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed." If the affidavit

filed with the petition is defective, the suit will not be dismissed for this reason, but the plaintiff may file an amended affidavit. *Eastes v. Eastes*, 79 Ind. 363; *Irwin v. Irwin*, 3 Okla. 186.

1. In *Polson v. Polson*, 140 Ind. 310, the following allegation of residence was held sufficient: "That the plaintiff is now and has been for more than two years last past, a *bona fide* resident of the State of Indiana, and for more than six months last past a *bona fide* resident of the county of Allen."

2. *Young v. Young*, 18 Minn. 90.

In *Pate v. Pate*, 6 Mo. App. 49, it was held that a petition for divorce which did not allege the county in which the parties resided was fatally defective. This was questioned by Judge Thompson, in *Werz v. Werz*, 11 Mo. App. 26, and *overruled* in *Gant v. Gant*, 49 Mo. App. 3, in which it was said: "The statutory provision that the suit for divorce should be instituted in the court of the plaintiff's residence was only intended to prescribe the venue, a statement of which need not be alleged in the body of the petition."

3. *Hare v. Hare*, 10 Tex. 355; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 204; *Greenlaw v. Greenlaw*, 12 N. H. 200.

Where the marriage was contracted in another state the libel should aver a residence within the state for the time required by the statute. *Batchelder v. Batchelder*, 14 N. H. 380.

4. See interpretation of such statute in *Way v. Way*, 64 Ill. 406.

Defective Allegations.—Where the allegation is defective and does not state facts sufficient to show the required residence the suit may be dismissed.¹ But on application of the plaintiff the petition may be amended so as to show the requisite residence, if such is the fact.²

3. Allegation of Marriage—Necessity of.—In every petition for divorce, separation, or alimony the marriage of the parties must be alleged, as this is one of the essential facts of the cause of action.³

The Date of the marriage and the place where it took place should be alleged if a marriage ceremony occurred, as such facts may be necessary to show the jurisdiction of the court.⁴

The Maiden Name of the wife is generally alleged⁵ and is a necessary allegation if there is a prayer that her maiden name be restored to her.

Facts Showing Validity.—But it is not necessary to allege all the facts showing the validity of a celebrated marriage, such as obtaining a license, a ceremony in the presence of witnesses, the official character of the person who performed the ceremony, or the fact that such officer made a return of his acts, as such facts are merely probative and not the ultimate facts required in a pleading.⁶

4. Allegation of Facts for Ancillary Relief.—See article ALIMONY, vol. 1, p. 407.

5. Denial of Condonation, Collusion, etc.—The plaintiff need not negative any of the defenses in the petition, as that he has not condoned or provoked the alleged offense, or that the alleged adul-

A divorce granted under such statute is void for want of jurisdiction over the subject-matter if both parties reside elsewhere, although the offense was committed in the state, and while one or both parties resided therein. *Van Fossen v. State*, 37 Ohio St. 317.

1. *Pate v. Pate*, 6 Mo. App. 49; *Cole v. Cole*, 3 Mo. App. 571; *Cheatham v. Cheatham*, 10 Mo. 296; *Kruse v. Kruse*, 25 Mo. 68.

2. *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 204; *Irwin v. Irwin*, 3 Okla. 186.

Where the plaintiff has not been a resident of the state for "one year next before the commencement of the action," a decree may be granted on an amended petition filed after the required residence is complete. *Wood v. Wood*, 59 Ark. 441.

3. *Lapp v. Lapp*, 43 Mich. 287; *Huston v. Huston*, 63 Me. 184; *Andrews v. Andrews*, 75 Tex. 609; *Pool v. Pool*, 2 Phillim. 119; *Brinckle v. Brinckle*, 10 Phila. (Pa.) 1; *Lattier v. Lattier*, 5 Ohio 538.

4. *Greenlaw v. Greenlaw*, 12 N. H. 200.

5. The following averment of marriage was held sufficient: "That heretofore, to wit, on the * * * day of * * * your oratrix, Daisy Farley, whose maiden name was Daisy Flexnor, was lawfully and legally married unto Hoxie C. Farley." *Farley v. Farley*, 94 Ala. 501.

6. See petition held sufficient in *Huston v. Huston*, 63 Me. 184.

Where the Marriage is Irregular, without formal solemnization or not in compliance with the requirements of the statute, the facts showing the marriage to be valid, such as the agreement of the parties and their subsequent cohabitation, should be alleged. If the facts alleged do not constitute a marriage a general demurrer to the petition will be sustained. *Andrews v. Andrews*, 75 Tex. 609. See allegations held sufficient in *Farley v. Farley*, 94 Ala. 501. See also petition in *Gibson v. Gibson*, 24 Neb. 394, an

tery was not committed with the connivance or collusion of plaintiff, for such defenses need not be anticipated.¹ Nor is it necessary for the plaintiff to allege the performance of all his or her duties as a husband or wife, or that he or she has maintained a good reputation for chastity and virtue.² But under some forms of the divorce statutes the plaintiff is required to negative all the defenses or to allege that he is not in fault or is the injured party.³

In some states the verification prescribed by the statute contains a negation of all the defenses.⁴

6. The Causes for Divorce—*a. IN GENERAL.*—The petition must state facts sufficient to constitute a cause for divorce as fixed by the terms of the statute, for the courts have no power to grant divorce for any other causes.⁵

The Time and Place of the offense should be alleged, not only as descriptive of the offense, but also as stating a cause for divorce under the terms of the statute and showing that the action is not barred by the statute of limitations. The petition should show that the offense was committed after the enactment of the statute making the offense a cause for divorce,⁶ and that the cause for

action to have a marriage declared valid.

1. *Earp v. Earp*, 1 Jones Eq. (N. Car.) 239; *Edwards v. Edwards*, Phil. (N. Car.) 534; *Everton v. Everton*, 5 Jones (N. Car.) 202; *Joyner v. Joyner*, 6 Jones Eq. (N. Car.) 322.

In *Young v. Young*, 18 Minn. 90, a demurrer on the point was overruled, the court holding that it was not "necessary that the complaint should show that the adultery upon which the action is founded was not condoned, or was not committed by the procurement or with the connivance of the plaintiff. These are matters of defense, the allegation of which * * * would properly come from the defendant in the first instance, so that they need not be anticipated in the complaint." Likewise in *Van Benthuyzen v. Van Benthuyzen* (Supreme Ct.), 17 N. Y. St. Rep. 978, 15 Civ. Pro. Rep. (N. Y.) 234, a demurrer on this ground was overruled, the court, however, saying that "technical good pleading may require such an allegation."

3. *Steel v. Steel*, 104 N. Car. 631; *Horne v. Horne*, 72 N. Car. 530. The statute requiring such proof prescribes a rule of evidence and not of pleading. *Fritz v. Fritz*, 23 Ind. 388; *Kenemer v. Kenemer*, 26 Ind. 330. But acts of cruelty should be so alleged as to show that it will appear that violence was

not provoked. *O'Connor v. O'Connor*, 109 N. Car. 139, and cases cited.

3. Under a statute conferring jurisdiction on courts of chancery to decree divorce to the party not in fault, it is held that such fact must be alleged. *Epling v. Epling*, 1 Bush (Ky.) 74. See also *Yallaly v. Yallaly*, 39 Mo. 490; *Cameron v. Cameron*, 2 Coldw. (Tenn.) 375. But it is sufficient if it appears from all the allegations that the defendant was the party at fault. *Kenemer v. Kenemer*, 26 Ind. 330.

4. See *infra*, III. 10. *Verification*. See also *De Armond v. De Armond*, 92 Tenn. 40. See rule of court in *Farace v. Farace*, 61 How. Pr. (N. Y. Supreme Ct.) 61.

Separation of Parties when Suit Commenced.—It should be alleged in the petition that the parties were separated when the suit was commenced. *Burns v. Burns*, 60 Ind. 259.

5. *Hopkins v. Hopkins*, 39 Wis. 167.

6. The divorce statutes are not intended to afford a remedy for misconduct which occurred before the statutes were enacted. *Clark v. Clark*, 10 N. H. 380; *Given v. Marr*, 27 Me. 212; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Dickinson v. Dickinson*, 3 Murph. (N. Car.) 327; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462; *Buckholts v. Buckholts*, 24 Ga. 238; *Scott v. Scott*, 6 Ohio 534; *Elliott v. Elliott*, 38 Md. 357; *Carson*

divorce existed when the petition was filed.¹ In some instances, however, the court may grant a divorce although the suit was premature, if the suit was brought in good faith and the cause of action accrued before the trial.² Causes for divorce accruing after the commencement of the action may be made the basis of a decree if brought in by a supplemental pleading.³

Offense within State or County.—The place where the offense was committed is usually alleged as a part of the description of the offense, but it is not necessary to allege that the offense was committed within the state or within the county over which the court has jurisdiction.⁴

b. ADULTERY—Form of Allegation.—Under various rules of plead-

v. Carson, 40 Miss. 349; *Giles v. Giles*, 22 Minn. 348; *McCraney v. McCraney*, 5 Iowa 232; *Jones v. Jones*, 2 Overt. (Tenn.) 2; *Sherbourne v. Sherbourne*, 6 Me. 210.

A divorce may be granted for desertion which continued the required time after the passage of the act although it began before the passage of the act. *McCraney v. McCraney*, 5 Iowa 232.

1. *Embree v. Embree*, 53 Ill. 394; *Milner v. Milner*, 2 Edw. Ch. (N. Y.) 114; *Ferrier v. Ferrier*, 4 Edw. Ch. (N. Y.) 296; *Hill v. Hill*, 10 Ala. 527; *Smith v. Smith*, 22 Kan. 699.

In North Carolina the cause for divorce must have been known to the complainant at least six months prior to the filing the complaint, except in cases where the husband is about to dispose of his property to defeat the order for alimony. *Scoggins v. Scoggins*, 80 N. Car. 318; *Scoggins v. Scoggins*, 85 N. Car. 347; *Gaylord v. Gaylord*, 4 Jones Eq. (N. Car.) 74.

2. *Hemenway v. Hemenway*, 65 Vt. 623. This practice is not approved, but has become a rule of practice in *Vermont*, and the Supreme Court has declined to change the rule.

3. *Wood v. Wood*, 59 Ark. 441; *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370. See also *infra*, IX. *Supplemental Pleadings*.

4. *Flower v. Flower*, 42 N. J. Eq. 152; *Jones v. Jones*, 67 Miss. 195; *Tolen v. Tolen*, 2 Blackf. (Ind.) 407; *Hanberry v. Hanberry*, 29 Ala. 719; *Clark v. Clark*, 8 N. H. 21; *Hubbell v. Hubbell*, 3 Wis. 662; *Lewis v. Lewis*, 6 Kulp (Pa.) 429; *Ditson v. Ditson*, 4 R. I. 87; *Jacobsen v. Jacobsen*, 11 Oregon 454; *Gleason v. Gleason*, 4 Wis. 64; *Pawling v. Willson*, 13

Johns. (N. Y.) 192; *Barber v. Root*, 10 Mass. 260.

The statutes may render it necessary to allege that the offense was committed within the state. *Harteau v. Harteau*, 14 Pick. (Mass.) 181; *Weston v. Weston*, 143 Mass. 274; *Merry v. Merry*, 12 Mass. 312; *Schrow v. Schrow*, 103 Mass. 574; *Greene v. Greene*, 11 Pick. (Mass.) 410; *Lane v. Lane*, 2 Mass. 167; *Harding v. Alden*, 9 Me. 140; *Norris v. Norris*, 64 N. H. 523; *Payson v. Payson*, 34 N. H. 518; *Foss v. Foss*, 58 N. H. 283; *Kimball v. Kimball*, 13 N. H. 222; *Martin v. Martin*, 47 N. H. 52; *Klutts v. Klutts*, 5 Sneed (Tenn.) 423; *Dorsey v. Dorsey*, 7 Watts (Pa.) 349; *M'Dermott's Appeal*, 8 W. & S. (Pa.) 251; *Heath v. Heath*, 42 La. Ann. 437; *D'Auvilliers v. Her Husband*, 32 La. Ann. 605; *Perzel v. Perzel*, 91 Ky. 634; *Hick v. Hick*, 5 Bush (Ky.) 670; *Becket v. Becket*, 17 B. Mon. (Ky.) 370; *Smith v. Smith*, 4 Mackey (D. C.) 255.

If it is Alleged that the Offense was Committed in Another State or Country, it is not necessary to allege that the offense was a cause for divorce in such state or country, unless the statute requires such allegation as an element of jurisdiction. *Tolen v. Tolen*, 2 Blackf. (Ind.) 407; *Hubbell v. Hubbell*, 3 Wis. 662; *Hare v. Hare*, 10 Tex. 355; *People v. Baker*, 76 N. Y. 78; *Jones v. Jones*, 67 Miss. 195; *Shreck v. Shreck*, 32 Tex. 579.

The Arkansas Statutes Require the plaintiff to allege and prove "that the cause of divorce occurred or existed in this state, or, if out of the state, either that it was a legal cause of divorce in the state where it occurred or existed, or that the plaintiff's residence was then in this state." Sand. & H. Dig. Ark., c. 54, § 2511.

ing, it is sufficient to allege that defendant "committed adultery,"¹ or "had carnal knowledge,"² or "had sexual intercourse."³ But the statute may require other forms of this allegation, as "living in adultery,"⁴ or "separating and living in adultery,"⁵ or "abandoned her and lived in adultery with another woman."⁶ Other forms of allegation may be sufficient if the facts are stated showing that the defendant was guilty of adultery.⁷ It is sufficient to allege an illicit cohabitation under a void marriage,⁸ or that "the defendant is now a common prostitute,"⁹ or "living in adultery,"¹⁰ or "living in adulterous intercourse,"¹¹ but such allegations are objectionable as requiring a greater amount of proof.¹²

Certainty.—The charge of adultery must be made with such certainty as to time and place, and to the person with whom the offense was committed, that the defendant may anticipate the evidence which can be introduced against him and be enabled to prepare a defense.¹³

1. *Freeman v. Freeman*, 39 Minn. 370; *Hawes v. Hawes*, 33 Ill. 286; *Mitchell v. Mitchell*, 61 N. Y. 398; *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

This is also a sufficient averment of the crime of adultery. *State v. Hinton*, 6 Ala. 864; *Lawson v. State*, 20 Ala. 65; *Mauil v. State*, 37 Ala. 160.

2. This term is identical with "committed adultery." *Helfrich v. Com.*, 33 Pa. St. 68.

3. *Kelly v. Kelly*, 12 Misc. Rep. (N. Y. Super. Ct.) 457.

4. *Morris v. Morris*, 75 N. Car. 168.

5. See *Holston v. Holston*, 23 Ala. 777; *Tew v. Tew*, 80 N. Car. 316; *Whittington v. Whittington*, 2 Dev. & B. (N. Car.) 64; *Steel v. Steel*, 104 N. Car. 631.

6. *Johnson v. Johnson* (Tex. Civ. App. 1893), 23 S. W. Rep. 1022; *Trevino v. Trevino*, 54 Tex. 261.

7. As contracting a venereal disease after marriage. *Clark v. Clark*, 7 Robt. (N. Y.) 276; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637.

8. Or pregnancy of the wife while the husband is absent from the country. *Moore v. Moore*, 3 Moore P. C. 84.

9. As in *Tollemache v. Tollemache*, 1 Swab. & T. 557.

In *Smith v. Smith*, 19 Neb. 706, it was alleged that since the — day of — "the defendant has wrongfully and unlawfully gone through the ceremony of marriage with said L. W. S., and has since cohabited with her in a state of adultery."

9. *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

10. *Marble v. Marble*, 36 Mich. 386.

11. *Carpenter v. Carpenter* (Supreme Ct.), 17 N. Y. Supp. 195; *Graves v. Graves*, 3 Curt. Ec. 235.

12. *Marble v. Marble*, 36 Mich. 386.

13. *Conant v. Conant*, 10 Cal. 249; *Christianberry v. Christianberry*, 3 Blackf. (Ind.) 202; *Trubee v. Trubee*, 41 Conn. 36; *Black v. Black*, 27 N. J. Eq. 664; *Shoemaker v. Shoemaker*, 20 Mich. 222; *Dunn v. Dunn*, 11 Mich. 284; *Sanders v. Sanders*, 25 Vt. 713; *Freeman v. Freeman*, 31 Wis. 238.

In *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 224, it is said that adultery should be specifically charged as to time, place, or person, so as to enable the defendant to meet the accusation.

In *Marsh v. Marsh*, 16 N. J. Eq. 391, the rule is stated as follows: "The practice in the English ecclesiastical courts on a charge of adultery, either in the libel or in the responsive allegation, is to set out circumstantially all the principal facts of the case as proposed to be proved. The libel states also the various acts of adultery intended to be relied on: when, where, and with whom committed. *Dillon v. Dillon*, 3 Curt. Ec. 86. * * * The same degree of particularity has not been adopted in bills for divorce in this country. But it is settled that a general allegation that the defendant, within a specified time, has committed adultery, is insufficient. The party with whom the crime is believed to

Describing Particulars.—But the plaintiff will not be required to state all these particulars in one allegation if the offense is otherwise sufficiently described and identified.¹ In some cases all the particulars cannot be given, and to require them would, in many cases, nullify the statute permitting divorce for adultery.²

The Name of the Particeps Criminis must be stated if known, and if not known the pleading will be sufficient if the adultery is alleged as committed "with a person whose name is unknown to the

have been committed must be named, or, if unknown, an averment to that effect is necessary. * * * Every principle of good pleading requires that the charge should be so full and specific that the defendant may know the charge she is called on to answer. It should state the time when, the place where, and, if known, the person with whom the offense was committed. It is not necessary, as in criminal cases, to state the day, but the month and year should be stated."

1. The general rule is stated as follows: "As the result of the decisions it may be stated that in general, in alleging the adultery, the circumstances of time, place, and person must be stated with definiteness. That degree of certainty is required because generally, where there is enough to justify alleging the fact of adultery, the party is able to state those circumstances. There may, however, be such a condition of things as will justify the party in alleging, and the jury in finding, the fact of adultery, although the party may be unable to state some one of the particulars. In such a case the party, when called on to make his allegations more definite and certain, must excuse himself by showing such a condition of things." *Freeman v. Freeman*, 39 Minn. 370. See also *Noel v. Noel*, 24 N. J. Eq. 137.

2. *Mitchell v. Mitchell*, 61 N. Y. 398.

Where Particulars Unknown.—In *Mitchell v. Mitchell*, 61 N. Y. 398, a complaint for divorce for adultery was held sufficient although the name of the *particeps criminis* was not given and the time and place were not stated with any certainty. The doctrine announced was that a complaint is sufficient which avers the commission of the offense with a person whose name is unknown to plaintiff, in a town or city named and at times between certain specified dates, with the further

averment that plaintiff is unable to state more particularly the times and place. The court said: "The nature of the offense is such that, although there is no doubt in reference to its having been committed, there is necessarily often an impossibility of naming the party with whom the illicit intercourse was had. * * * The act is generally perpetrated without the presence of a witness to attest to its commission, and the guilt of the offending party is sometimes ascertained by the development and existence of a disease proving the offense, or by the pregnancy of a wife after the absence of a husband showing nonintercourse for a year or upwards, without any other evidence of the fact. Under such circumstances a decision holding that an allegation in a complaint stating that the defendant had committed adultery, within certain dates specified, in a town or city in this state, with a person whose name was unknown, without specifically designating the person or the time and place, was insufficient to admit proof of the fact so alleged, would, in many cases, nullify the statute. Such a construction is not called for by public policy, or for the protection of the rights of a party against whom such a charge is made. The courts have required those particulars to be stated where it can be done; but where the offense is alleged to have occurred with a person whose name is unknown to the plaintiff, and that fact is alleged, it has been uniformly held that the allegation is sufficiently specific, and I do not understand that any well-considered case holds it to be necessary that the particular locality or time of the commission of the offense should be stated, when there is an averment that they are unknown and that a statement of the specific time and place cannot be made, to permit proof of the commission of adultery to be given under it."

plaintiff."¹ Where the name is alleged to be unknown the offense must be identified by other particulars, as the description of the unknown person, or such designation of time, place, and circumstances as will enable the defendant and the court to distinguish the particular offense to be charged.²

Not All the Particulars will be required in such case if the plaintiff alleges that the exact time and place are unknown, but it will be sufficient to allege that the offense was committed in a certain town or city between specified dates.³

1. *Mitchell v. Mitchell*, 61 N. Y. 398; *Farley v. Farley*, 94 Ala. 501; *Black v. Black*, 27 N. J. Eq. 664, 26 N. J. Eq. 431; *Germond v. Germond*, 6 Johns. Ch. (N. Y.) 347; *Kane v. Kane*, 3 Edw. Ch. (N. Y.) 389; *Choate v. Choate*, 3 Mass. 391; *Sanders v. Sanders*, 25 Vt. 713; *Dunlap v. Dunlap*, *Wright* (Ohio) 210; *Farr v. Farr*, 34 Miss. 597; *Morrell v. Morrell*, 1 Barb. (N. Y.) 318; *Garrat v. Garrat*, 4 Yeates (Pa.) 244. See *contra*, *Miller v. Miller* (Va. 1895), 23 S. E. Rep. 232.

If the petition does not state the name of the adulterer, leave will be granted to amend by stating that such name is unknown. *Richards v. Richards*, *Wright* (Ohio) 302; *Bird v. Bird*, *Wright* (Ohio) 98.

2. *Heyde v. Heyde*, 4 Sandf. (N. Y.) 692; *Tim v. Tim*, 47 How. Pr. (N. Y. Supreme Ct.) 253; *Morrell v. Morrell*, 1 Barb. (N. Y.) 318; *Marsh v. Marsh*, 16 N. J. Eq. 391.

This rule seems to be incorporated into a rule of court in *New Jersey*, *Black v. Black*, 26 N. J. Eq. 431; *Miller v. Miller*, 20 N. J. Eq. 216; *Mills v. Mills*, 18 N. J. Eq. 445.

In *Miller v. Miller*, 20 N. J. Eq. 216, this rule is stated as follows: "If the name of the adulterer is known it must be stated; if it is unknown, that fact must be stated in excuse of the omission and proved at the hearing. His person may be described, or the time, place, and the circumstances which show that the offense was committed, may be stated; and the complainant must prove the offense or one offense specified in the bill. The precise time is not necessary, provided the variance is not so great as to mislead the defendant. Proof of adultery with A will not sustain a charge of adultery with B; nor will proof of adultery with a person whose name was known to the complainant sustain a charge of adultery with a person whose name was un-

known. And a divorce can never be granted upon a general charge of adultery with divers persons whose names are unknown, within a specified period of time."

In *Heyde v. Heyde*, 4 Sandf. (N. Y.) 692, the following allegation was held insufficient: "The defendant, * * * in the month of November, 1851, committed adultery with a female in the city of New York, whose name is unknown to the plaintiff, and the particular circumstances whereof are unknown to the plaintiff, but which she expects to be able to prove at the trial of this cause." This decision was approved in *Conant v. Conant*, 10 Cal. 249. But in *Mitchell v. Mitchell*, 61 N. Y. 409, it was observed that such allegations would have been sufficient if plaintiff had alleged "that she could not state with more particularity in what part of the city of New York the offense occurred; the statement was only that the particular circumstances thereof were unknown to her, but that she expected to be able to prove them at the trial."

3. In *Mitchell v. Mitchell*, 61 N. Y. 398, the following allegation was held sufficient: "That at divers times between the 1st day of May, 1869, and the commencement of this action, and at divers places in said city of Elmira, but at what particular times and places plaintiff is unable more particularly to state, said defendant has committed adultery with J. H. C. and H. B., and with other men whose names are unknown to plaintiff." The finding was that defendant committed adultery with a man by the name of B. L., and the decree was affirmed. This case announces a more liberal rule than is found in any prior cases in New York or elsewhere. The following cases were quoted and distinguished: *Codd v. Codd*, 2 Joh. Ch. (N. Y.) 224; *Germond v. Germond*, 6 Johns. Ch. (N. Y.) 347; *Wood v. Wood*, 2 Paige (N. Y.)

The Time when the adultery was committed should be stated with reasonable certainty although the offense is identified by other facts.¹ Generally the time should be stated as between certain dates not exceeding a month,² but the exact day is not required.³ Where the offense is sufficiently described by other facts it has been held sufficient to fix the time within three or four months,⁴ or within one⁵ or two years.⁶

There must, however, be some certain period of time stated.⁷ A defendant will not be required to defend his conduct during his whole married life.⁸ A pleading is clearly indefinite which alleges that defendant committed adultery "at divers times and

113; *Bokel v. Bokel*, 3 Edw. Ch. (N. Y.) 376; *Heyde v. Heyde*, 4 Sandf. (N. Y.) 692; *Anonymous*, 17 Abb. Pr. (N. Y. Super. Ct.) 48; *Strong v. Strong*, 3 Robt. (N. Y.) 719; *Pramagiori v. Pramagiori*, 7 Robt. (N. Y.) 302; *Tim v. Tim*, 47 How. Pr. (N. Y. Supreme Ct.) 253.

1. *Trubee v. Trubee*, 41 Conn. 36.

2. *Scheffling v. Scheffling*, 44 N. J. Eq. 438.

3. In *Scheffling v. Scheffling*, 44 N. J. Eq. 438, the court said: "The time when and the place where and the person, if known, with whom the offense was committed must be stated; but in laying the time, it will be sufficient if the month and year are given, without specifying the particular day." *Citing* *Marsh v. Marsh*, 16 N. J. Eq. 391; *Black v. Black*, 27 N. J. Eq. 664.

4. *Morrell v. Morrell*, 1 Barb. (N. Y.) 318. See *contra*, *Dunn v. Dunn*, 11 Mich. 284.

5. *Black v. Black*, 26 N. J. Eq. 431, 27 N. J. Eq. 664; *De Carrillo v. Carrillo*, 53 Hun (N. Y.) 359.

6. *Goodwin v. Goodwin*, 23 N. J. Eq. 210. But see *contra*, *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

In *Harrington v. Harrington*, 107 Mass. 329, the averment was that defendant had been guilty of "various acts of adultery" with E. M., "during and within the time said E. M. lived at Northampton and in the house of the libellee, to wit, in the years 1867, 1868, and 1869." A motion to make this allegation more specific was overruled, but the court stated, however, that relief would be granted if, in the course of the trial, the evidence should surprise him.

Divers Times and Places.—In *Freeman v. Freeman*, 39 Minn. 370, the allegation was "that at divers times between March 1, 1883, and the com-

mencement of the action (March 14, 1888), and at divers places in the county of Freeborn, but at what particular times and places plaintiff is unable more particularly to state, said defendant has committed adultery with men whose names are unknown to plaintiff." In sustaining a motion to have the complaint more definite and certain, the court said: "This gives but one particular, to wit, the person, leaving those of time and place practically as much at large as though no attempt were made to specify them. *Prima facie*, the charge is too indefinite and uncertain. But when called on to correct the pleading in this particular, the plaintiff might perhaps be able to show circumstances that would justify the charge of adultery with the person named, though they might not enable one to state time and place with any more definiteness than in the complaint. As, for instance, that the persons lived or constantly associated together during the period, and at the several places mentioned, under such circumstances that the inference of adulterous connection would naturally follow, though not such as to point to any specific act."

7. A contrary view is taken in *Goodwin v. Goodwin*, 23 N. J. Eq. 210. It was said: "In equity, where there are not technical rules as to the form of allegations, as there are at law, I see no reason to make a rule that the allegations shall be as to a time certain, either as to day, month, or year, when it is not required to prove the fact at the time alleged. Such allegation would be mere form—a fiction which would do no good and might mislead." But see rule in *Scheffling v. Scheffling*, 44 N. J. Eq. 438.

8. *Clutch v. Clutch*, 1 N. J. Eq. 474; *Farr v. Farr*, 34 Miss. 597.

with persons whose names are to the plaintiff unknown." ¹

Remedy for Indefiniteness.—Where the pleading is indefinite the remedy is to move to have the pleading made more definite and certain. ² In some states the defendant must apply for a bill of particulars ³ and make a showing of his inability to meet the charges in the complaint. ⁴ See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

Waiver of Objection.—The objection that a pleading is indefinite in the allegation of adultery is waived by a party unless made before answer or demurrer, ⁵ but the court may, for its own protection, order an amendment after the defendant has answered. ⁶

c. DESERTION—Statutory Terms.—Desertion or abandonment is usually alleged in the terms of the statute. ⁷ Under the codes, however, this practice is objectionable as alleging conclusions of law, and the safest course is to allege the separation of the parties and the facts which caused it with sufficient minuteness to show that the defendant abandoned the plaintiff without reasonable cause, and remained absent for the statutory period. ⁸

1. *Conant v. Conant*, 10 Cal. 249; *Anonymous*, 17 Abb. Pr. (N. Y. Super. Ct.) 48; *Kane v. Kane*, 3 Edw. Ch. (N. Y.) 389; *Horne v. Horne*, 1 Tenn. Ch. 260; *Adams v. Adams*, 16 Pick. (Mass.) 254.

Time of Discovery of Offense.—Under a statute providing that the action must be brought within a certain period after the discovery of the offense, the petition should allege when the alleged adultery was discovered. *Zorkowski v. Zorkowski*, 27 How. Pr. (N. Y. Super. Ct.) 37.

2. *Freeman v. Freeman*, 39 Minn. 370.

The order in such case may be that unless the adverse party amends the pleading, as directed, within a certain time after the order is made, the entire paragraph shall be stricken out. See *Cardwell v. Cardwell*, 12 Hun (N. Y.) 92.

3. *Mitchell v. Mitchell*, 61 N. Y. 414; *Tilton v. Beecher*, 59 N. Y. 176; *Realf v. Realf*, 77 Pa. St. 31; *Garrat v. Garrat*, 4 Yeates (Pa.) 244; *Hancock's Appeal*, 64 Pa. St. 470; *Harrington v. Harrington*, 107 Mass. 329; *Adams v. Adams*, 16 Pick. (Mass.) 254; *Gridley v. Gridley*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 215; *Edwards v. Edwards*, 9 Phila. (Pa.) 617; *Carpenter v. Carpenter* (Supreme Ct.), 42 N. Y. St. Rep. 577. See also practice under English divorce act, *Hunt v. Hunt*, 2 Swab. & T. 574; *Codrington v. Codrington*, 4 Swab. & T. 63; *Porter v. Porter*, 3 Swab. & T. 596.

See also article BILLS OF PARTICULARS, vol. 3, p. 548.

4. *De Carrillo v. Carrillo*, 53 Hun (N. Y.) 359.

5. *Conant v. Conant*, 10 Cal. 249; *Holston v. Holston*, 23 Ala. 777; *Black v. Black*, 27 N. J. Eq. 664; *De Carrillo v. Carrillo*, 53 Hun (N. Y.) 359.

6. See order of Chancellor Kent in *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 224.

7. *Hancock's Appeal*, 64 Pa. St. 470.

Where a divorce is granted for "wilful, obstinate, and continued desertion for the term of a year," an allegation of "wilful desertion" is not sufficient. *Phelan v. Phelan*, 12 Fla. 449.

The petition must allege that the desertion was "wilful and malicious" where such are the statutory terms. *Stewart v. Stewart*, 2 Swan (Tenn.) 591.

An allegation that defendant "has withdrawn from his house and family" is not a sufficient allegation of "wilful and malicious desertion." *Edwards v. Edwards*, 3 Pittsb. (Pa.) 333.

8. *Pinkney v. Pinkney*, 4 Greene (Iowa) 324. In this case it was said that "the petition should not only distinctly state the facts constituting the cause of divorce, but it should also show *prima facie* that complainant is the injured party, in order to admit proof of these essential facts."

The following allegation was held sufficient under the rules of code pleading: "That defendant wilfully,

Terms Equivalent to Those of Statute.—Where the desertion is usually alleged in the terms of the statute, a petition is not fatally defective if terms are used which are equivalent to those of the statute.¹

Desertion without Cause.—In some states it must be alleged that the desertion occurred without reasonable cause.²

Time of Desertion.—The petition should state when the desertion occurred, and that it was continuous and uninterrupted for the statutory period.³

Failure to Support.—Where both desertion and failure to support constitute the cause for divorce, the failure to support must be alleged as if it were a separate cause for divorce.⁴

Status of Innocent Party.—It is not necessary to allege that the innocent party is or has been willing to receive and cohabit with the deserter.⁵

d. CRUELTY—A General Allegation that defendant has been guilty of cruelty or extreme cruelty, or other statutory offense, is not sufficient under any system of pleading.⁶

Under the Ecclesiastical Practice the acts of cruelty were alleged together with the evidence which established them.⁷

and without any reasonable or just cause therefor, deserted and abandoned the plaintiff, and had refused to live and cohabit with him any longer, and that for more than the space of one year, and up to the commencement of this action, has continually absented herself from home, and refused to return and live with him, and still does, without any fault on the part of plaintiff; and that said act of desertion became completed while plaintiff was a resident of the State of Colorado." *Calvert v. Calvert*, 15 Colo. 390.

The Circumstances Attending the Desertion should be alleged as showing that it occurred without sufficient cause and without the plaintiff's consent. *Smith v. Smith*, 12 N. H. 80; *White v. White*, 45 N. H. 121.

1. An allegation that defendant deserted his wife "without leaving any provision for her support" is an equivalent for the statutory term "not leaving * * * sufficient provision for her * * * support." *Harris v. Harris*, 101 Ind. 498.

The Term "Abandoned" was held to be a sufficient equivalent for the statutory "deserted," although the terms are not identical. *Carr v. Carr*, 6 Ind. App. 377.

2. *Freeland v. Freeland*, 19 Mo. 354.

3. *Calvert v. Calvert*, 15 Colo. 390; *Powell v. Powell*, 58 Mich. 299.

Continuance of Desertion.—In some states it must be alleged that the desertion continued to the time of filing the petition. *Kimball v. Kimball*, 13 N. H. 222; *Morey v. Morey*, 82 Tex. 308.

4. *Harris v. Harris*, 101 Ind. 498; *Ward v. Ward*, 20 Wis. 252.

5. *Gray v. Gray*, 15 Ala. 779.

6. *Callen v. Callen*, 44 Kan. 370; *Conn v. Conn*, *Wright (Ohio)* 563; *Wright v. Wright*, 3 Tex. 168; *Dashback v. Dashback*, 62 Mich. 322; *Mercer v. Mercer*, 114 Ind. 558; *Hill v. Hill*, 10 Ala. 527; *Nogees v. Nogees*, 7 Tex. 538; *Freerking v. Freerking*, 19 Iowa 34.

Bill of Particulars.—Where the allegation of cruel and barbarous treatment is in general terms, a bill of particulars may be demanded, *Butler v. Butler*, 1 Pars. Eq. Cas. (Pa.) 329; but such objection is waived unless the demand is made before trial, *Breinig v. Breinig*, 26 Pa. St. 161.

7. **The Libel Was Prolix**, and framed to test the memories of the witnesses and to search the conscience of the defendant, who was not a competent witness. Under the divorce act the petition, while required to be concise, must "state certain acts, which, if proved, would show legal cruelty to have been committed." *Suggate v. Suggate*, 1 Swab. & T. 489; *Leete v. Leete*, 2 Swab. & T. 568.

Alleging Facts with Certainty.—“If the divorce suit is a proceeding in equity, the principal facts must be alleged with such certainty as to time, place, and circumstances as to enable the defendant to prepare a defense.”¹

Remedy for Indefiniteness.—If the charges of cruelty are vague and indefinite, the defendant must move to have the complaint made more definite and certain, for the complaint will otherwise be sustained if it states a cause of action.²

General Allegation under Codes.—A general allegation that defendant has been guilty of cruelty is improper under the rules of code pleading as alleging a conclusion of law and as not setting out

1. *Fellows v. Fellows*, 8 N. H. 160; *Horne v. Horne*, 1 Tenn. Ch. 259; *Ward v. Ward*, 1 Tenn. Ch. 262; *Sanders v. Sanders*, 25 Vt. 713.

In *K. v. K.*, 43 N. H. 164, a general allegation in the language of the statute was held insufficient. The court said: “The acts complained of should be stated in the libel with such particularity of time, place, and circumstance as to give the libellee notice not only of the general charge made against him, but of the main facts upon which that charge is to be maintained. We do not mean that no evidence will be received of any fact or circumstance not set forth in the libel, but that the material facts upon which the libellant relies must be substantially set forth therein.”

In *Campbell v. Campbell*, 27 Ill. App. 309, the following allegations were held sufficient on demurrer: “And your oratrix charges that very soon after their said marriage, as aforesaid, the said defendant commenced a course of extreme and repeated cruelty toward your oratrix; that he has often threatened and abused your oratrix in a most cruel and shameful manner; that on, to wit, the 9th day of May, A. D. 1886, at the city of Chicago aforesaid, the said defendant caught hold of your oratrix by her throat and threw her down upon the floor, and choked, beat, bruised, and otherwise maltreated your oratrix in a most cruel, angry, rude, and revengeful manner. And again, on the same day last aforesaid, at the place aforesaid, the said defendant again choked, beat, bruised, and otherwise maltreated your oratrix, and threatened to take the life of your oratrix, and by means of force took from your oratrix a certain gold watch, of the personal goods and chattels of your oratrix. So your oratrix charges that the said de-

fendant, A. C., has been and is guilty of extreme and repeated cruelty toward your oratrix.”

2. The following complaint was held sufficient in the absence of a motion to require it to be made more definite and certain: “That on or about February —, 1892, and on divers other occasions prior and subsequent thereto, said defendant was guilty of cruel and inhuman treatment to said plaintiff, in this, to wit: Slapped said plaintiff. Plaintiff further alleges that, for a long time past, said defendant has cursed and abused said plaintiff by calling said plaintiff vile names. Plaintiff further alleges that defendant failed, refused, and neglected to provide for said plaintiff and her minor children according to his station in life.” “It is contended,” said the court, “that the complaint should show that such slapping was done in anger or with intent to injure the party complaining. No doubt such an additional allegation would strengthen the complaint, and leave nothing to inference; but the language used must all be considered together, and if the intent of the pleader plainly appears, such intention will be sufficient in the absence of a motion to make more definite and certain.” As to the second allegation the court said: “It would add but little to the complaint if the particular kind of vileness which the husband assumed the wife to be guilty of was specifically described in the complaint; and, after consideration, we are of the opinion that, upon its face, the complaint states a cause of action, and if the defendant was not fully informed as to the nature of the cause charged against him, he had his remedy by motion to make more definite and certain.” *Irwin v. Irwin*, 2 Okla. 180.

the facts which constitute the cause of action.¹

Time and Place.—Where the cruelty consists of a course of cruel conduct and neglect during a period of time, the allegation may state the general nature of the misconduct without specifying time or place.²

The Acts of Cruelty.—In such case it is not necessary to allege each act constituting the course of ill treatment,³ for while the decree must be based upon the acts of cruelty alleged, and not upon other acts proven at the trial,⁴ yet other acts not alleged are admissible to give color to the acts charged and to inform the court of the general conduct of the parties and their attitude towards each other.⁵ It is not improper to allege a general course of cruel conduct together with other allegations of specific acts of cruelty.⁶ If the cruelty alleged is a charge of adultery

1. "The code requires that the petition must contain a statement of the facts constituting the cause of action. * * * The pleadings must state facts, and not conclusions." *Callen v. Callen*, 44 Kan. 370. See also *Winterburg v. Winterburg*, 52 Kan. 406; *Prather v. Prather*, 26 Kan. 275.

Where the complaint does not specify the "nature and circumstances" of cruelty, and does not "set forth times and places with reasonable certainty," as required by a special divorce statute, a demurrer will lie, although in other cases it would not. *Walton v. Walton*, 32 Barb. (N. Y.) 203.

See allegations of cruelty held sufficient in *Smedley v. Smedley*, 30 Ala. 714.

Usual Form of Allegation.—The following is the usual form of the allegation of cruelty in the code states: "The plaintiff alleges that on or about the — day of —, the defendant was guilty of extreme cruelty (or other statutory term) towards the plaintiff without any cause or provocation on her part" (stating each act of cruelty and the time and place with reasonable certainty). *Kinnie's Code Pleading*; *Maxwell's Code Pleading*; *Kinhead's Code Pleading*.

Cruelty Unprovoked.—The petition should state the circumstances showing that the cruelty was unprovoked and without reasonable cause. *White v. White*, 84 N. Car. 340, and cases cited.

2. *Sylvis v. Sylvis*, 11 Colo. 319; *Jackson v. Jackson*, 105 N. Car. 433; *Marks v. Marks*, 56 Minn. 264; *Donald v. Donald*, 21 Fla. 571. See also petition held sufficient in *Holyoke v. Holyoke*, 78 Me. 404; *Myrick v. Myrick*, 67 Ga. 771.

3. *Reese v. Reese*, 23 Ala. 785. In this case it was said: "I do not think it necessary to allege every act of cruelty complained of with circumstantial particularity; one or two specifications will be sufficient, and proof may make out others under the general charge."

4. *Winterburg v. Winterburg*, 52 Kan. 406; *Thompson v. Thompson*, 79 Me. 286; *Bennett v. Bennett*, 24 Mich. 482; *Squires v. Squires*, 3 Swab. & T. 541; *Thompson v. Thompson*, 79 Me. 286; *McQueen v. McQueen*, 82 N. Car. 471; *Chadwick v. Chadwick*, 52 N. J. Eq. 539.

5. *Whispell v. Whispell*, 4 Barb. (N. Y.) 217; *Briggs v. Briggs*, 20 Mich. 34; *Hanna v. Hanna*, 3 Tex. Civ. App. 51. But see *McQueen v. McQueen*, 82 N. Car. 471.

6. In *Jones v. Jones*, 60 Tex. 451, the plaintiff alleged that she at all times demeaned herself as became a true and faithful wife, but that defendant's conduct towards her was cruel and suspicious; that he passed his time in idleness and vagrancy, and depended for the support of himself and family upon the bounty of his parents and the parents of the plaintiff; that from the time of their marriage appellant constantly outraged her feelings by charging her with unchastity, and, without any cause, accusing her of making assignations with men of whom she had no knowledge, and that she had not been guilty of the least impropriety; that after their child was born he denied its paternity in the presence of plaintiff. The plaintiff also charged two accusations of adultery at particular times and places, and averred that

the complaint should set out the language of the charge and allege that it is false.¹ If the charge is alleged to have been made in the pleadings of a divorce suit the petition should allege that such suit has been dismissed.²

c. HABITUAL DRUNKENNESS—General Allegation.—It is sufficient to allege in general terms that defendant has been guilty of habitual drunkenness for a certain time, using the language of the statute.³ The specific times and places when and where defendant was intoxicated need not be alleged.⁴

such charges were false and rendered her condition intolerable. In holding this petition sufficient, the court said: "The petition charged a continued course of wrongs, excesses, and cruelties extending over a long period of time, *viz.*, five months, which finally culminated in acts of outrage, which were specified with all possible particularity. It is not improper to include in a petition for divorce general charges of cruelty and follow them by allegations of one or more specific acts which may or may not be included in the general charge. * * *

And in accordance with this rule are the forms in the English ecclesiastical court. 2 Bish., § 650. This latter author says that good pleading requires that the libel, in addition to the special charges, should contain proper general ones under which to prove general conduct, temper, and the like. * * * But may it not be said that these acts are averred with sufficient certainty for divorce pleading? Mr. Bishop says that such pleading is somewhat different from what is used in ordinary cases. It certainly is not required that the acts should be averred with the certainty of an indictment. The forms used in the English courts and in some of those in the United States do not allege the precise day and place of the occurrence of the acts. The place is scarcely ever alleged and the time no more certain than by reference to the month of the occurrence. * * * Our own court, in *Wright v. Wright*, 6 Tex. 3, considered an act [allegation] of cruelty sufficiently specific that gave the month when it happened without mentioning the place where it happened. The object of the pleading is to give the defendant notice of the charges he will be called upon to meet, and we think that object was accomplished in the present case. The time was between the last of November and

the first of May, and the defendant could not mistake as to the place where events occurring during that time must have taken place."

1. *Huckabay v. Huckabay*, 35 Tex. 620. See also allegations of cruelty, consisting of accusations of adultery, in *Hill v. Hill*, 24 Oregon 416; *Jones v. Jones*, 60 Tex. 451.

2. *Homes v. Carrier*, 16 La. Ann. 94; *De Haley v. Haley*, 74 Cal. 489. See also opinion of commissioners in *Haley v. Haley*, 14 Pac. Rep. 92, not officially reported.

3. *Forney v. Forney*, 80 Cal. 528; *Burns v. Burns*, 13 Fla. 369; *Reading v. Reading*, 96 Cal. 4.

4. In *Forney v. Forney*, 80 Cal. 528, habitual drunkenness was alleged as follows: "That for four years and eight months last past said defendant has been and still is guilty of habitual intemperance, and is habitually intemperate from the use of intoxicating drinks, to that degree that the intemperance of defendant reasonably inflicts a course of great mental anguish upon said plaintiff, and to that degree which did in fact, during that whole time, inflict, and still inflicts, a course of great mental anguish upon her, and that during all that time said plaintiff has been an innocent party with respect to said intemperance; that defendant was so intemperate from the use of intoxicating drinks * * * that it became necessary for her to * * * leave the defendant, and has not returned to him, * * * and his habits of intemperance have not changed for the better at any time since the plaintiff so left him." It was contended that these allegations were defective as stating conclusions of law, and that the extent of the intoxication and the acts causing mental anguish should be alleged specifically. The court said: "The allegations contained in the complaint were allegations of fact, not conclusions of law,

The Extent of the Intoxication, and the effect of this misconduct on the plaintiff, should be alleged, but the failure to do so is not fatal in the absence of any objection before decree.¹

f. CONVICTION OF CRIME.—The petition for divorce for this cause should set out the court which rendered the sentence, the nature of the crime, and the terms of the sentence.²

The Nature of the Crime should be stated in the language of the statute as “infamous” or as a felony, but it will be sufficient if facts are stated from which the nature of the crime may be inferred.³

Imprisonment.—It must be alleged that the imprisonment is in some prison within the state if the statute is so interpreted.⁴

Finality of Conviction.—It should also appear that the conviction is final and that no proceedings for reversal are pending.⁵

g. NEGLECT TO PROVIDE—General Allegation.—The facts constituting this cause should be set out in the petition, as a general allegation in the terms of the statute will not be sufficient.⁶ Facts should be alleged showing that the husband has sufficient ability to provide and has refused to do so,⁷ or that his inability is caused by his idleness, profligacy, or dissipation.⁸

h. OTHER CAUSES FOR DIVORCE.—The same general rule applies to other causes for divorce. The facts which constitute the cause for divorce must be alleged, and it will not be sufficient to describe the misconduct by using the words of the statute.⁹

and being charged in the language of the statute, and found in the same way, the complaint and findings were sufficient.”

1. *Reading v. Reading*, 96 Cal. 4.

2. *Frantz v. Frantz*, 11 Pa. Co. Ct. Rep. 467.

Commission of Crime.—An allegation that defendant has committed the crime of larceny is not sufficient. There must be a conviction. *Thomas v. Thomas*, 51 Ill. 162.

3. Under the statute of *Indiana* the seventh cause for divorce is: “The conviction, subsequent to the marriage, in any country, of either party, of an infamous crime.” It was alleged that defendant “was convicted of the crime of rape upon a little girl, the daughter of plaintiff.” It was held that this was sufficient, as it appeared that the crime was “infamous.” *Polson v. Polson*, 140 Ind. 310.

4. See *Klutts v. Klutts*, 5 Sneed (Tenn.) 423; *Martin v. Martin*, 47 N. H. 53; *Leonard v. Leonard*, 151 Mass. 151.

5. See *Vinsant v. Vinsant*, 49 Iowa 639; *Rivers v. Rivers*, 60 Iowa 378, 65 Iowa 568. But see *contra*, *Cone v.*

Cone, 58 N. H. 152; *State v. Duket*, 90 Wis. 272.

6. In *Devoe v. Devoe*, 51 Cal. 543, the allegation was, “That during more than a year last past defendant has treated her with wanton and wilful neglect, in that by reason of profligacy and dissipation he has failed to provide for her the common necessities of life.” This was held defective as not containing a “statement of facts” required by the code. For form of petition alleging the facts constituting this cause for divorce, see *Keeler v. Keeler*, 24 Wis. 522.

7. *Ward v. Ward*, 20 Wis. 252.

8. *Devoe v. Devoe*, 51 Cal. 543.

Cruel Neglect.—Where the statute contemplates a cruel and wanton neglect, it is not necessary to allege acts of cruel treatment other than the cruelty arising from the neglect and refusal to support. See petitions held sufficient in *Brown v. Brown*, 22 Mich. 242, and *Chaffee v. Chaffee*, 15 Mich. 184.

9. *Intolerable Indignities.*—Conduct constituting “such indignities to the other as shall render his or her condition intolerable” must be specifically

Sufficient facts must be stated in the pleading to enable the court to determine that the applicant is entitled to a divorce.¹

7. Joinder of Causes for Divorce—Separation and Absolute Divorce.—In the states where separations are granted on the plaintiff's petition, or where the court may, at its discretion, grant a separation instead of an absolute divorce, it is held that a cause for a dissolution of the marriage may be joined in the same petition with a cause for a separation, and a decree may be granted according to the circumstances of the case.² Such petition is not defective as multifarious.³ And the two kinds of relief sought are not inconsistent, as the greater decree includes the less.⁴ Where causes for both kinds of divorce are alleged the prayer may be in the alternative form.⁵

In some states a cause for divorce and a cause for separation cannot be joined, as the pleading is said to leave it uncertain upon which cause the plaintiff may rely.⁶

Different Methods of Trial.—Where the cause for absolute divorce must be tried by a jury, and the cause for limited divorce is tried

alleged. *Bowers v. Bowers*, 19 Mo. 351; *Brown v. Brown*, 38 Ark. 324; *Huckabay v. Huckabay*, 35 Tex. 620; *Griffith v. Griffith*, 89 N. Car. 113; *Erwin v. Erwin*, 4 Jones Eq. (N. Car.) 82.

Inhuman Treatment.—The facts constituting "inhuman treatment" should be alleged, so that the court can determine whether the conduct is of such character as to constitute this cause for divorce. *Freerking v. Freerking*, 19 Iowa 34.

Cohabitation Unsafe and Improper.—Conduct rendering cohabitation "unsafe and improper" is a form of cruelty, and the facts should be alleged in the same manner. See *McBride v. McBride* (Supreme Ct.), 31 N. Y. St. Rep. 631; *Lutz v. Lutz* (Supreme Ct.), 31 N. Y. St. Rep. 718.

"Violent and Ungovernable Temper."—When this is alleged as a cause for divorce the leading facts should be stated, and it should appear from the pleading that the ill temper was towards the wife. *Phelan v. Phelan*, 12 Fla. 449; *Burns v. Burns*, 13 Fla. 369.

1. *Bowers v. Bowers*, 19 Mo. 351.

In *Brown v. Brown*, 38 Ark. 324, no particular acts of cruelty were alleged. The court said: "The indignities of which she complained should have been specifically set out, that it might have been seen whether they were such as to render her condition intolerable as alleged." *Citing Bowers v. Bowers*, 19 Mo. 351; *Rie v. Rie*, 34 Ark. 37; *Horne*

v. Horne, 1 Tenn. Ch. 259. "The objection, however, could only have been taken by a motion to require the charge to be made more definite and specific, and was not a ground of demurrer."

2. *Mack v. Handy*, 39 La. Ann. 491; *Stokes v. Stokes*, 1 Mo. 320.

3. *McDonald v. McDonald*, 1 Mich. (N. P.) 191; *Morris v. Morris*, 20 Ala. 168.

4. *Wagner v. Wagner*, 36 Minn. 239.

5. *Grant v. Grant*, 53 Minn. 181. In *Wagner v. Wagner*, 36 Minn. 239, the court said: "We apprehend that there might be cases in which a court would, in the exercise of a sound judicial discretion, grant a separation from bed and board on account of cruel and inhuman treatment of the wife, when it would not grant an absolute divorce; and if the wife desires the limited in case she cannot obtain the absolute divorce, she ought to make her prayer for relief in the alternative. The doctrine that what is once litigated to final judgment cannot be retried between the same parties governs divorce equally as other civil actions. If a plaintiff fails to obtain the relief which she asks for, she ought not to be permitted to bring a second suit on the same cause of action for a part of that relief, when she might have obtained this partial relief in the first action."

6. *Decamp v. Decamp*, 2 N. J. Eq. 294; *Snover v. Snover*, 10 N. J. Eq. 261.

by the court, a petition alleging both causes for divorce is demurrable on the ground that the two causes of action are improperly joined.¹

8. Joinder of Causes for Ancillary Relief.—In the petition for divorce the wife may join such causes for ancillary relief as will protect her person and property during the litigation, or prevent the husband from conveying his property to defeat the decree for alimony or a distribution of the property.² But no cause of action can be joined with the suit for divorce if it concerns property or rights of action which may be adjudicated after a divorce is rendered where the property will be secure during the divorce proceedings, or where the parties can obtain the

1. *Johnson v. Johnson*, 6 Johns. Ch. (N. Y.) 163; *Smith v. Smith*, 4 Paige (N. Y.) 92; *M'Intosh v. M'Intosh*, 12 How. Pr. (N. Y. Supreme Ct.) 289; *Henry v. Henry*, 17 Abb. Pr. (N. Y. Super. Ct.) 411; *McNamara v. McNamara*, 9 Abb. Pr. (N. Y. C. Pl.) 18; *Hoffman v. Hoffman*, 35 How. Pr. (N. Y. Supreme Ct.) 384; *Klein v. Klein*, 42 How. Pr. (N. Y. Super. Ct.) 166; *Beach v. Beach*, 11 Paige (N. Y.) 161; *Buchholz v. Buchholz*, 1 How. Pr. N. S. (N. Y. Super. Ct.) 46; *Rose v. Rose*, 11 Paige (N. Y.) 166.

In *Zorn v. Zorn*, 38 Hun (N. Y.) 67, it was held that "the charges of adultery and of cruel usage are not only distinct and unconnected charges, but they lead to separate and distinct issues. The mode of proceeding is different, and it leads to confusion to connect them in the same action. One of the causes of action asks for a judgment dissolving the marriage contract, and the other for relief based upon its existence and continuance. The charge of adultery overbears and destroys the effect of the one of cruelty and ill treatment, and the remedy is merged in the other, and it would be vexatious and improper, as well as useless, to pursue the charge of cruel usage until the charge of adultery had been tried and determined adversely to the plaintiff."

2. In the same petition the wife may ask for divorce and alimony, and also allege all the facts necessary to sustain a creditor's bill to set aside a conveyance made by the husband to defeat her claim for alimony. See article CREDITORS' BILLS, vol. 5, p. 388. See also *Damon v. Damon*, 28 Wis. 510; *Prouty v. Prouty*, 4 Wash. 174.

Any Cause of Action may be joined in the petition for divorce if the relief prayed for is such as may properly be granted on a dissolution of the marriage, and affects the amount of alimony to be awarded to the wife, although this may involve the rights of third parties. *Damon v. Damon*, 28 Wis. 510; *Armstrong v. Armstrong*, 32 Miss. 279.

In *Galusha v. Galusha*, 138 N. Y. 272, it is held that questions relating to alimony cannot properly be tried in a suit for divorce, as such questions may be reserved by the terms of the decree for determination at some subsequent time. "The plaintiff," it was said, "could not have united a cause of action for an absolute divorce with one for the annulment of the deed of separation. * * * The demand for alimony in a divorce suit is not an essential part of the cause of action. * * * It need not be determined when the judgment dissolving the marriage is entered, providing the right to have it subsequently determined is reserved in the judgment. In that celebrated case [*Forrest v. Forrest*, 25 N. Y. 501] the right to permanent alimony was litigated for twelve years after the judgment of divorce was granted. The plaintiff may omit from the complaint all reference to alimony, and not thereby prejudice her right to claim it, if she succeeds in the action, providing she asserts her demand for it before the entry of judgment. In fact, the orderly conduct of the cause would require the delictum of the husband to be first established by the verdict of the jury or the finding of the court or referee before an inquiry into the allowance for alimony could be properly entered upon."

same relief in an independent proceeding.¹

9. Prayer—In General.—The petition or cross-petition should contain a prayer for the specific relief desired, and also a general prayer for such relief as may be just and equitable.² If the defendant does not answer, and the judgment is rendered on default, the relief cannot exceed that prayed for in the petition.³

Custody of Children.—It is usual to pray for the custody of the children of the parties, but the court may provide for such custody although neither party has prayed for it.⁴

Absolute or Limited Divorce.—If an absolute divorce is desired, such relief must be prayed for, as it cannot be granted under a prayer for alimony or for general relief.⁵ But a prayer may be in the alternative form, and ask for an absolute divorce or a decree of separation.⁶

1. In *Peck v. Peck*, 66 Mich. 586, the wife alleged in a supplemental petition that the husband had conveyed her separate property to his attorney since the commencement of the suit, and prayed that the attorney be declared to hold the same in trust for her and ordered to convey the same to her, and for an injunction. The court, on refusing the divorce, added: "We do not care to go into an examination of the money conflict between the parties. We do not consider that this is a proper proceeding to bring about an accounting between the husband and wife for the wife's separate property. The property claimed by the complainant does not relate to or grow out of the marriage relation. * * * Its recovery has no congruity whatever with her action for divorce, and should have been sought in an independent suit." See also *Peck v. Uhl*, 66 Mich. 592.

Where the wife discovers that her marriage is void because her supposed husband has another wife living, in an action to annul her marriage she cannot have the title to her real estate quieted against the claims of her reputed husband. *Uhl v. Uhl*, 52 Cal. 250.

If the husband has conveyed his real estate by deed to secure a debt, the wife cannot, in her suit for divorce, have an accounting with the party in possession under such deed. *Cummings v. Cummings*, 75 Cal. 434.

2. The prayer should be similar to that in a bill in equity. *Darrow v. Darrow*, 43 Iowa 411.

3. Under a statute which provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have de-

manded in his complaint," if the plaintiff asks for temporary and permanent alimony, a decree is erroneous which grants a division of defendant's property. *Hoh v. Hoh*, 84 Wis. 378.

Under a similar statute, if the petition alleges a cause for separation and also contains facts showing the marriage to be void, and prays for a decree of separation only, without a prayer for other or general relief, a decree of nullity cannot be entered although the defendant has appeared and filed a demurrer. *Walton v. Walton*, 32 Barb. (N. Y.) 203.

Amendment.—In a petition for divorce the wife prayed for an absolute divorce "and such other and further relief as the court may deem equitable and just in the premises." The husband was duly served with summons, but permitted a default. Before obtaining a decree the wife filed an amended petition asking permanent alimony, which was granted. It was held that the amendment was authorized and the decree valid on collateral attack. *Darrow v. Darrow*, 43 Iowa 411.

4. *Parker v. Parker*, 8 Ohio Cir. Ct. Rep. 363.

5. *Pillow v. Pillow*, 5 Yerg. (Tenn.) 420.

6. In *Fera v. Fera*, 98 Mass. 155, the court said: "But the court are of the opinion that a libel for divorce from the bonds of matrimony and a libel for divorce from bed and board are proceedings having a direct and intimate relation to each other. They seek for different degrees of change in the marriage relation, and concern the same subject-matter. It is not uncommon to include in the same libel

Divorce or Annulment.—If the facts alleged are such as to make out both a cause for divorce and a cause for annulling the marriage, the relief prayed for must be granted or refused. If the plaintiff prays for an absolute divorce and alimony, and the facts alleged and proved show that the marriage is void, the court cannot enter a decree annulling the marriage, but must dismiss the cause for failure to prove a marriage.¹

Amendment.—In such case the court cannot allow the petition to be amended by changing the prayer to one for a decree of annulment, for such amendment would change the cause of action and the nature of the relief sought.²

10. Verification.—In the absence of any statute or rule of practice governing the suit for divorce, the petition or cross-petition need not be verified.³ Where the suit for divorce is held to be a civil action under the code, the petition and answer or cross-petition must be verified in conformity to the general provisions of the code.⁴ In some states the verification is required by a rule of court authorized by statute.⁵ If the statute directs that

a prayer in the alternative for the two kinds of divorce; and the practice has received judicial sanction." *Citing Young v. Young*, 4 Mass. 430.

Where the statute confers on the court the power to grant at discretion either form of decree, as may seem most conducive to the welfare of the parties under all the circumstances, the decree need not be that prayed for by either of the parties. *Young v. Young*, 4 Mass. 430.

See also statute in *Wagner v. Wagner*, 36 Minn. 239; *Grant v. Grant*, 53 Minn. 181.

1. *Powell v. Powell*, 18 Kan. 371.

In *Caton v. Caton*, 6 Mackey (D. C.) 309, the petition alleged facts showing a cause for annulment of marriage, and prayed for such relief. The court, however, found the allegations sufficient to sustain a decree of divorce, and granted that relief, saying: "This bill asks for a decree of nullity; but it is quite competent for us to give the relief that the bill makes out."

2. *Schaffberg v. Schaffberg*, 52 Mich. 429.

But under the codes of civil procedure, and some forms of statutes, the prayer may always be amended to conform to the pleadings and proof, if both parties are, before the court and the cause of action is not changed. See article PRAYERS FOR RELIEF. Thus a prayer for alimony may be amended to a prayer for absolute divorce, *Williams v. Williams*, 96 Ky. 397; or a

prayer for divorce to a prayer for separate maintenance, if the petition states a cause of action justifying such relief, *Klemme v. Klemme*, 37 Ill. App. 54.

3. *Willard v. Willard*, 4 Mass. 506. Although the answer must be under oath if the plaintiff requires it, neither a petition or cross-petition need be verified. *Musselman v. Musselman*, 44 Ind. 106. See also article VERIFICATION.

Date of Petition.—The petition should be dated the same day it is filed, as the cause for divorce must continue until the suit is commenced. *Davis v. Davis*, 37 N. H. 191.

Signing Petition.—The petition should be signed by the plaintiff or in his presence by some person authorized to do so. *Daniels v. Daniels*, 56 N. H. 219.

4. *Warner v. Warner*, 11 Kan. 121. A petition sworn to before any officer authorized to administer oaths is sufficient although the statute directs such oath to be taken before the clerk of the court. *Brown v. Brown*, 138 Ind. 257.

Where a divorce statute requires the petition to be verified, but contains no other directions, a verification as in other actions under the code is sufficient. *Burdick v. Burdick*, 7 Wash. 533; *Kelly v. Kelly*, 18 Nev. 49. But where the divorce statute prescribes the form of verification the ordinary form is insufficient. *Hoffman v. Hoffman*, 30 Pa. St. 417.

6. See *Farace v. Farace*, 61 How. Pr.

the verification shall recite that the application for divorce is made without any collusion or agreement in relation to the same, such requirement is mandatory and cannot be waived by the parties.¹

If the Verification Is Defective or has been Omitted, the defendant may move to have the action dismissed or to have the petition stricken from the files.² In some instances the court may, on its own motion, dismiss the petition for want of verification.³

The objection that the petition is not verified cannot be raised for the first time on appeal.⁴ But if the error is discovered by the appellate court it will remand the cause and direct a decree to be entered on an amended verification.⁵

Amendment.—The failure to verify the petition is an error or irregularity which may be cured by amendment at any time.⁶

Cross-petition.—Where a petition for divorce is required to be verified the cross-petition for a divorce must also be verified.⁷

An Amended Petition must be verified as an original petition.⁸

IV. THE ANSWER. (See also, in general, articles ANSWERS IN EQUITY PLEADING, vol. 1, p. 863; ANSWERS IN CODE PLEADING, vol. 1, p. 777.)—**1. Form and Contents.**—The answer in a divorce suit must conform to the general requirements of the practice in the particular court in which the suit is brought.⁹ If the suit is

(N. Y. Supreme Ct.) 61; *Anable v. Anable*, 24 How. Pr. (N. Y. Supreme Ct.) 92; *Dyer v. Dyer*, 5 N. H. 271; *Ex p. Bruce*, 6 Prob. Div. 16. See also *People v. McCaffrey*, 75 Mich. 123.

1. *Ayres v. Wayne Circuit Judge*, 90 Mich. 380. See verification in *People v. McCaffrey*, 75 Mich. 115.

2. *Warner v. Warner*, 11 Kan. 121.

If the Plaintiff Makes No Application for Leave to Amend, by adding or correcting the verification, the court must dismiss the suit. Mandamus will lie to compel the court to dismiss the action under such circumstances. *Ayres v. Wayne Circuit Judge*, 90 Mich. 380.

3. In *De Armond v. De Armond*, 92 Tenn. 40, the Supreme Court raised this point on appeal, and, in dismissing the case, said: "All of these requirements of the statute are for the benefit of society, and not for the benefit of the parties. They are intended to guard against the bad faith and collusion of the parties. The application must show a clean and meritorious case under the statute before the court can take jurisdiction of the cause. The statutory affidavit is an essential part of the application, and without it there is no jurisdiction."

4. *De Armond v. De Armond*, 92

Tenn. 41; *Holcomb v. Holcomb*, 100 Mich. 421.

5. *Harrison v. Harrison*, 94 Mich. 559.

In *Holcomb v. Holcomb*, 100 Mich. 421, the decree was affirmed, although the verification did not comply with the statute, the parties having contested the case in good faith.

6. A petition may be verified after a decree has been entered. *Daly v. Wayne Circuit Judge*, 102 Mich. 392.

It is not a jurisdictional fact which must appear on the face of the petition, nor is it a part of the cause of action which must support the decree as part of the pleadings. *Darrow v. Darrow*, 43 Iowa 411; *McCraney v. McCraney*, 5 Iowa 252. But see *contra*, *De Armond v. De Armond*, 92 Tenn. 41.

7. *Daly v. Wayne Circuit Judge*, 102 Mich. 392.

8. *Briggs v. Briggs*, 20 Mich. 34; *Green v. Green*, 26 Mich. 437; *Foy v. Foy*, 13 Ired. (N. Car.) 90.

9. No answer is necessary in *Vermont*, where the practice is to admit any evidence tending to show that the libellant is not entitled to a divorce. *Tillison v. Tillison*, 63 Vt. 411, and cases cited.

But elsewhere it is held that the defendant must answer as in other cases.

in a court of equity the answer must conform to the rules of the court.¹ But if the divorce suit is an action under the code only issuable facts and not probative facts should be alleged,² and if the answer follows the former chancery practice and alleges mere probative facts such allegations are redundant and irrelevant and will be stricken out.³

Contents.—The answer need not state facts which constitute a complete bar to the plaintiff's petition, but may set up facts which do not constitute a cause for divorce, but which may mitigate the alleged offense,⁴ or may affect the discretion of the court in awarding alimony or fixing the custody of the children,⁵ or the defendant may explain the alleged misconduct and deny the offenses imputed.⁶

A General Denial puts in issue the marriage as well as all other material allegations of the petition.⁷ A general denial may be joined with a plea of recrimination⁸ or condonation.⁹

Admission by Failure to Deny.—To prevent collusion or connivance, the rule of pleading that material allegations not denied are admitted does not apply to suits for divorce.¹⁰

Verification.—The answer need not be verified if the proceeding is in a court of equity and is not required by some rule or statute.¹¹

The state, however, is not bound by the issues presented by the defendant. See *infra*, IV. 2. *The Defenses in General*; IV. 3. *a. Recrimination*. See also *infra*, XI. 10. *Conduct of the Court*.

1. Fairchild *v.* Fairchild, 43 N. J. Eq. 473; Hopper *v.* Hopper, 11 Paige (N. Y.) 46; Warner *v.* Warner, 54 Mich. 492.

2. Vermilye *v.* Vermilye, 32 Minn. 499; Sylvis *v.* Sylvis, 11 Colo. 319.

3. Vermilye *v.* Vermilye, 32 Minn. 499.

4. In Hopper *v.* Hopper, 11 Paige (N. Y.) 46, in sustaining such an answer, it was said: "In cases of this kind it is important for the court to know what has been the conduct of the wife towards the husband, as well as what his conduct has been towards her, in deciding the question whether it is a proper case for a decree of separation. I am not, therefore, prepared to say that misconduct on her part which was calculated to irritate and provoke him, or to excite his jealousy, or to alienate his affections from her, should be considered as useless and impertinent, in an answer to a bill which charges cruelty on his part."

5. In a suit for divorce either party may allege any facts which tend to show the unfitness of the other for the

custody of the children. Vermilye *v.* Vermilye, 32 Minn. 499.

6. Van Voorhis *v.* Van Voorhis, 94 Mich. 60.

7. Under a general denial the defendant cannot prove that the marriage is void on account of a prior marriage undissolved. Such defense is new matter in avoidance which must be pleaded to be available. Vincent *v.* Vincent, 16 Daly (N. Y.) 534.

8. Wood *v.* Wood, 2 Paige (N. Y.) 108.

9. Smith *v.* Smith, 4 Paige (N. Y.) 432; Marsh *v.* Marsh, 13 N. J. Eq. 281; Turnbull *v.* Turnbull, 23 Ark. 615.

10. The plaintiff cannot rely upon admissions in defendant's answer to support the allegations in the pleading. Hughes *v.* Hughes, 44 Ala. 698.

The failure to deny the residence of the plaintiff in the state does not obviate the necessity of proving such residence. Bennett *v.* Bennett, 28 Cal. 600.

Both the residence of the plaintiff, or other facts showing the jurisdiction of the court, and the marriage of the parties must be proved, although admitted by defendant. Schmidt *v.* Schmidt, 29 N. J. Eq. 496.

11. Sweet *v.* Sweet, 15 How. Pr. (N. Y. Supreme Ct.) 169; Anable *v.* Anable, 24 How. Pr. (N. Y. Supreme Ct.) 92; Schmidt *v.* Schmidt, 29 N. J. Eq.

Under the code the answer must be verified as in other actions.¹ And if the answer is in the nature of a cross-bill it must be verified as a petition.²

Amendment.—The answer may be amended under the same circumstances as other pleadings in suits for divorce.³

2. The Defenses in General—Must be Plead.—The defendant in a divorce suit is concluded by his pleadings as in other actions, and cannot prove a defense which has not been alleged.⁴

Court Not Concluded by Pleadings.—But there is a maxim concerning all suits for divorce that “a cause is never concluded against the judge.”⁵ It is the duty of the court to refuse a divorce in all cases where the evidence discloses, or the court discovers on its examination of the witnesses, that the plaintiff is not entitled to

496; *Olney v. Olney*, 7 Abb. Pr. (N. Y. Supreme Ct.) 350.

1. *Musselman v. Musselman*, 44 Ind. 106.

2. See *infra*, V. *Cross-bill or Cross-petition*.

3. See *infra*, VIII. *Amendments*. See also *Sharon v. Sharon*, 77 Cal. 102; *Magill's Appeal*, 59 Pa. St. 430; *Strong v. Strong*, 28 How. Pr. (N. Y. Super. Ct.) 432.

4. *Smith v. Smith*, 4 Paige (N. Y.) 432; *Wood v. Wood*, 2 Paige (N. Y.) 108; *Morrell v. Morrell*, 3 Barb. (N. Y.) 236; *Warner v. Warner*, 31 N. J. Eq. 225; *Reid v. Reid*, 21 N. J. Eq. 331; *Marsh v. Marsh*, 16 N. J. Eq. 391; *Lewis v. Lewis*, 9 Ind. 105; *Pastoret v. Pastoret*, 6 Mass. 276; *Roe v. Roe*, 14 Hun (N. Y.) 612; *Chapman v. Chapman*, 27 Ill. App. 487, 129 Ill. 386; *Forster v. Forster*, 1 Hag. Con. 144.

In *Jones v. Jones*, 18 N. J. Eq. 33, the defendant introduced evidence in proof of recrimination without alleging such defense. On objection to such proof the court said: “The question then arises, must this defense be pleaded or set up in the answer? The ordinary rules of pleading at law and in equity would seem to require that it should be; and the decisions in the English ecclesiastical courts, and in the courts of the different states where it has been discussed and adjudicated, require it to be set up in pleading; the only exception seems to be when the complainant, in putting his case, shows his own guilt. * * * This is a suit *inter partes*, and the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it.”

This case was approved in *Fuller v. Fuller*, 41 N. J. Eq. 198. It was said: “The court, in actions for divorce, can exercise no greater power than it can exercise in any other class of actions. It can only pronounce judgment on the issues presented by the pleadings.”

5. In an early edition of his work on marriage and divorce, Mr. Bishop said: “A maxim in these suits, therefore, is that a cause is never concluded as against the judge; and the court may, and, to satisfy its conscience, sometimes does, of its own motion, go into inquiry of matters not involved in the pleadings.” Cited in *Ribet v. Ribet*, 39 Ala. 348; *Moore v. Moore*, 41 Mo. App. 176.

The Ecclesiastical Courts followed this practice, and refused divorce where it appeared that the plaintiff was not entitled to a decree. In *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, it was objected that the court could not dismiss a suit on account of condonation where it was not pleaded. The court said: “Undoubtedly, in fairness, it ought to have been stated, because, being a plea in bar, it is a plea which the plaintiff ought to have had an opportunity of contradicting. At the same time the court is not precluded from noticing it, at least to this effect, that if the fact appeared clearly and distinctly upon the face of the depositions that there had been cohabitation subsequent to the knowledge and detection of the guilt of the wife, it might, *ex officio*, call upon the husband to disprove it.”

In *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, the court said: “If the wife does not take the objection, the court will. The husband must lay his

a divorce, whether the defense is alleged in the pleadings or not.¹

case before the court in such a manner as not to give occasion to an inference of collusion or connivance." See also *Timmings v. Timmings*, 3 Hag. Ec. 76; *Phillips v. Phillips*, 1 Rob. Ec. 144.

The American courts have followed this practice. See cases cited *infra*.

1. "The Court is Bound to Act for the Public in such cases, and so has the right to hear proofs not strictly within the allegations of the bill and answer. No one deserves to succeed in a suit to dissolve the bonds of marriage, that foundation upon which the whole framework of civilized society may be said to rest, who does not come into court without great blame; and it is the right and the duty of the court to be governed by the facts of the case going to establish its true character, no matter how they may be elicited." *Ribet v. Ribet*, 39 Ala. 348.

"It is not the policy of the law to allow judgments of divorce to be taken where a valid defense exists, and courts, on their own motion, interfere to prevent such result where the facts are brought to their knowledge." *Peck v. Peck*, 44 Hun (N. Y.) 290.

In *Dutcher v. Dutcher*, 39 Wis. 651, it appeared at the trial that the action was barred, and that the plaintiff was not a resident of the state. It was held that the evidence of such facts was not admissible under a general denial. "These views would," said the court, "in ordinary cases, dispose of this appeal by affirmance of the judgment of the court below. But in cases of this nature, we cannot consider our duty ended by determining the strict rights of the parties between themselves, under their pleadings and proofs, when these support a divorce apparently unwarranted by the statute. Questions of public policy are involved in divorce, which, after grave consideration, we think that we are not at liberty to disregard. * * * We do not mean to put the policy of the courts above the policy of the legislature, or to hold that the courts should exercise any discretion to refuse divorces authorized by the statute. But we do hold that, whatever apparent claim there may be to divorce, resting on mistake or collusion of the parties or other accident, the courts of this state are vested by the statute with judicial discretion

to withhold judgment of divorce, in cases not within the statute, upon their merits." *Citing Smith v. Smith*, 13 Gray (Mass.) 209; *Smith v. Smith*, 4 Paige (N. Y.) 432.

Rule under the Codes.—The general rule of the codes that the defendant must set up all matters of defense in ordinary and concise language, or he will be precluded at the trial from proving such defenses, does not apply to suits for divorce, as the state is not bound by the issues presented by the parties. The rule is said to be applicable "only in a limited sense, because in such cases the state or the public are presumed to be a party in interest. If the defendant fails to set out affirmative matter relied on as a defense, the court may still, as representing the public, permit the introduction of evidence tending to defeat the plaintiff's action, or the court may on its own motion elicit such evidence." *Owen v. Owen*, 48 Mo. App. 208.

Condonation.—In *Warner v. Warner*, 31 N. J. Eq. 225, the court said: "It is an elementary rule that a defendant shall not have the benefit of a defense not disclosed by his answer, and a rigid adherence to this rule is so manifestly vital to the safe administration of justice that no consideration of policy or morals can ever justify a departure from it. * * * While it is clear the defendant cannot, in the present condition of the pleadings, avail himself of the defense of condonation, it does not follow that a decree must be pronounced contrary to truth and the very right of the case. Courts of equity do not permit truth and right to be sacrificed to preserve form, nor allow justice to be defeated and wrong to triumph, on a mere mistake or unskilfulness in pleading. If necessary to the accomplishment of justice, the court may yet permit this defense to be interposed by supplemental answer, upon such terms as will afford the complainant a full opportunity to be heard in disproof of it."

The Tennessee Code requires the defenses to be alleged and proved, but it is held that "it is not necessary that they be formally set up and retried upon a plea or answer. The court is bound to take judicial notice of the requirements of the statute; and it must appear affirmatively, by satisfactory

Whenever facts are disclosed by the evidence which arouse the suspicion that the plaintiff is not entitled to a divorce, it is within the power of the court to examine the witness concerning facts not within the issues.¹ If the facts elicited by the court or otherwise disclosed by the evidence are not regarded as conclusive by the court, a reference may be ordered,² or a new trial granted upon an amended answer;³ or the trial may proceed upon an amended or supplemental answer;⁴ or the action may be dismissed without prejudice.⁵ But where the court is satisfied that no divorce should be granted under the circumstances the suit will be dismissed.⁶

3. Special Defenses—*a. RECRIMINATION.*—The defendant may set up as a defense any misconduct of the plaintiff which will prevent a decree of divorce.⁷ If such misconduct constitutes a cause for divorce in favor of the defendant it may be alleged as a defense in recrimination, or it may be set up as a cause for divorce in a cross-petition.⁸

How Alleged.—The recriminatory offense must be alleged by the

proof of good character or otherwise, that none of these defenses exist before the court is authorized to dissolve so solemn a relation as that of husband and wife. And this is as necessary after judgment *pro confesso* as after admission of the facts charged in the bill. The evidence, and not the pleadings and presumptions of law, constitute the ground of divorce; and no presumptions of good character or conduct which might arise, nothing appearing to the contrary in other cases, are sufficient, in cases of divorce, to supersede the necessity of affirmative proof." *Cameron v. Cameron*, 2 Coldw. (Tenn.) 375.

1. See proceedings in *Thompson v. Thompson*, 70 Mich. 62; *Belz v. Belz*, 33 Ill. App. 105; *Mattox v. Mattox*, 2 Ohio 234.

"In the early days of the Republic, when there was a higher appreciation of the sanctity of the marital relation than now prevails, the judges took a part in the examination of the witnesses, not to aid the plaintiff in making out his case, but to prevent him from imposing on the court the semblance of truth for its reality. To this extent I reserve the right of intervening, but the parties seeking a divorce must make out the case according to the strict requirements of the law." *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

2. *E. B. v. E. C. B.*, 28 Barb. (N.

Y.) 299. See also dictum in *Smith v. Smith*, 4 Paige (N. Y.) 432.

3. See *Smith v. Smith*, 4 Paige (N. Y.) 432.

4. *Warner v. Warner*, 31 N. J. Eq. 225.

5. *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

Where it appears that the action was commenced before the plaintiff had resided within the state the required time, the court may direct the defendant to file an amended answer stating such fact and dismiss the suit for this reason. *Dutcher v. Dutcher*, 39 Wis. 651.

6. *Thompson v. Thompson*, 70 Mich. 62; *Belz v. Belz*, 33 Ill. App. 105; *Clague v. Clague*, 46 Minn. 461; *Ribet v. Ribet*, 39 Ala. 348; *Mattox v. Mattox*, 2 Ohio 234; *Morrison v. Morrison*, 62 Mo. App. 299.

7. *Hoffman v. Hoffman*, 43 Mo. 547. This misconduct may be such as mitigates the offense committed by defendant, as where the plaintiff provoked the alleged cruelty or caused the alleged desertion. In such case the plaintiff is not entitled to a divorce, because he is not an innocent and injured party. The misconduct in such case may be a defense, although not a cause for divorce. *Lyster v. Lyster*, 111 Mass. 327. See also Am. and Eng. Encyc. of Law, tit. Divorce.

8. See *infra*, V. *Cross-bill or Cross-petition*. See also *Hoffman v. Hoff-*

defendant in the same manner as a cause for divorce.¹

Adultery.—Thus adultery must be alleged with as much particularity as in a petition for divorce, and the allegation must specify the time and place and give the name of the *particeps criminis* if known.²

Cruelty and Desertion.—In the same manner cruelty³ or desertion⁴ may be set up as a defense, regardless of the cause for divorce alleged in the petition. But the cruelty must be alleged with such particularity that it will appear to be of that degree which constitutes a cause for divorce.⁵ And when desertion is set up as a recrimination it must be alleged to be without reasonable cause and to have continued for the statutory period.⁶

b. CONDONATION—Necessity of Pleading.—A party cannot, as a matter of right, insist upon condonation without pleading it as a

man, 43 Mo. 547; *Wilson v. Wilson*, 40 Iowa 230.

1. *Jones v. Jones*, 18 N. J. Eq. 33; *Morrell v. Morrell*, 3 Barb. (N. Y.) 236; *Strong v. Strong*, 3 Robt. (N. Y.) 719; *Pastoret v. Pastoret*, 6 Mass. 276; *Reid v. Reid*, 21 N. J. Eq. 331; *Smith v. Smith*, 4 Paige (N. Y.) 432; *Wood v. Wood*, 2 Paige (N. Y.) 108; *Marsh v. Marsh*, 16 N. J. Eq. 391.

Under the Rules of Code Pleading, this defense is "new matter," which must be stated as any other affirmative defense. *Roe v. Roe*, 14 Hun (N. Y.) 612.

Vermont.—A different practice prevails in Vermont, where "anything that tends to show that the libellant is not entitled to a divorce for the causes alleged may be shown in evidence without pleading the same." *Tillison v. Tillison*, 63 Vt. 411; *Blain v. Blain*, 45 Vt. 538; *Shackett v. Shackett*, 49 Vt. 195.

The procedure in such cases need not conform to that of the common law, and it is not necessary to have pleadings even in contested cases. *Burton v. Burton*, 58 Vt. 414.

2. *Jones v. Jones*, 18 N. J. Eq. 33; *Reid v. Reid*, 21 N. J. Eq. 331; *Wood v. Wood*, 2 Paige (N. Y.) 108.

Where the Plaintiff has Contracted a Venereal Disease it will be sufficient to allege that he committed adultery in certain cities during certain months and thereby contracted such disease and communicated the same to defendant. In such case the precise time and place and the name of the paramour are not required. *Clark v. Clark*, 7 Robt. (N. Y.) 276.

3. *Wheeler v. Wheeler*, 18 Oregon 261; *Beck v. Beck*, 63 Tex. 34; *Hoff-*

man v. Hoffman, 43 Mo. 547; *Hawkins v. Hawkins*, 65 Md. 104; *Wessels v. Wessels*, 28 Ill. App. 253; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Boeck v. Boeck*, 16 Neb. 196.

Cruelty may be pleaded as a bar to divorce for adultery. *Church v. Church*, 16 R. I. 667; *Pease v. Pease*, 72 Wis. 136; *Nagel v. Nagel*, 12 Mo. 53; *Evans v. Evans*, 93 Ky. 510.

Cruelty is a bar to divorce for desertion. *Kikel v. Kikel*, 25 Neb. 256; *Harvey v. Harvey* (N. J. Eq. 1887), 7 Atl. Rep. 871.

4. *Wilson v. Wilson*, 40 Iowa 230; *Conant v. Conant*, 10 Cal. 250; *Adams v. Adams*, 17 N. J. Eq. 325; *Blakely v. Blakely*, 89 Cal. 324; *Taylor v. Taylor*, 80 Iowa 29; *Evans v. Evans*, 93 Ky. 510; *Dupont v. Dupont*, 10 Iowa 112.

Desertion is a bar to divorce for adultery. *Johnson v. Johnson* (Tex. Civ. App. 1893), 23 S. W. Rep. 1022; *Wood v. Wood*, 5 Ired. (N. Car.) 674. But it was not a bar in the ecclesiastical law. *Sullivan v. Sullivan*, 2 Add. Ec. 299; *Holston v. Holston*, 23 Ala. 777; *Bast v. Bast*, 82 Ill. 584; *Huling v. Huling*, 38 Ill. App. 144.

5. *Hoffman v. Hoffman*, 43 Mo. 547.

6. *Wilson v. Wilson*, 40 Iowa 230; *Dupont v. Dupont*, 10 Iowa 112; *Adams v. Adams*, 17 N. J. Eq. 325; *Evans v. Evans*, 93 Ky. 510; *Taylor v. Taylor*, 80 Iowa 29.

In a suit for divorce on the ground of desertion, the defendant may set up any misconduct which provoked or caused the desertion, although such misconduct does not constitute a cause for divorce, and is not therefore sufficient as a recrimination. *Lyster v. Lyster*, 111 Mass. 327.

defense.¹ But the court may dismiss the suit if it appears at any time that the parties have cohabited or the injured party has condoned and forgiven the offense.²

General Denial.—In order to interpose this defense the fact should be alleged as new matter, for condonation cannot be proved under a general denial.³

Misconduct after Condonation.—Where the defendant has been guilty of some misconduct after plaintiff condoned the offense, the plaintiff should allege such misconduct in the reply as a violation of the condition of the condonation.⁴

How Alleged.—It is sufficient to allege the cohabitation of the parties as husband and wife after the cause for divorce accrued or was discovered,⁵ or that the plaintiff has by certain conduct forgiven the offense.⁶

Joinder with Other Pleas.—A plea of condonation may be joined with a general denial where the defendant is innocent and the parties have cohabited after the alleged offense.⁷

c. COLLUSION.—Where the parties have entered into a conspiracy to obtain a divorce and one party desires to rely on such fact as a defense, the collusion should be alleged as any other defense.⁸

1. *Warner v. Warner*, 31 N. J. Eq. 226; *Moore v. Moore*, 41 Mo. App. 176; *Lewis v. Lewis*, 9 Ind. 105; *Smith v. Smith*, 4 Paige (N. Y.) 432.

2. *Hill v. Hill*, 24 Oregon 416.

3. In *Moore v. Moore*, 41 Mo. App. 176, the objection was made that condonation was not pleaded. The court said: "We are of the opinion that in this respect, in a case for divorce, we need not confine ourselves to the allegations of the answer. * * * So far as a defendant would be concerned as a matter of right, which he may assert, he would, perhaps, be concluded by his pleading. But there is a maxim in these suits 'that a cause is never concluded against the judge.'"

Where the fact of condonation was contested at the trial, the court may dismiss the suit on proof of condonation, although not pleaded as a defense. *Clague v. Clague*, 46 Minn. 461.

3. *Lewis v. Lewis*, 9 Ind. 105.

In *Backus v. Backus*, 3 Me. 136, proof of condonation was admitted under a general denial.

4. In *Sullivan v. Sullivan*, 34 Ind. 368, the plaintiff alleged that the offenses had been condoned and that defendant had subsequently been guilty of similar offenses. The court said: "Had the case proceeded in a different and perhaps a more usual

and natural way, the petition would have alleged the cruel treatment, etc., the defendant would have pleaded the condonation in defense, and the petitioner would have replied the subsequent acts as a violation of the implied condition on which the condonation took place. * * * In such a case it is not necessary for the defendant to plead the condonation in order to have the benefit of it."

5. *Marsh v. Marsh*, 13 N. J. Eq. 281; *Turnbull v. Turnbull*, 23 Ark. 615.

6. *Smith v. Smith*, 4 Paige (N. Y.) 432.

The conduct alleged as condonation must be such as to show a reconciliation and forgiveness of the offense. It is not sufficient to allege a mere offer of the wife to return to the husband. *Betz v. Betz*, 19 Abb. Pr. (N. Y. Super. Ct.) 90.

7. *Marsh v. Marsh*, 13 N. J. Eq. 281; *Turnbull v. Turnbull*, 23 Ark. 615.

8. The same rule applies to this defense as to condonation or connivance, that while the court may deny divorce for such conduct, a party cannot prove such defense without alleging it in the answer. See allegation of collusion in *Winship v. Winship*, 16 N. J. Eq. 107.

Generally This Defense is Not Pledged, but where collusion is suspected by the court, the facts are obtained by an

d. CONNIVANCE.—The fact that the plaintiff has connived at the offense of which he complains, and is, therefore, estopped to set up such offense as a cause for divorce, must be pleaded as a defense;¹ otherwise the defendant cannot prove such connivance.² But where the facts are disclosed at the trial the court will, on its own motion, interfere in behalf of the state and examine the witnesses concerning this defense although there it is not in issue.³

e. DELAY.—The defense that the plaintiff has been guilty of unreasonable delay or acquiescence must be raised by answer or demurrer according to the system pleading in force in each state.⁴ Unless the defendant pleads such defense he cannot object to the proof of causes for divorce which are barred by the statute of limitations.⁵ In the absence of a pleading raising such defense, and in cases where there is no appearance by the

examination of the witness by the court or by the attorney who represents the state. *Belz v. Belz*, 33 Ill. App. 105; *Thompson v. Thompson*, 70 Mich. 62; *Porritt v. Porritt*, 18 Mich. 420; *People v. Dawell*, 25 Mich. 247; *Leavitt v. Leavitt*, 13 Mich. 452; *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299; *Parker v. Parker*, 28 Ill. App. 22; *Costill v. Costill*, 47 N. J. Eq. 346.

In some states it is made the duty of the prosecuting officer to interpose this defense by answer in the same manner as a party to the suit. *State v. Brinneman*, 120 Ind. 357.

1. In *Welch v. Welch*, 50 Mo. App. 395, the answer confessed the commission charged and alleged that it was committed with the knowledge and consent of the plaintiff.

See answers alleging connivance in *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58.

2. The defendant cannot complain of the exclusion of evidence tending to show that plaintiff consented to his adultery where connivance was not alleged as a defense. *Chapman v. Chapman*, 27 Ill. App. 487, 129 Ill. 386.

Where the Plaintiff Goes to Trial without an Answer, and permits evidence of connivance to be introduced by defendant and contests the case upon such defense, he cannot object to a decree of dismissal on the ground that no answer was filed. "If he had asked for an answer and it was not voluntarily furnished, the court would undoubtedly, upon motion, have ordered

one filed." *Citing Orrok v. Orrok*, 1 Mass. 341. "He does not appear to have expressed any surprise at the evidence, or the defense taken at the trial, and it is now too late to object that no answer was filed." *Morrison v. Morrison*, 136 Mass. 310.

3. *Peck v. Peck*, 44 Hun (N. Y.) 290; *Hoar v. Hoar*, 3 Hag. Ec. 137; *Crewe v. Crewe*, 3 Hag. Ec. 123; *Turton v. Turton*, 3 Hag. Ec. 338.

4. The *New York* code (§ 413) provides that "the objection that the action was not commenced within the time limited can be taken only by answer." This section is held to apply to divorce suits and actions for annulment of marriage. *Kaiser v. Kaiser*, 16 Hun (N. Y.) 602; *Bihin v. Bihin*, 17 Abb. Pr. (N. Y. Supreme Ct.) 19. The objection cannot be raised under a general denial. *Dutcher v. Dutcher*, 39 Wis. 651. Where it appears upon the face of the complaint that the cause of action is barred by the statute of limitations, the objection may be raised in some states by demurrer. *Tufts v. Tufts*, 8 Utah 142.

5. In *Bihin v. Bihin*, 17 Abb. Pr. (N. Y. Supreme Ct.) 19, it was said: "The complaint, in stating the acts of cruelty upon which the plaintiff intended to rely as constituting her cause of action, gave the dates of their occurrence with sufficient particularity to inform the defendant that some of them happened more than ten years before the commencement of the action, and if he intended to object to proof of them on that account, he should have taken the objection by answer, for such

defendant, the court will dismiss the suit on account of delay,¹ unless some excuse or explanation is given by plaintiff.²

4. Other Defenses—Existence or Validity of Marriage.—As a complete defense the defendant may deny the marriage³ or may set up facts sufficient to show that the alleged marriage is void.⁴

Insanity may be pleaded as a defense to a charge of desertion,⁵ adultery,⁶ or cruelty,⁷ if the defendant was insane at the time the offense was committed.

Drunkenness.—Delirium tremens may also be alleged as a de-

is the positive requirement of the code (§ 74); equally applicable to those actions which were formerly known as suits in equity as to actions at law.”

1. *Valleau v. Valleau*, 6 Paige (N. Y.) 207; *Nullmeyer v. Nullmeyer*, 49 Ill. App. 573; *Boulting v. Boulting*, 3 Swab. & T. 329; *Hitchins v. Hitchins*, 140 Ill. 326. See proceedings in *Dutcher v. Dutcher*, 39 Wis. 651.

2. *M. v. D.*, 10 Prob. Div. 75.

3. *White v. White*, 82 Cal. 427; *Van Dusan v. Van Dusan*, 97 Mich. 70; *Clancy v. Clancy*, 66 Mich. 202; *Cross v. Cross*, 55 Mich. 280; *Kilburn v. Kilburn*, 89 Cal. 46; *Bates v. Bates*, 7 Misc. Rep. (N. Y. Super. Ct.) 547; *Harbeck v. Harbeck*, 102 N. Y. 714, affirming 31 Hun (N. Y.) 640; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Borton v. Borton*, 48 Iowa 697; *Trimble v. Trimble*, 2 Ind. 76; *Bowman v. Bowman*, 24 Ill. App. 165.

4. *Wheeler v. Wheeler*, 76 Wis. 631; *Freeman v. Freeman* (Ky. 1890), 13 S. W. Rep. 246; *Finn v. Finn*, 12 Hun (N. Y.) 339.

Where the defense of void marriage is interposed the answer should state facts showing that the marriage is void, as that at the time of the alleged marriage the defendant or plaintiff had a wife living. *Vincent v. Vincent*, 16 Daly (N. Y.) 534.

In *Jones v. Jones*, 71 Hun (N. Y.) 519, the answer alleged a former marriage as follows: “The defendant admits that on —, at —, the plaintiff was in form married to the defendant; said marriage, the defendant avers, on information and belief, was illegal and void, as set forth in the second answer herein. * * * For a separate and further answer to said plaintiff’s complaint, under which this defendant asks for affirmative relief, the defendant avers, on information and belief, that on or about —, at —, the plaintiff herein was lawfully married to one J. C. B., and lived and

cohabited with him as his wife; that at the time of the alleged marriage of the plaintiff with the defendant, to wit, —, the said J. C. B., was alive, and deponent is informed and believes, and therefore charges the fact to be, she, the plaintiff herein, was the lawful wife of said J. C. B., all of which was unknown to the defendant at the time of his said marriage to the plaintiff.” Prayer for decree annulling the alleged marriage.

In *Collins v. Collins*, 80 N. Y. 1, the defendant admitted that a marriage ceremony was performed between him and the plaintiff at the time and place alleged, but denied that he was on said day or at any time legally married to the defendant; that at the time said marriage ceremony was performed, the plaintiff had a husband living named J. H., to whom she was lawfully married, which marriage was in force on and after the date of her alleged marriage to the defendant.

5. *Pile v. Pile*, 94 Ky. 308; *Douglass v. Douglass*, 31 Iowa 421.

6. *Nichols v. Nichols*, 31 Vt. 328; *Mims v. Mims*, 33 Ala. 98; *Wray v. Wray*, 19 Ala. 522; *Yarrow v. Yarrow* (1892), Prob. 92; *Broadstreet v. Broadstreet*, 7 Mass. 474; *Hill v. Hill*, 27 N. J. Eq. 214. See *contra*, *Matchin v. Matchin*, 6 Pa. St. 332.

7. *Cohn v. Cohn*, 85 Cal. 108; *Wertz v. Wertz*, 43 Iowa 534; *Tiffany v. Tiffany*, 84 Iowa 122; *Powell v. Powell*, 18 Kan. 371; *Sapp v. Sapp*, 71 Tex. 348; *Hayward v. Hayward*, 1 Swab. & T. 81; *Curtis v. Curtis*, 1 Swab. & T. 192; *White v. White*, 1 Swab. & T. 591.

Mental Derangement Not Amounting to Insanity will not excuse acts of cruelty. *Smith v. Smith*, 40 N. J. Eq. 566, 33 N. J. Eq. 458; *McGrady v. McGrady*, 48 Mo. App. 668; *Scoland v. Scoland*, 4 Wash. 118; *Avery v. Avery*, 33 Kan. 1.

fense,¹ but ordinary drunkenness is not a sufficient excuse for cruelty.²

Where the Plaintiff Alleges Cruelty as a ground for divorce the defendant may plead that the plaintiff provoked the misconduct,³ or that the defendant is repentant and will reform,⁴ or that the injury was not intended and will not be repeated.⁵

Where Desertion Is the Ground Set Up.—The defendant may set up any misconduct of plaintiff which justified the separation,⁶ or that the separation continued with the consent or acquiescence of the plaintiff,⁷ or that defendant offered to return and plaintiff refused

1. *Hanbury v. Hanbury* (1892), Prob. 222.

2. *Crichton v. Crichton*, 73 Wis. 59; *Berryman v. Berryman*, 59 Mich. 605; *Coursey v. Coursey*, 60 Ill. 186; *Powers v. Powers*, 20 Neb. 529; *Allen v. Allen*, 31 Mo. 479; *Hughes v. Hughes*, 19 Ala. 307; *Lee v. Lee*, 3 Wash. 236; *Wachholz v. Wachholz*, 75 Wis. 377.

3. *Alabama*.—*David v. David*, 27 Ala. 222.

California.—*Johnson v. Johnson*, 14 Cal. 459.

Illinois.—*Von Glahm v. Von Glahm*, 46 Ill. 134.

Iowa.—*Evans v. Evans*, 82 Iowa 462; *McKee v. McKee*, 77 Iowa 464; *Knight v. Knight*, 31 Iowa 451; *Peavey v. Peavey*, 76 Iowa 443; *Edgerton v. Edgerton*, 79 Iowa 68; *Owen v. Owen*, 90 Iowa 365; *Felton v. Felton* (Iowa, 1895), 62 N. W. Rep. 677.

Louisiana.—*Trowbridge v. Carlin*, 12 La. Ann. 882.

Maryland.—*Hoshall v. Hoshall*, 51 Md. 72; *Childs v. Childs*, 49 Md. 509; *Daiger v. Daiger*, 2 Md. Ch. 335.

Missouri.—*Doyle v. Doyle*, 26 Mo. 545; *Harper v. Harper*, 29 Mo. 301.

Nevada.—*Reed v. Reed*, 4 Nev. 395.

New Jersey.—*Coles v. Coles*, 32 N. J. Eq. 547.

New York.—*Taylor v. Taylor*, 74 Hun (N. Y.) 639, 26 N. Y. Supp. 246; *Bedell v. Bedell*, 1 Johns. Ch. (N. Y.) 604; *Devaismes v. Devaismes*, 3 Code Rep. (N. Y. Supreme Ct.) 124.

Oregon.—*Wheeler v. Wheeler*, 18 Oregon 261; *Taylor v. Taylor*, 11 Oregon 303.

Pennsylvania.—*Richards v. Richards*, 37 Pa. St. 225.

Washington.—*Blurock v. Blurock*, 4 Wash. 495.

England.—*Anthony v. Anthony*, 1 Swab. & T. 594; *Holden v. Holden*, 1 Hag. Con. 453; *Hughes v. Hughes*, L. R. 1 P. & D. 219; *Taylor v. Taylor*,

2 Lee 172; *Dysart v. Dysart*, 1 Rob. Ec. 106; *Waring v. Waring*, 2 Phillim 132.

In *Albert v. Albert*, 5 Mont. 577, it is said that no provocation will justify an assault and battery by the husband.

4. *English v. English*, 27 N. J. Eq. 71, 579; *O'Neill v. O'Neill*, 30 N. J. Eq. 119; *Broom v. Broom*, 47 N. J. Eq. 215; *Meathe v. Meathe*, 83 Mich. 150.

5. *Shaw v. Shaw*, 17 Conn. 189; *Shorediche v. Shorediche*, 115 Ill. 102; *Ford v. Ford*, 104 Mass. 198.

6. *Arkansas*.—*Rie v. Rie*, 34 Ark. 37. *Illinois*.—*Carter v. Carter*, 62 Ill.

439; *Farnham v. Farnham*, 73 Ill. 497; *Johnson v. Johnson*, 125 Ill. 510.

Massachusetts.—*Lyster v. Lyster*, 111 Mass. 327; *Watts v. Watts*, 160 Mass. 464; *Pidge v. Pidge*, 3 Met. (Mass.) 257.

Missouri.—*Neff v. Neff*, 20 Mo. App. 182; *Dwyer v. Dwyer*, 16 Mo. App. 422.

New Jersey.—*Kestler v. Kestler*, 31 N. J. Eq. 197; *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274; *Meldowney v. Meldowney*, 27 N. J. Eq. 328; *Marker v. Marker*, 11 N. J. Eq. 256; *Herold v. Herold*, 47 N. J. Eq. 210; *McVickar v. McVickar*, 46 N. J. Eq. 490; *Laing v. Laing*, 21 N. J. Eq. 249.

Ohio.—*Hesler v. Hesler*, Wright (Ohio) 211.

7. *Massachusetts*.—*Bradley v. Bradley*, 160 Mass. 258.

Missouri.—*Simpson v. Simpson*, 31 Mo. 24; *Davis v. Davis*, 60 Mo. App. 545.

New Jersey.—*Moores v. Moores*, 16 N. J. Eq. 276; *Meldowney v. Meldowney*, 27 N. J. Eq. 328; *Cornish v. Cornish*, 23 N. J. Eq. 208; *Hankinson v. Hankinson*, 33 N. J. Eq. 66; *Taylor v. Taylor*, 28 N. J. Eq. 207; *Bowlby v. Bowlby*, 25 N. J. Eq. 406; *Broom v. Broom*, 47 N. J. Eq. 347; *Reece v. Reece*, 34 N. J. Eq. 32;

the offer,¹ or that the period of desertion was not continuous² or had not continued for the statutory period.³

Former Decree.—The answer may set up a former decree of absolute divorce between the same parties,⁴ but a decree of separation will not constitute a bar to a suit for an absolute divorce.⁵

As a Plea in Abatement, the defendant may allege that another suit for divorce is pending between the same parties⁶ or that the plaintiff is not a resident of the state.⁷

V. CROSS-BILL OR CROSS-PETITION—1. Ecclesiastical Practice.—In the ecclesiastical courts the defendant might obtain any relief concerning the marriage relation, such as a separation, a restitution of conjugal rights, or a decree annulling the marriage, and this regardless of the relief prayed for in the petition.⁸ In the

Olcott v. Olcott (N. J. Eq. 1893), 26 Atl. Rep. 469; *Payne v. Payne* (N. J. Eq. 1894), 28 Atl. Rep. 449; *Goldstein v. Goldstein* (N. J. Eq. 1893), 26 Atl. Rep. 862.

Pennsylvania.—*Hardie v. Hardie*, 162 Pa. St. 227.

Texas.—*Hannig v. Hannig* (Tex. Civ. App. 1893), 24 S. W. Rep. 695.

1. *Alabama.*—*Crow v. Crow*, 23 Ala. 583.

California.—*Benkert v. Benkert*, 32 Cal. 467.

Illinois.—*Thomas v. Thomas*, 152 Ill. 577; *Jenkins v. Jenkins*, 104 Ill. 134.

Iowa.—*Day v. Day*, 84 Iowa 221.

Kansas.—*Taylor v. Taylor*, 41 Kan. 535; *Prather v. Prather*, 26 Kan. 273.

Missouri.—*Messenger v. Messenger*, 56 Mo. 329; *Jones v. Jones*, 55 Mo. App. 523.

New Jersey.—*Barrett v. Barrett*, 37 N. J. Eq. 29; *Elliott v. Elliott*, 48 N. J. Eq. 231; *Newing v. Newing*, 45 N. J. Eq. 498.

Oregon.—*Sisemore v. Sisemore*, 17 Oregon 542.

2. *Phelan v. Phelan*, 135 Ill. 445; *Burk v. Burk*, 21 W. Va. 445; *Gaillard v. Gaillard*, 23 Miss. 152; *Holmes v. Holmes*, 44 Mich. 555.

3. *Embree v. Embree*, 53 Ill. 394; *Wagner v. Wagner*, 39 Minn. 394; *Bailey v. Bailey*, 21 Gratt. (Va.) 43.

4. *De Graw v. De Graw*, 7 Mo. App. 121; *Jones v. Jones*, 108 N. Y. 415; *Roth v. Roth*, 104 Ill. 35; *Ross v. Ross*, 129 Mass. 248; *Hood v. Hood*, 110 Mass. 463; *Munson v. Munson*, 60 Hun (N. Y.) 189; *Hunt v. Hunt*, 72 N. Y. 217; *Crabill v. Crabill*, 22 Oregon 588; *Williams v. Williams*, 130 N. Y. 193; *Williams v. Williams*, 53 Mo. App.

617; *Whetstone v. Whetstone*, 31 Iowa 276.

A decree dismissing a complaint for divorce for the same cause is also a bar. *Brown v. Brown*, 37 N. H. 536.

5. *Evans v. Evans*, 43 Minn. 31; *Edgerly v. Edgerly*, 112 Mass. 53; *Mason v. Mason*, 8 Prob. Div. 21; *Hitchins v. Hitchins*, 41 Ill. App. 82.

As the estoppel extends to all that might have been litigated in the former suit for divorce, a party cannot afterwards apply for divorce for the same offense. *Thurston v. Thurston*, 99 Mass. 39; *Miller v. Miller*, 150 Mass. 111; *Slade v. Slade*, 58 Me. 157.

6. *Williams v. Williams*, 53 Mo. App. 617; *Dunham v. Dunham*, 57 Ill. App. 475; *Jones v. Jones*, 108 N. Y. 415 (see another action in *Texas*, *Jones v. Jones*, 60 Tex. 451); *Monroy v. Monroy*, 1 Edw. Ch. (N. Y.) 382; *Kittle v. Kittle*, 8 Daly (N. Y.) 72; *Nichols v. Nichols*, 12 Hun (N. Y.) 428; *Thornton v. Thornton*, 11 Prob. Div. 176.

Where the wife commences a suit for divorce while her suit for separate maintenance is pending, a decree of divorce will operate as a dismissal of her former suit. *Harper v. Rooker*, 52 Ill. 370.

7. *Dutcher v. Dutcher*, 39 Wis. 651.

8. *Best v. Best*, 1 Add. Ec. 411. See early cases cited and discussed in

Wadsworth v. Wadsworth, 81 Cal. 182. In a **Suit for Annulment of Marriage** the court might grant a decree for restitution of conjugal rights if the marriage was established and the proof was otherwise sufficient. *Clowes v. Jones*, 3 Curt. Ec. 185.

Or in a suit for restitution of conjugal rights the defendant could obtain

absence of any special statute in the statutes relating to divorce, and in those states where the provisions of the code relating to counterclaims do not include a cross-demand for affirmative relief, the practice of the ecclesiastical courts may be followed on the ground that such practice, in the absence of any other, has been adopted as a part of our common law.¹

2. Practice in Equity.—Where jurisdiction to grant divorce has been conferred upon courts of equity, the ecclesiastical practice is followed.² When a suit is pending for divorce for one cause the defendant is not compelled to institute an independent proceeding in order to obtain a divorce for a different cause, but she may allege the plaintiff's offense in recrimination and also as a cause for divorce, and if the plaintiff fails in his proofs she will be entitled to a divorce on her cross-bill.³

3. Cross-petitions under the Codes.—The right to file a cross-petition for divorce under the codes is not always clear, as the provisions were not framed with reference to suits for divorce. The cause for divorce is not a "contract" or "transaction" within the meaning of the codes.⁴ Such terms have no reference

a decree of separation. *Anichini v. Anichini*, 2 Curt. Ec. 210; *Dysart v. Dysart*, 1 Rob. Ec. 106.

1. *Wuest v. Wuest*, 17 Nev. 217.

2. In *Harrison v. Harrison*, 46 N. J. Eq. 75, the court refused to strike an answer denying the desertion and alleging desertion on the part of plaintiff. "The office of a cross-bill," it was said, "is to enable a defendant to obtain discovery from or relief against a defendant or codefendant in the original bill, so that he may make a more complete and effectual defense than he could make by answer alone, or so that the court may do complete justice to all parties in respect to the matter put in litigation by the original bill. If new facts are introduced by it, they must be so closely connected with the cause of action set up in the original bill as to render the cross-suit a mere auxiliary of the original suit."

* * * The English ecclesiastical courts exhibited a greater liberality in the allowance of cross-actions in matrimonial causes than is necessary to sustain this cross-bill, and when it is remembered that chancery borrowed its practice respecting cross-bills from those courts, and that in this state it has succeeded to jurisdiction over matrimonial causes, which was so long the concern of those courts, it would seem that a practice sanctioned by the ecclesiastical courts with reference to

cross-actions in matrimonial causes cannot be without weight in this consideration."

3. *Osborn v. Osborn*, 44 N. J. Eq. 257.

4. The *New York* code provided that the counterclaim must "arise out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Under this section it was held that plaintiff's adultery could not be set up as a counterclaim against the defendant's adultery, as it did not arise out of "the transaction" alleged. Nor was such offense "connected with the subject of the action." *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9; *Henry v. Henry*, 27 How. Pr. (N. Y. Super. Ct.) 5; *Terhune v. Terhune*, 40 How. Pr. (N. Y. C. Pl.) 258; *M'Intosh v. M'Intosh*, 12 How. Pr. (N. Y. Supreme Ct.) 289.

This defect was remedied by a section of the divorce statute (§ 1770 of the code) permitting any cause for divorce to be set up as a counterclaim in the answer. *Spahn v. Spahn*, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 169; *Van Benthuyzen v. Van Ben-*

to the marriage relation, and were not intended to include divorce suits or authorize cross-petitions for affirmative relief.¹ But under some general terms of the code it has been held that the terms "contract or transaction" include the marriage relation alleged in the petition.² It is clear that a cross-petition for divorce is sufficiently connected with the subject of the action to constitute a counterclaim under the definitions of some of the codes.³ The right to file a cross-petition for affirmative relief is derived from special provisions under the divorce statutes of some of the states.⁴

4. Nature and Form of Cross-bill—Complete Pleading.—The cross-petition is in many respects a petition, and should be a complete pleading conforming to all the requirements as if it were an original petition or complaint.⁵

Jurisdictional Facts.—A defendant need not allege the statutory residence within the state, or the domicil of the parties, or other facts showing jurisdiction.⁶ The court, having obtained jurisdiction of the parties and the subject-matter by the filing of a petition of a resident plaintiff and the appearance of the non-resident defendant, will retain the case and determine the rights of both parties.⁷

thuysen, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 234; *De Meli v. De Meli*, 120 N. Y. 492.

1. *Wuest v. Wuest*, 17 Nev. 217. See also dictum in *De Haley v. Haley*, 74 Cal. 489.

2. Under the California Code (§ 442) a cross-petition for divorce is a cross-demand "relating to or depending upon the contract or transaction upon which the action is brought." *Wadsworth v. Wadsworth*, 81 Cal. 182; *Mott v. Mott*, 82 Cal. 413; *Blakely v. Blakely*, 89 Cal. 324; *Kirsch v. Kirsch*, 83 Cal. 633.

3. A cross-petition for divorce was held to be a counterclaim under the *Iowa* code, which required that a counterclaim must arise "out of the contracts or transactions set forth in the petition or connected with the subject of the action." *Wilson v. Wilson*, 40 Iowa 230.

Under the *Oregon* code, a cause for divorce in favor of defendant is held to be a counterclaim and sufficiently "connected with the subject of the suit." *Dodd v. Dodd*, 14 Oregon 338.

4. See statutes cited in *Owen v. Owen*, 54 Ga. 527; *Jenness v. Jenness*, 24 Ind. 355; *Armstrong v. Armstrong*, 27 Ind. 186; *Glasscock v. Glasscock*, 94 Ind. 163; *Hoffman v. Hoffman*, 43

Mo. 547; *Ficke v. Ficke*, 62 Mo. 335; *Carter v. Carter*, 62 Ill. 439.

5. The cross-complaint must state facts sufficient to entitle the defendant to affirmative relief like a petition. It cannot be aided by any of the other pleadings. It is defective unless it alleges the marriage, residence of defendant, and a cause for divorce. *Coulthurst v. Coulthurst*, 58 Cal. 239.

Verification.—Where the petition or complaint is required to be verified the cross-petition must also be verified, otherwise it need not be. *Musselman v. Musselman*, 44 Ind. 106; *Clutton v. Clutton* (Mich. 1896), 66 N. W. Rep. 52; *Daly v. Wayne Circuit Judge*, 102 Mich. 392.

6. The defendant may plead recrimination without alleging that she is not a resident of the state or without other allegation of jurisdiction. *Leseuer v. Leseuer*, 31 Barb. (N. Y.) 330.

But see *contra*, *Coulthurst v. Coulthurst*, 58 Cal. 239.

7. Where the husband is a resident of the state and sues for divorce the wife may obtain a divorce on a cross-bill although she is not a resident of the state. *Sterl v. Sterl*, 2 Ill. App. 223; *Jenness v. Jenness*, 24 Ind. 355; *Ferry v. Ferry*, 9 Wash. 239; *Clutton v. Clutton* (Mich. 1896), 66 N. W. Rep. 52.

Denial.—The cross-petition should contain a general denial of the causes for divorce alleged in the petition, for if the defendant is guilty as alleged neither party will be entitled to a divorce.¹

Causes for Divorce.—Each cause for divorce should be alleged as in a petition, otherwise the bill will be defective.² The defendant may set up causes for divorce which accrued after the suit was commenced.³

Relief Obtainable.—In the cross-petition, or answer in the nature thereof, the defendant may seek any kind of relief concerning the marriage relation regardless of the relief prayed for in the petition. Thus in a suit for absolute divorce the cross-petition may be for a separation,⁴ or an absolute divorce,⁵ or alimony without divorce,⁶ or a settlement of property rights,⁷ or a decree annulling the marriage.⁸ In an action for a decree of separation the defendant is not confined to a prayer for the same relief, but may demand an absolute divorce.⁹ Or in an action to annul the marriage of the parties, they may assert the validity of the marriage and pray for an absolute divorce¹⁰ or for alimony without divorce.¹¹

At What Stage.—The answer and cross-bill may be joined in one pleading.¹² But where application is made before taking testimony, leave may be granted to file a cross-bill after the greater portion of the plaintiff's evidence has been taken.¹³

But see *contra*, *Valk v. Valk*, 18 R. I. 639.

Alimony.—A nonresident wife may recover alimony without divorce in the state where the husband resides. *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299; *Miller v. Miller*, 33 Fla. 453; *Keerl v. Keerl*, 34 Md. 21.

1. 5 Am. and Eng. Encyc. of Law 824; *Pease v. Pease*, 72 Wis. 136.

The pleading is both an answer and a cross-petition, as in *Harrison v. Harrison*, 46 N. J. Eq. 75.

2. *Clark v. Clark*, 5 Hun (N. Y.) 340; *Chestnut v. Chestnut*, 88 Ill. 548; *Moore v. Moore*, 16 N. J. Eq. 275.

3. *Martin v. Martin*, 33 W. Va. 695.

Facts Concerning the Property of the Parties or other facts necessary to entitle the wife to ancillary relief may be set out as in an original petition. *Mott v. Mott*, 82 Cal. 413. See also *Oliver v. Oliver*, 5 Ala. 75.

4. *Pease v. Pease*, 72 Wis. 136. The defendant may allege adultery as a cause for absolute divorce, or cruelty as cause for separation, as the statute enables the parties to settle all their controversies in one action. *Spahn v. Spahn*, 12 Abb. N. Cas. (N. Y. Su-

preme Ct.) 169. See also *Allen v. Allen*, Hempst. (U. S.) 58.

5. *Wuest v. Wuest*, 17 Nev. 217; *Shafer v. Shafer*, 10 Neb. 468.

6. *Mott v. Mott*, 82 Cal. 413; *Deweese v. Dewees*, 55 Miss. 315; *Butler v. Butler*, 38 N. J. Eq. 626.

In a suit for absolute divorce the wife may allege cruelty in a cross-petition and pray for alimony and maintenance and custody of the children although she does not ask for a divorce. *Gilpin v. Gilpin*, 12 Colo. 504.

7. *Mott v. Mott*, 82 Cal. 413.

8. *Wheeler v. Wheeler*, 76 Wis. 631; *Freeman v. Freeman* (Ky. 1890), 13 S. W. Rep. 246; *Jones v. Jones*, 71 Hun (N. Y.) 519.

9. *Harrison v. Harrison*, 46 N. J. Eq. 75; *Van Benthuyssen v. Van Benthuyssen*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 234; *Depass v. Winter*, 23 La. Ann. 422.

10. *Wadsworth v. Wadsworth*, 81 Cal. 182.

11. *Poole v. Wilber*, 95 Cal. 339.

12. *Johnson v. Johnson*, 50 Mich. 293. But see *contra*, *Allen v. Allen*, Hempst. (U. S.) 58.

13. *Van Voorhis v. Van Voorhis*, 94 Mich. 60.

Reply.—In order to raise an issue upon the charges in the cross-petition the plaintiff must deny the same in a pleading usually termed a reply.¹

Both Petitions True.—If the court finds that the allegations of both the petition and cross-petition are true the suit must be dismissed, as neither party is entitled to a decree.²

VI. DEMURRER—Causes for.—The sufficiency of a petition, answer, or cross-bill in a divorce suit may be tested by demurrer, as in other suits.³ If the petition does not allege sufficient facts to constitute a cause for divorce,⁴ or there is a misjoinder of causes for divorce or causes for divorce and other relief,⁵ or it appears on the face of the petition that the court has no jurisdiction⁶ or that the suit is barred by the statute of limitations,⁷ a demurrer will be sustained.

When Overruled.—If all the essential facts which constitute a cause for divorce have been alleged, or if sufficient facts may be reasonably inferred from those alleged, the demurrer will be overruled.⁸

Indefiniteness.—A petition for divorce may be vague and indefinite and yet state a cause for divorce. In such case the remedy is not by demurrer, but by a motion to make the petition more definite and certain.⁹

No Answer after Demurrer.—Where a demurrer to an answer is sustained, or where a demurrer to a petition is overruled and no answer is filed, a decree of divorce cannot be entered as on

1. *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311; *Ficke v. Ficke*, 62 Mo. 335.

In *Armstrong v. Armstrong*, 27 Ind. 186, this pleading is termed an "answer to the cross-petition."

Failure to Deny the Allegations of the cross-petition will not entitle the defendant to a decree by default without adequate and satisfactory proof. *Freeman v. Freeman* (Ky. 1890), 13 S. W. Rep. 246; *Sylvis v. Sylvis*, 11 Colo. 319; *Nichols v. Nichols*, 39 Mo. App. 291.

2. *Alexander v. Alexander*, 140 Ind. 555; *Ribet v. Ribet*, 39 Ala. 348; *Hoff v. Hoff*, 48 Mich. 281; *Gullett v. Gullett*, 25 Ind. 517; *Redington v. Redington*, 2 Colo. App. 8, and cases cited.

3. *Vance v. Vance*, 17 Me. 203; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 204; *Stone v. Stone* (N. J. Eq. 1888), 13 Atl. Rep. 245; *Burton v. Burton*, 58 Vt. 414; *Black v. Black*, 27 N. J. Eq. 664; *Reese v. Reese*, 23 Ala. 785. See petition and demurrer in *Steel v. Steel*, 104 N. Car. 631.

4. *Steel v. Steel*, 104 N. Car. 631; *Holyoke v. Holyoke*, 78 Me. 404.

5. *Fritz v. Fritz*, 23 Ind. 388; *Uhl v. Uhl*, 52 Cal. 250.

6. See *supra*, III. 2. *Allegation of Other Jurisdictional Facts.*

7. In some states the statute of limitations must be pleaded in the answer. *Rice v. Rice*, 13 Oregon 337; *Eggerth v. Eggerth*, 15 Oregon 626. And see generally the article LIMITATIONS, STATUTES OF.

8. *Huston v. Huston*, 63 Me. 184; *Holyoke v. Holyoke*, 78 Me. 404; *Murphy v. Murphy*, 95 Ind. 430; *Van Benthuyssen v. Van Benthuyssen* (Supreme Ct.), 2 N. Y. Supp. 238, 15 Civ. Pro. Rep. (N. Y.) 234; *Steel v. Steel*, 104 N. Car. 631.

A demurrer to a petition for divorce will be overruled if it states facts which entitle the plaintiff to separate maintenance. *Hooper v. Hooper*, 19 Mo. 355.

9. *Goodwin v. Goodwin*, 23 N. J. Eq. 210; *Marsh v. Marsh*, 16 N. J. Eq. 391; *Black v. Black*, 26 N. J. Eq. 431; *Brown v. Brown*, 138 Ind. 257; *Van Driele v. Van Driele*, 58 Mich. 273. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

confession or default without adequate proof.¹

VII. REPLY.—Where new matter is set up in the answer the defendant should file a reply as in other actions.² A statement by way of defense of facts which are merely inconsistent with those stated by the plaintiff is, in effect, a denial and not new matter requiring a replication.³

VIII. AMENDMENTS—Generally Allowable.—Whether the divorce suit is a proceeding in equity or a civil action under the code, the general concurrence of the authorities is that amendments may be allowed as in other suits or actions.⁴

Discretionary.—The allowance of amendments is generally within the discretion of the court and is to be exercised in aid of justice and in order that a trial of the divorce suit may be had on its merits.⁵ This discretionary power appears to be without limit except that the amendment shall not change the nature of the action.⁶

Extent of Amendments.—A petition for divorce cannot be amended to a petition for the annulment of marriage.⁷ But where the facts alleged state a cause for divorce, or for alimony without divorce, the prayer of the petition may be amended so as to ask

1. Rice v. Rice, 13 Oregon 337.

The cause for divorce must be established by competent testimony in all cases, and cannot be granted on the admissions of parties on demurrer. Rie v. Rie, 34 Ark. 37. And see Gray v. Gray, 143 N. Y. 358.

2. Leslie v. Leslie, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311; Ficke v. Ficke, 62 Mo. 335; Armstrong v. Armstrong, 27 Ind. 186; Sullivan v. Sullivan, 34 Ind. 368; Peck v. Peck, 44 Hun (N. Y.) 290. See generally the article REPLY.

Nunc pro Tunc.—Where the objection that no replication was filed is raised after judgment, the court may allow the replication filed *nunc pro tunc*. Daly v. Wayne Circuit Judge, 102 Mich. 392.

3. A petition for divorce on the ground of desertion alleged that plaintiff was compelled to leave defendant on account of certain misconduct. The answer and cross-petition alleged that plaintiff left the defendant without cause. The court held that the answer was, in effect, a denial and no reply was necessary. Sylvis v. Sylvis, 11 Colo. 331.

4. Melvin v. Melvin, 130 Pa. St. 6; Lee v. Lee, 3 Wash. 236; Miller v. Miller, 40 N. J. Eq. 475; Barrett v. Barrett, 37 N. J. Eq. 29; Walton v. Walton, 32 Barb. (N. Y.) 203; Wood v. Wood, 59 Ark. 441; Robertson v.

Robertson, 9 Daly (N. Y.) 44; Klein v. Klein, 11 Abb. Pr. N. S. (N. Y. Super. Ct.) 450; Gardner v. Gardner, 2 Gray (Mass.) 434. And see generally article AMENDMENTS, vol. 1, p. 458.

The provisions of the code relating to amendments are applicable to divorce suits. Robertson v. Robertson, 9 Daly (N. Y.) 44.

5. Harrington v. Harrington, 107 Mass. 329; Ford v. Ford, 104 Mass. 198; Musselman v. Musselman, 44 Ind. 106; Olleman v. Olleman (Ind. 1895), 42 N. E. Rep. 470.

Delay.—Leave to amend may be denied where the applicant is guilty of unreasonable delay in asking for such relief. Burr v. Burr, 2 Edw. Ch. (N. Y.) 448.

6. See article AMENDMENTS, vol. 1, pp. 547-567; Grove's Appeal, 37 Pa. St. 443.

A libel for divorce for adultery may be amended by alleging cruelty as a cause for separation. Anderson v. Anderson, 4 Me. 100.

Where, as in *New York*, the suit for an absolute divorce is different in many respects from an action for separation, a petition for absolute divorce cannot be amended so as to state a cause for separation. Robertson v. Robertson, 9 Daly (N. Y.) 52.

7. Schafberg v. Schafberg, 52 Mich. 429.

for an absolute divorce¹ or for a decree for alimony or separate maintenance.²

If the Suit Is Premature, the plaintiff will be allowed to file an amended petition alleging a residence for the required time in the state,³ or that the defendant is guilty of desertion for the statutory period.⁴

On Demurrer Sustained.—Where a demurrer to a pleading has been sustained, leave will be granted to file an amended petition as in other cases.⁵

The Prayer of the petition may be amended to ask for any different relief justified by the pleadings.⁶

The Application for Leave to amend should be made promptly on discovery of the defect, but it seems that an amendment will be allowed at any stage of the proceedings, as before answer,⁷ or after cause was at issue,⁸ or during the trial,⁹ or after the cause has been submitted.¹⁰

After Trial.—Even where the cause has been submitted to the Supreme Court, leave will be granted to amend the pleadings to conform to the evidence,¹¹ or such amendment will be regarded as made.¹² But such amendment will not be permitted if it would entitle the adverse party to introduce additional evidence and the decree is to be dismissed on other grounds.¹³

1. *Williams v. Williams*, 96 Ky. 397.

2. *Klemme v. Klemme*, 37 Ill. App. 54; *Hackney v. Hackney*, 9 Humph. (Tenn.) 450.

3. Where the plaintiff had not resided in the state for one year, as required by the statute, she will, after a residence of one year, be permitted to file an amended petition alleging the required residence. *Wood v. Wood*, 59 Ark. 441.

Such practice, while not erroneous, is not sanctioned. *Steele v. Steele*, 35 Conn. 48.

4. *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Butler v. Butler*, 4 Litt. (Ky.) 201; *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370; *Martin v. Martin*, 33 W. Va. 695.

5. *Walton v. Walton*, 32 Barb. (N. Y.) 203.

6. See *supra*, III. 9. *Prayer*.

7. *Freeman v. Freeman*, 39 Minn. 370.

8. Where evidence that is sufficient to prove acts of cruelty is discovered after commencement of the suit the wife will be allowed to amend although she was aware of the cruelty when inflicted. *Briggs v. Briggs*, 20 Mich. 34.

9. *Melvin v. Melvin*, 130 Pa. St. 6;

Lee v. Lee, 3 Wash. 236; *Armstrong v. Armstrong*, 27 Ind. 186.

10. After pleadings and proof are submitted to the court, leave will be granted to allow the wife to amend so as to recover alimony. *Miller v. Miller*, 40 N. J. Eq. 475.

If the parties resided in the state the court, on granting the decree, may permit the petition to be amended so as to show jurisdiction. *Barrett v. Barrett*, 37 N. J. Eq. 29.

11. *Heilbron v. Heilbron*, 158 Pa. St. 297.

12. A defective verification may be amended in the Supreme Court, though amendment is unnecessary if the defect has been waived. *Holcomb v. Holcomb*, 100 Mich. 421; *Harrison v. Harrison*, 94 Mich. 559.

Where a cause is reversed by the Supreme Court because the petition does not state a cause of action, leave will be granted to amend. *Jones v. Jones*, 62 N. H. 463.

An amendment will not be permitted which raises issues not tried in the lower court. *Bamford v. Bamford*, 4 Oregon 30.

See generally article AMENDMENTS, vol. 1, pp. 582, 583.

13. An allegation that defendant

IX. SUPPLEMENTAL PLEADINGS—Necessity for.—A cause for divorce which occurred after the suit was commenced cannot be shown, either directly or in recrimination, unless such cause has been alleged in a supplemental or amended pleading of some kind.¹

New Cause of Action.—But it is held that a new substantive cause of action upon which a judgment can be had without joining it with the original complaint cannot be set up by supplemental complaint.² The plaintiff, it is said, must dismiss his case and file a new petition,³ or he may bring a separate and independent suit on the new cause of action.⁴ But it seems that the matter is discretionary with the court, and the supplemental pleadings are generally permitted in order that the rights of the parties may be determined in one proceeding.⁵

turned the plaintiff out of doors on a certain date may be amended after trial to allege the defendant's refusal to permit the plaintiff to return and cohabit with him. *Powers's Appeal*, 120 Pa. St. 320.

1. *Klemme v. Klemme*, 37 Ill. App. 54; *Burdell v. Burdell*, 2 Barb. (N. Y.) 473; *Feigley v. Feigley*, 7 Md. 537. And see generally article SUPPLEMENTAL PLEADINGS.

No decree could be based on such proof, because it is not the cause for divorce alleged or complained of. *Halsted v. Halsted*, 7 Misc. Rep. (N. Y. C. Pl.) 23, 5 Misc. Rep. (N. Y.) 416; *Ferrier v. Ferrier*, 4 Edw. Ch. (N. Y.) 296.

Where cruelty or adultery occurred after the commencement of the suit, or where the period of desertion was not complete at the time the action was commenced, the plaintiff may file a supplemental petition setting up the new cause for divorce. *Steele v. Steele*, 35 Conn. 48; *Cornwall v. Cornwall*, 30 Hun (N. Y.) 573; *Butler v. Butler*, 4 Litt. (Ky.) 201; *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370; *Scoland v. Scoland*, 4 Wash. 118; *Davis v. Davis*, 19 Ill. 334; *Adams v. Adams*, 20 N. H. 299.

General Code Provision.—It would seem that the plaintiff would have this right under a general provision of the code permitting a supplemental pleading "alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made." *Blanc v. Blanc*, 67 Hun (N. Y.) 384. See *contra*, *Neiberg v. Neiberg*, 8 Misc. Rep. (N. Y. Super. Ct.) 97.

2. *Halsted v. Halsted*, 5 Misc. Rep.

(N. Y. C. Pl.) 416, 7 Misc. Rep. (N. Y.) 23; *Lutz v. Lutz*, 52 N. J. Eq. 241. 3. *Milner v. Milner*, 2 Edw. Ch. (N. Y.) 114.

If the action is premature the defect cannot be cured by filing a supplemental petition after the cause of action accrued. *Embree v. Embree*, 53 Ill. 394.

In *Smith v. Smith*, 22 Kan. 699, the court refused to allow a supplemental petition to be filed alleging a desertion which was not complete when the suit was commenced. "We do not understand," said the court, "that a party may commence suit before a cause of action accrues, and then, after it accrues, as a matter of right, file a supplemental petition alleging the facts showing this. * * * We do not mean that a court may not allow this, or that it may never be done. But it is not a matter of right. The circumstances must be such as to excuse the premature commencement of the action, and to show that the interests of justice require the change, rather than the dismissal, of the present and the commencement of a new action."

4. *Cordier v. Cordier*, 26 How. Pr. (N. Y. Supreme Ct.) 187.

5. See article AMENDMENTS, vol. 1, p. 576.

In a suit for divorce for cruelty, a supplemental petition may be filed alleging acts of cruelty occurring after the commencement of the action, not as a new cause of action, but in aid of the original petition. *Cornwall v. Cornwall*, 30 Hun (N. Y.) 573.

Where Condonation is Interposed as a defense of a suit for divorce on the ground of adultery, the plaintiff will be allowed to file an amended petition

By Defendant.—It is well established by the adjudications that the defendant may in a supplemental answer set up any cause for divorce which occurred or accrued after the action was begun, as in such case the conduct of the plaintiff may amount to recrimination.¹

X. PROCESS AND NOTICE—1. Subpœna or Summons.—The subpœna or summons in a divorce suit must conform to the rules of the court and the general statutes of the state and must be served as in other civil actions.²

charging the defendant with acts of adultery subsequent to the alleged condonation and since the commencement of the suit. If the adultery had been committed before the suit, the offense will be incorporated in the petition by amendment, but if after, it can be introduced by a supplementary petition. *Lutz v. Lutz*, 52 N. J. Eq. 241.

Right to Injunction or Attachment.—A supplementary bill may be filed setting up any new facts which have occurred since the commencement of the action which would entitle the wife to an injunction or attachment. See *Peck v. Peck*, 66 Mich. 586.

The Granting or Refusing the Privilege of filing a supplemental pleading is within the discretionary power of the court, and may be refused if the right to make the application has been waived or the application is made at too late a stage of the action. *Scoland v. Scoland*, 4 Wash. 118.

1. *Smith v. Smith*, 4 Paige (N. Y.) 432; *Strong v. Strong*, 3 Robt. (N. Y.) 669, 28 How. Pr. (N. Y.) 432; *Fuller v. Fuller*, 41 N. J. Eq. 198; *Brisco v. Brisco*, 2 Add. Ec. 259.

Under section 544 of the *New York Code Civ. Pro.* a defendant in a suit for divorce for adultery may plead by supplemental answer acts of adultery committed by plaintiff since the suit was commenced. *Blanc v. Blanc*, 67 Hun (N. Y.) 384.

If defendant becomes entitled to a divorce for desertion, she may plead such desertion although the period of desertion was not complete when the suit was begun. *Martin v. Martin*, 33 W. Va. 695.

In New York it is held that the defendant may set up any cause for divorce committed by the plaintiff since the action was commenced, although the plaintiff cannot file a supplemental petition under similar circumstances, the distinction being that

"a plaintiff may discontinue and sue over again, while a defendant cannot." *Halsted v. Halsted*, 5 Misc. Rep. (N. Y. C. Pl.) 416; *Day v. Day*, N. Y. L. J. Sept. 7, 1893.

Supplemental Petition for Alimony.—After the issues were made up the wife was permitted to file a supplemental petition for alimony and a distribution of property, setting up the value and description of the real and personal property owned by each party and the incumbrances on the same. On appeal the Supreme Court sustained this order, saying: "It was eminently fit and proper, although not absolutely necessary, that such a pleading should be filed, in order that the issue might be made more specific than in the original pleading. The course pursued is not only free from objection, but it is in accordance with the better practice, and may be followed with advantage in other cases." *Johnson v. Johnson* (Colo. 1895), 43 Pac. Rep. 130.

2. *Temple v. Temple*, 13 Lea (Tenn.) 160; *Brown v. Brown*, 59 Ill. 315; *Brown v. Brown*, 15 Mass. 389; *Rochester v. Rochester*, 1 Oregon 307; *Wanamaker v. Wanamaker*, 10 Phila. (Pa.) 466; *Phelps v. Phelps*, 7 Paige (N. Y.) 150.

The Affidavit of Service of summons should show the place where the defendant was served. *Dunn v. Dunn*, 4 Paige (N. Y.) 425; *Shetzler v. Shetzler*, 2 Edw. Ch. (N. Y.) 584. And should be made part of the record. *Townsend v. Townsend*, 21 Ill. 540.

An affidavit of a private person that he served the summons is sufficient, although sworn to before the plaintiff attorney, and does not otherwise comply with the rules of the court. *Young v. Young*, 18 Minn. 90.

The Return of an Officer may be contradicted, before decree, by showing that the person with whom a copy of the summons was left was not a mem-

Following Chancery Practice.—In those states where the suit is in equity the chancery practice must be followed.¹

In the Code States the divorce suit is an action under the code and the summons must conform to the general provisions of the code.²

The Nature of the Relief Demanded should be indorsed on the summons if required by statute, but the failure to do so is not prejudicial error and objection must be made before a default is entered.³

Defendant in Person.—The summons should be served upon the defendant in person, and where the court is empowered to direct the manner of service this is usually required.⁴

ber of defendant's family. *Brown v. Brown*, 59 Ill. 315.

In Rhode Island the court is authorized by statute to prescribe, by general rule or otherwise, the notice to be given, within or without the state, and may issue such processes as may be necessary to carry into effect all powers conferred upon them in relation to the same.

Who may Serve.—Where the statute directs the method and time of serving summons in divorce suits, but does not authorize any person to serve the same, the presumption is that it must be served by the same officer as other writs and summons. *Spafford v. Spafford*, 16 Vt. 511.

Under such statutes a constable or a disinterested person cannot serve the summons unless by a special order of the court. *Brown v. Brown*, 15 Mass. 389; *Leavitt v. Leavitt*, 135 Mass. 191.

Time of Service.—Where the summons is not served ten days before the term of court, as required by law, the failure to do so is a ground for continuance, but not a ground for quashing the writ. *Bratton v. Bratton*, 79 Ind. 588.

Service in Another County.—A subpœna in divorce may be served by the sheriff of the county in which the defendant resides, and no special authorization by the court is necessary. *Fillman's Appeal*, 99 Pa. St. 286.

Where the defendant resides in another county, a service of summons is not sufficient; there must be a publication of summons also. *Harter v. Harter*, 5 Ohio 319.

Where the summons is served in another county the service should be made thirty days before the commencement of the term, but under a general statute relating to summonses in all civil actions a decree may be en-

tered at the term if summons was served ten days before the term, and a decree of divorce so rendered will not be reversed. *Rochester v. Rochester*, 1 Oregon 307.

Under a statute permitting a decree to be rendered by the court of the county "where the parties, or one of them, resides," a summons may be served on the wife in another county. *Brown v. Brown*, 10 Neb. 349.

1. *Welch v. Welch*, 16 Ark. 527.

A common provision of the divorce statutes is that like process and proceeding shall be had in divorce cases as are had in "other cases in chancery." See statutes in *Alabama, Arkansas, Florida, Illinois, Maryland, Mississippi, Montana, Tennessee, Virginia, West Virginia*.

2. *Brown v. Brown*, 10 Neb. 349; *Rudolph v. Rudolph*, 19 Civ. Pro. Rep. (Buffalo Super. Ct.) 424; *Rochester v. Rochester*, 1 Oregon 307.

A common provision of the divorce statute in the code states is that the same process and proceedings shall be had "as in other civil suits or actions." See statutes in *Arizona, Georgia, Iowa, Kansas, Missouri, Nebraska, North Carolina, Texas, Utah, Washington, Wisconsin, Wyoming*.

3. In *Rudolph v. Rudolph*, 19 Civ. Pro. Rep. (Buffalo Super. Ct.) 424, 12 N. Y. Supp. 81, a decree of separation was rendered on default where the summons was indorsed "action for a divorce." This was held to be error without prejudice.

Where the summons is properly indorsed, but the copy served is not, the latter may be amended. *Sears v. Sears*, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 432.

4. *Labotiere v. Labotiere*, 8 Mass. 383; *Smith v. Smith*, 9 Mass. 422; *Randall v. Randall*, 7 Mass. 502.

Where the statute is silent as to personal service on a defendant who resides in another state, the court may, in its discretion, refuse a divorce on service by publication where the circumstances are such as to arouse a suspicion that the plaintiff has some object in concealing notice from the defendant.¹

2. Waiver of Summons.—The defendant may waive the service of summons or indorse an acceptance of service on the summons.²

3. Appearance.—A general appearance in the divorce suit is a waiver of any defects in the summons or its service.³

Reading to Defendant.—Where the statute requires a copy of the summons to be delivered to defendant or left at his usual place of abode, merely reading the same to defendant is not sufficient. *Welch v. Welch*, 16 Ark. 527.

Leaving Summons at Residence.—It is sufficient to leave the summons at the usual place of abode with a member of the family, as provided by statute in civil cases. *Scanlan v. Scanlan*, 41 Ill. App. 449.

Where the Defendant Is Insane the service must be personal and also upon the committee, if any has been appointed. *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194.

1. In *Clark v. Clark*, 48 Mo. App. 157, the plaintiff separated from his wife in Indiana, and sued for divorce in a different city, in Missouri, from that of his usual place of residence, although in the same county. Notice was given by publication when personal service would have been less expensive, and no explanation for such proceeding was given. The court refused a divorce, admitting, however, that the husband had a right under the statute to proceed in this manner. "Yet that the plaintiff adopted this means of notice rather than serve the wife with a copy of the petition tends naturally to impress the court that the plaintiff preferred a quiet *ex parte* hearing, rather than a full disclosure, as might have resulted if the wife was in fact advised of the pending suit."

2. *Rouse v. Rouse*, 47 Iowa 422; *Willman v. Willman*, 57 Ind. 500.

Where the defendant is a resident of another state and admits service in such state by indorsing an admission of the service of summons, and waiving all other service of summons and complaint, the court will not acquire jurisdiction unless an order of publication was first obtained. *Weatherbee v. Weatherbee*, 20 Wis. 499, *dis-*

guished in *Keeler v. Keeler*, 24 Wis. 522.

Where the statute requires the service of a copy of the petition with the summons an acknowledgment of the service of a copy of the summons alone is not sufficient. *Stone v. Stone*, 25 N. J. Eq. 445.

3. *Standridge v. Standridge*, 31 Ga. 223; *Johnson v. Johnson*, 12 Bush (Ky.) 485; *White v. White*, 60 N. H. 210; *Jones v. Jones*, 108 N. Y. 415; *Yorke v. Yorke*, 3 N. Dak. 343. And see generally article APPEARANCES, vol. 2, p. 588.

Stipulation.—In *Keeler v. Keeler*, 24 Wis. 522, no service or notice of any kind was proved, but the parties stipulated that the cause should be tried at the next term of court, and waived any further notice of trial. The defendant was a nonresident, and made no further appearance. It was held that the stipulation constituted an appearance in the suit, and the judgment would not be reversed because no affidavit was filed proving defendant's signature.

After service by publication in a suit in *Ohio*, the wife, a resident of New York, admitted service of a notice to take depositions in New York, and stipulated that the depositions might be taken without further notice to her. It was held that this was not an appearance. *House's Estate*, 20 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 130.

Appearing at Taking of Depositions without counsel, and without interrogating the witness or otherwise taking part in the proceeding, does not constitute an appearance in a suit for divorce. *O'Dea v. O'Dea*, 101 N. Y. 23.

Filing Pleadings.—In *Jones v. Jones*, 108 N. Y. 415, the husband commenced a suit for divorce in New York. The wife removed to Texas and commenced a suit in that state, and served the husband with summons by delivering a

4. Constructive Service—*a. IN GENERAL.*—Service by publication or other form of constructive service is generally authorized by special provisions of the statute relating to divorce. But in the absence of such provisions the general statute providing for constructive service in all civil actions will include suits for divorce.¹ In some states the service may be the same as in other chancery cases.² Generally the divorce statutes contain special provisions relating to the method of giving notice to a nonresident defendant.³

Decree on Substituted Service.—Under this form of service the decree of divorce is in the nature of a decree *in rem*,⁴ and unless the provisions of the statute are complied with the court will not acquire jurisdiction and the decree will be void.⁵ If the statute providing for substituted service has been complied with, the decree of divorce is valid and effective in all the states⁶

copy to him in New York. The husband filed an answer in the suit in Texas (see *Jones v. Jones*, 60 Tex. 451), pleading in abatement that he was not a resident of the state, and that the Supreme Court of the city and county of New York had jurisdiction over his person and the subject-matter of the suit. He also filed general and special exceptions and a general denial. It was held that the filing of such pleadings constituted a general appearance.

Both Parties Nonresidents.—The voluntary appearance of both parties who are nonresidents is invalid, as the court does not thereby derive jurisdiction over the subject-matter. *People v. Dawell*, 25 Mich. 247.

1. *Hare v. Hare*, 10 Tex. 355.

2. *Lawrence v. Lawrence*, 73 Ill. 577; *McJunkin v. McJunkin*, 3 Ind. 30; *Smith v. Smith*, 20 Mo. 166; *Temple v. Temple*, 13 Lea (Tenn.) 160.

3. In *Colorado*, *Connecticut*, *Delaware*, *Massachusetts*, *Nevada*, *New Hampshire*, *New Jersey*, *New Mexico*, and *Vermont* the court may make such order as it may determine to be necessary after a showing has been made by the plaintiff or a disinterested person. These statutes require an examination of such showing to discover if possible the address of defendant and to give such party actual notice of the proceedings if possible.

In many of the states service by publication is authorized by the divorce statute in all cases where it is permitted in other cases in chancery. This is so in *Alabama*, *Arkansas*, *Florida*, *Georgia*, *Illinois*, *Maryland*,

Mississippi, *Montana*, *Tennessee*, *Virginia*, and *West Virginia*.

In *Arizona*, *Iowa*, *Kansas*, *Minnesota*, *Missouri*, *Nebraska*, *North Carolina*, *Texas*, *Utah*, *Washington*, *Wisconsin*, and *Wyoming* this service is permitted as in other civil cases or suits.

4. *Roth v. Roth*, 104 Ill. 35; *McGill v. Deming*, 44 Ohio St. 645; *Bunnell v. Bunnell*, 25 Fed. Rep. 214; *Gould v. Crow*, 57 Mo. 200; *Ellison v. Martin*, 53 Mo. 575; *Hansford v. Hansford*, 34 Mo. App. 262; *In re Newman's Estate*, 75 Cal. 213; *Thoms v. King*, 95 Tenn. 60; *Dillon v. Starin*, 44 Neb. 881; *Kline v. Kline*, 57 Iowa 386; *Niboyet v. Niboyet*, 4 Prob. Div. 12.

5. *California*.—*McBlain v. McBlain*, 77 Cal. 507.

Colorado.—*Israel v. Arthur*, 7 Colo. 5; *Clayton v. Clayton*, 4 Colo. 410.

Dakota.—*Beach v. Beach*, 6 Dakota 371; *Yorke v. Yorke*, 3 N. Dak. 343.

Georgia.—*Parish v. Parish*, 32 Ga. 653.

Illinois.—*Tucker v. People*, 122 Ill. 583; *Werner v. Werner*, 30 Ill. App. 159.

Iowa.—*Smith v. Smith*, 4 Greene (Iowa) 266; *Pinkney v. Pinkney*, 4 Greene (Iowa) 324.

Minnesota.—*Morey v. Morey*, 27 Minn. 265.

Nebraska.—*Atkins v. Atkins*, 9 Neb. 191.

New York.—*Wortman v. Wortman*, 17 Abb. Pr. (N. Y. Supreme Ct.) 66; *Burton v. Burton*, 45 Hun (N. Y.) 68.

Wisconsin.—*Keeler v. Keeler*, 24 Wis. 522.

United States.—*Cheely v. Clayton*, 110 U. S. 701.

6. *Harding v. Alden*, 9 Me. 140;

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except *New York, North Carolina, and South Carolina*.¹

Holding Summons until Return Day.—Some statutes require the sheriff to hold the summons until the return day although an affidavit has been filed that defendant is a nonresident and the clerk has caused a notice to be published, and it is held that such notice is void if the sheriff makes a return *non inventus* before the return day.²

b. PERSONAL SERVICE IN ANOTHER STATE OR COUNTRY.—In all cases where the defendant is a nonresident and service by publication is proper, a copy of the summons and petition should be served on the defendant in another state or foreign country if defendant's address is known.³

Concealment by Plaintiff.—Although the plaintiff has complied with the requirements of the statute, by publishing the summons or notice of the proceedings, the court may refuse to grant a divorce if the circumstances disclosed at the hearing are such as to arouse a suspicion that the plaintiff knows the defendant's address and has concealed all notice of the proceedings.⁴

Ditson v. Ditson, 4 R. I. 87; *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Wright v. Wright*, 24 Mich. 180; *Roe v. Roe*, 52 Kan. 724; *Van Orsdal v. Van Orsdal*, 67 Iowa 35; *Doerr v. Forsythe*, 50 Ohio St. 726; *Smith v. Smith*, 43 La. Ann. 1140; *Loker v. Gerald*, 157 Mass. 42.

1. *People v. Baker*, 76 N. Y. 78; *Matter of Morrisson*, 52 Hun (N. Y.) 102; *Cross v. Cross*, 108 N. Y. 628; *De Meli v. De Meli*, 120 N. Y. 485; *Van Cleaf v. Burns*, 118 N. Y. 549; *Williams v. Williams*, 130 N. Y. 193; *Harris v. Harris*, 115 N. Car. 587; *McCreery v. Davis*, 44 S. Car. 195.

2. The Rev. Stat. Colo., c. 13, § 8, command the "usual exertion on the part of the sheriff to serve the summons," notwithstanding the proceedings by publication, and a notice by publication is void if a return is made before the return day of summons. *Clayton v. Clayton*, 4 Colo. 410; *Israel v. Arthur*, 7 Colo. 5; *Cheely v. Clayton*, 110 U. S. 701. See same construction in *Soule v. Hough*, 45 Mich. 418.

In *Palmer v. Cowdrey*, 2 Colo. 1, this statute was construed as follows: "The law intends that service of the summons shall be made on the defendant, if he can be found within the jurisdiction during the life of the writ. If the defendant is not in the county at the time the summons is placed in the hands of the officer, he may come into the county before the return day, and

if notice by publication has been given it is nevertheless the duty of the officer to serve the summons if he can find the defendant in his bailiwick. * * * Whether the defendant came into the county after the return and during the life of the writ we do not know, nor can we be informed, except by the return of the proper officer. By the return as it stands in the record it does not appear that service could not have been made during the life of the writ, and the court had no authority to proceed upon notice by publication without such evidence."

3. Where such notice is given, the decree cannot be set aside for want of actual notice. Such notice will also remove any suspicion that the decree was obtained by fraud. In *Doughty v. Doughty*, 28 N. J. Eq. 581, the court, by way of dictum, said: "A judgment of divorce, proceeding from a jurisdiction founded on domicil, would not contravene essential rules of natural justice if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending may add nothing to the judicial right to take cognizance over the cause, but nevertheless it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction."

4. *Clark v. Clark*, 48 Mo. App. 157. If it appears after decree that the

Personal Notice in Addition to Publication.—Although the summons or notice has been published, personal notice may be given to the nonresident defendant. The personal notice is not an abandonment of the notice by publication.¹

Personal Service without Publication.—Personal service out of the state is a form of constructive service, and cannot be resorted to without publication unless authorized by the statutes.²

Order of Court.—The statute providing for personal service in another state or country requires a showing that the defendant is a nonresident and an order of court for publication or personal service in lieu of such publication, and the service is held to be void where such order was not first obtained.³

plaintiff knew the defendant's address and concealed all notice of the proceedings from the defendant, the decree will be set aside for fraud. *Whitcomb v. Whitcomb*, 46 Iowa 437; *Everett v. Everett*, 60 Wis. 200; *Caswell v. Caswell*, 120 Ill. 377; *Crouch v. Crouch*, 30 Wis. 667; *Britton v. Britton*, 45 N. J. Eq. 88; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388.

1. In *Burnes v. Burnes*, 61 Mo. App. 612, the defendant contended that the plaintiff abandoned the service by publication by substituting personal notice, and that the latter superseded the former. The court said: "Thus to supplement the constructive service of notice by publication with that of actual notice would seem to be commendable rather than reprehensible; especially so in a case of this kind (*Clark v. Clark*, 48 Mo. App. 157), and ought not to have the effect to invalidate or supersede the first service. *Dresser v. Wood*, 15 Kan. 344."

2. *Burton v. Burton*, 45 Hun (N. Y.) 68.

Personal service out of the state is not authorized by a statute directing the subpoena to be "served personally on the said party wherever found." *Ralston's App.* 93 Pa. St. 133.

Where the defendant is a nonresident, personal service in another state will not be sufficient to give the court jurisdiction over the subject-matter, *i.e.*, the status of the parties, according to the peculiar doctrines announced in *New York*. See *Williams v. Williams*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 297, affirmed in 130 N. Y. 193, and cases cited. Such notice is sufficient if defendant goes to the state and enters a general appearance in the suit. *Jones v. Jones*, 108 N. Y. 415.

Under the statutes of *Pennsylvania* personal service may be made upon a defendant who is a resident in a foreign country. *Green v. Green*, 13 Pa. Cō. Ct. Rep. 671.

Where an Englishman domiciled in England is served there with a citation to appear in a divorce suit in *Pennsylvania*, but does not enter an appearance, the divorce so obtained is void in England. *Green v. Green* (1893), Prob. 89.

Under a statute providing for personal service in cases where the defendant is a nonresident, a summons may be served in Mexico by any authorized person. *Trevino v. Trevino*, 54 Tex. 261.

3. *McBlain v. McBlain*, 77 Cal. 507. See also dictum in *Keeler v. Keeler*, 24 Wis. 522.

The Statute Is Remedial, and should receive a liberal interpretation, and the decree rendered on such service is to be sustained by the usual presumptions in favor of the regularity of the proceedings. The object of the statute, it is said, "was to provide for an easier and less expensive method of effecting service on nonresidents than by publication, and at the same time to make it certain that the defendant has full notice of the suit. To carry out these objects we must give the statute a liberal construction, disregard technicalities, and supply by intentment what the law, in other cases, would presume had been done. The defendant was a nonresident, and this authorized the service. The application for the notice will be presumed when it has issued, and especially when it has been asked in the petition. It is also a fair presumption that the party making the service is competent and disin-

c. PROOF THAT DEFENDANT IS A NONRESIDENT—*Affidavit*.—Where the defendant is a nonresident, a showing of such fact must be made by affidavit or otherwise before a valid order for publication can be made or a valid notice published.¹ The affidavit is jurisdictional and must conform to the requirements of the statute.²

Rule as to Sufficiency.—The following rule concerning the sufficiency of the affidavit in other cases is held applicable to suits for divorce: "If there is a total want of evidence upon a vital point in the affidavit the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the

interested until the contrary is proved, and the signature and seal of the officer to the jurat, as made in the present case, is as full and complete a certificate as is required by the statute." *Jones v. Jones*, 60 Tex. 451.

1. *Atkins v. Atkins*, 9 Neb. 191; *Morton v. Morton*, 16 Colo. 358; *Calvert v. Calvert*, 15 Colo. 390; *Yorke v. Yorke*, 3 N. Dak. 343; *Beach v. Beach*, 6 Dakota 371; *Morrison v. Morrison*, 64 Mich. 53; *Burnes v. Burnes*, 61 Mo. App. 612.

Allegation in Petition.—Under some statutes an allegation in the petition that defendant is a nonresident is sufficient. *Phelps v. Phelps*, 7 Paige (N. Y.) 150; *Bland v. Bland*, L. R. 3 P. & D. 233; *Anonymous*, 5 Mass. 197; *Mace v. Mace*, 7 Mass. 212; *Choate v. Choate*, 3 Mass. 391.

Attorney's Affidavit.—The affidavit may be made by plaintiff's attorney. *O'Connell v. O'Connell*, 10 Neb. 390; *Morrison v. Morrison*, 64 Mich. 53.

But such practice is objectionable, as the plaintiff may not disclose all the facts to his attorney. *Morton v. Morton*, 16 Colo. 358.

Some reason should be stated why the affidavit is not made by the plaintiff. *Yorke v. Yorke*, 3 N. Dak. 343.

In New York plaintiff's affidavit is not sufficient. There must be other proof. *Hall v. Hall* (Supreme Ct.), 10 N. Y. Supp. 223.

The Returns of the Sheriffs of two counties, showing that defendant could not be found, is not sufficient proof of nonresidence. Such fact should be made to appear of record by an affidavit. *Godfrey v. Godfrey*, 27 Ga. 466.

Concealment within the State.—Service by publication may be resorted to, under some statutes, if defendant con-

ceals himself within the state. *Morrison v. Morrison*, 64 Mich. 53.

2. Showing Due Diligence.—Where the statute provides that "when the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in a like manner appears that a cause of action exists against the defendant, * * * such court or judge may grant an order that the service be made by the publication of a summons," the facts showing due diligence must be stated in the affidavit. *Beach v. Beach*, 6 Dakota 371; *Yorke v. Yorke*, 3 N. Dak. 343; *Wortman v. Wortman*, 17 Abb. Pr. (N. Y. Supreme Ct.) 66.

Insufficient Affidavit.—In *Atkins v. Atkins*, 9 Neb. 191, the affidavit was as follows: "Henry Atkins, being first duly sworn, on oath says that he is the plaintiff in the above entitled action; that service of summons cannot be made within this state on the defendant, Rebecca Atkins, on whom service by publication is desired, and that this cause is one mentioned in section 77 of title V. of the Revised Statutes of Nebraska as amended." It was held that this affidavit was insufficient, as it did not state that defendant was a nonresident and did not state the nature of the action, the section referred to not relating to divorce. *Followed in Holmes v. Holmes*, 15 Neb. 615.

In Florida the service is void where the affidavit of nonresidence does not state "the belief of affiant as to the age of defendant being over or under twenty-one years," or that such age is unknown, as required by the statute. *Shrader v. Shrader*, 36 Fla. 502.

proceedings are merely voidable."¹

Statement of Cause of Action.—Where the affidavit is to be filed with the clerk and he issues the order for publication, or the affidavit is filed as a preliminary step before publishing the notice, it need not state a cause of action or state particularly the causes for divorce alleged in the petition, but it will be sufficient if facts are stated which show the nature of the action and the relief demanded, and that the defendant is a nonresident.²

d. ORDER FOR PUBLICATION.—The order for publication must be granted by the court upon an affidavit or other showing required by the statute, as in other proceedings *in rem*.³

Publication without Order.—In some states the plaintiff may proceed to publish notice of the proceedings upon filing an affidavit that defendant is a nonresident, without obtaining an order for publication.⁴

The Order must Comply with the Statute as to fixing the time when the defendant must appear or plead, and as to the length of time the notice shall be published, or the service is void.⁵

1. *Atkins v. Atkins*, 9 Neb. 191; *Shrader v. Shrader*, 36 Fla. 502.

Where the statute requires the affidavit of plaintiff to state that defendant is a nonresident, the county in which defendant resides, and the nearest post office, the omission to state the name of the nearest post office renders the decree erroneous but not void. *Carr v. Carr*, 92 Ky. 552.

Information and Belief.—An affidavit made by complainant's solicitor, showing a search and inquiry for defendant, and a failure to find or learn of the defendant's residence, and stating that to the best of affiant's knowledge and belief the defendant was a resident of the state, is sufficient without a positive averment that defendant was a resident of the state and concealed himself therein. *Morrison v. Morrison*, 64 Mich. 53.

An affidavit that the defendant is a nonresident is not insufficient because the deponent testifies to mere information and belief, not even giving the sources of his information. *Pettiford v. Zoellner*, 45 Mich. 358.

2. *Calvert v. Calvert*, 15 Colo. 390. See defective affidavit in *Shrader v. Shrader*, 36 Fla. 502.

Causes for Divorce.—It is not necessary to state the causes for divorce, and the affiant may state or omit the same at his option. *Shedenhelm v. Shedenhelm*, 21 Neb. 387.

The Affidavit need Not State the Res-

idence of the Plaintiff, or other facts showing the jurisdiction of the court, as such facts appear in the petition. "The affidavit must contain sufficient facts to show that the case is one in which service may be made by publication, and that service of summons cannot be made within this state on the defendant to be served by publication." *O'Connell v. O'Connell*, 10 Neb. 390.

3. See *supra*, X. 4. c. *Proof that Defendant Is a Nonresident*.

4. See *Atkins v. Atkins*, 9 Neb. 191; *Calvert v. Calvert*, 15 Colo. 390.

5. *Morey v. Morey*, 27 Minn. 265; *Shrader v. Shrader*, 36 Fla. 502; *Freeman v. Freeman*, 1 Mich. 480.

Time of Publication.—In *Burnes v. Burnes*, 61 Mo. App. 612, the order was published once a week for four successive weeks, the fourth insertion being sixteen days before the term of court. This was held valid although the order directed the notice to be published thirty days before the term. The court said: "The order of publication, after reciting everything the statute required, contained a clause to the effect that the last insertion of said publication, in the newspaper therein designated, was to be 'at least thirty days before the first day of the said next December term of the court.' This was mere surplusage—not being required by the statute, it did not vitiate the order of publication, since it

e. NOTICE OR PUBLICATION OF SUMMONS.—The published notice or order must comply with the requirements of the statute and must state the causes for which the divorce is sought and the relief prayed for,¹ and the time when the defendant is required to answer.² The notice must be published in a newspaper of general circulation³ for the required length of time.⁴

f. MAILING COPY OF SUMMONS AND PETITION.—Where the statute requires a copy of the summons and petition to be mailed to the defendant unless it appears to the court that defendant's address is unknown and cannot be ascertained with reasonable diligence, the record must show either that the copy of the summons and petition was mailed,⁵ or a showing must be made, at some time before a decree is granted, that such address cannot be ascertained.⁶ If the residence of the defendant was known to plaintiff and he avers that he cannot ascertain it,⁷ or if the plaintiff stated the address in the petition and no notice was mailed to the defendant,⁸ the decree is void and will be set aside⁹ or will be declared void in a collateral attack in another state.¹⁰

g. PROOF OF CONSTRUCTIVE SERVICE—Record must Contain.—Where the defendant is a nonresident the record should contain the proof that the notice was duly published for the required time and that the statute was complied with in all respects.¹¹

was otherwise valid. * * * There was no possible chance for the defendant to be deceived or misled in the matter."

1. *Shedenhelm v. Shedenhelm*, 21 Neb. 387.

2. Under a statute requiring notice to the absent defendant to appear, plead, answer, or demur at a certain day therein to be named, "not less than three nor more than six months from the date of such order," a notice fixing a date within two months is void, and a decree rendered on such notice is a nullity. *Morey v. Morey*, 27 Minn. 265.

3. *Everett v. Everett*, 60 Wis. 200; *Hemphill v. Hemphill*, 38 Kan. 220; *Adams v. Adams*, 51 N. H. 388.

4. *Tucker v. People*, 122 Ill. 583. An order to publish three weeks successively is complied with by the publication of three notices in three successive weeks in a biweekly newspaper, two notices in the Saturday issues and one notice in the Wednesday issue. *Bachelor v. Bachelor*, 1 Mass. 256.

Where the statute requires a publication of the order for four successive weeks, once a week, a fifth insertion will not impair the validity of a publication otherwise valid. *Burnes v. Burnes*, 61 Mo. App. 612.

5. *Werner v. Werner*, 30 Ill. App. 159; *Morton v. Morton*, 16 Colo. 358; *Lewis v. Lewis*, 15 Kan. 181.

6. *Ensign v. Ensign*, 45 Kan. 612; *Larimer v. Knoyle*, 43 Kan. 338; *Hemphill v. Hemphill*, 38 Kan. 220.

The mailing of copies of the petition and notice to defendant is a part of the constructive service and must be proved as a publication of the notice. But the affidavit that defendant's address is unknown and cannot be ascertained is not a part of the constructive service. *Larimer v. Knoyle*, 43 Kan. 338; *Ensign v. Ensign*, 45 Kan. 612.

7. *Werner v. Werner*, 30 Ill. App. 160; *Spinney v. Spinney*, 87 Me. 484.

8. *Morton v. Morton*, 16 Colo. 358; *Stanton v. Crosby*, 9 Hun (N. Y.) 370.

9. *Morton v. Morton*, 16 Colo. 358; *Spinney v. Spinney*, 87 Me. 484; *Hemphill v. Hemphill*, 38 Kan. 220. In *Larimer v. Knoyle*, 43 Kan. 338, the petition to set aside a default on such service was held to be insufficient.

10. *Werner v. Werner*, 30 Ill. App. 160; *Stanton v. Crosby*, 9 Hun (N. Y.) 370.

11. Under a statute requiring the notice to be published for four successive weeks and more than fifteen days be-

Amendment.—The affidavit of service by publication may be amended after decree so as to conform to the facts and to show a valid service.¹ An amendment of the affidavit without notice to defendant will not cure a defect in the proof of constructive service.²

If the Defendant Enters a Special Appearance and objects to the constructive service, the court, in sustaining the objection, may continue the case for a valid service,³ and is not bound to dismiss it.⁴

XI. TRIAL—1. In General.—The suit for divorce conforms to the procedure of the court having jurisdiction over such suits, and is generally a suit in equity tried before the court without the intervention of a jury.⁵ Unless the trial is required to be in open court, or the parties are required to testify in court, the evidence may be submitted in the form of depositions⁶ or the report of a referee or master in chancery.⁷

In "Open Court."—In some states the divorce suit is required to be

fore the first day of the term, an affidavit showing a publication for a greater period of time is sufficient if it discloses that the notice complied with the statute in other respects. *Burnes v. Burnes*, 61 Mo. App. 612. See *contra*, *Shrader v. Shrader*, 36 Fla. 502.

A decree is void where no certificate of publication of the order is filed as required by the statute. *Shrader v. Shrader*, 36 Fla. 502.

Where the proof of service shows that copies of summons and complaint were mailed to Mrs. R. L. Smith at a post office where the defendant was always known and addressed as Mrs. Asahel L. Smith, the showing is not sufficient to establish a valid constructive service. *Smith v. Smith*, 4 Greene (Iowa) 266.

The proof should show that copies of summons and complaint were addressed to defendant at his usual place of residence, and at a sufficient time before the answer day. *Pinkney v. Pinkney*, 4 Greene (Iowa) 324.

1. An imperfect return of personal service on a nonresident in a foreign country may be amended by leave of court as in other cases where service is had by citation. *Trevino v. Trevino*, 54 Tex. 261.

Where the affidavit of service by publication was erroneous and stated that service by publication was commenced before the suit was brought, and that copies of the complaint and summons were deposited in the post office ten days before the suit was brought, the court may permit an amended affidavit

to be filed before the entry of the decree, although the decree was signed by the judge more than one year before such entry. *In re Newman's Estate*, 75 Cal. 213.

2. *Tucker v. People*, 122 Ill. 583.

3. *Harter v. Harter*, 5 Ohio 318.

4. *Chase v. Chase*, 61 N. H. 123.

5. *Mangels v. Mangels*, 6 Mo. App. 481.

In *New York*, *Wisconsin*, and *Georgia* certain issues must be tried by a jury unless waived by the parties.

In the absence of any statute the parties cannot demand a jury as a matter of right. *Mead v. Mead*, 1 Mo. App. 247; *Cassidy v. Sullivan*, 64 Cal. 266. See *infra*, XI. 7. *Trial by Jury*.

6. *Lattier v. Lattier*, 5 Ohio 538; *Edwards v. Edwards*, 3 Pittsb. (Pa.) 333; *Anonymous*, 1 Yeates (Pa.) 404; *Page v. Page*, 51 Mich. 88; *Looker v. Looker*, 46 Mich. 68; *Brown v. Brown*, 38 Ark. 324; *Leach v. Leach*, 46 Kan. 724.

7. **Where the Plaintiff Is Unable to Attend** the trial a decree may be awarded on other satisfactory proof. *Scott v. Scott*, Kirby (Conn.) 270; *Shillinger v. Shillinger*, 14 Ill. 147; *Graves v. Graves*, 2 Paige (N. Y.) 62; *Dodge v. Dodge*, 7 Paige (N. Y.) 589; *Pugsley v. Pugsley*, 9 Paige (N. Y.) 589; *People v. McGinnis*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 387; *Lincoln v. Lincoln*, 6 Robt. (N. Y.) 525; *Banta v. Banta*, 3 Edw. Ch. (N. Y.) 295; *Renwich v. Renwich*, 10 Paige (N. Y.) 420; *Stone v. Stone*, 28 N. J. Eq. 409; *Hobart v. Hobart*, 45 Iowa 501.

tried in "open court," as a safeguard against fraud and collusion.¹ An "open court" is defined as "a court formally opened and engaged in the transaction of judicial affairs, to which all persons who conduct themselves in an orderly manner are admitted."²

Upon Depositions.—But in the absence of any statute, the suit for divorce may be heard upon the depositions of witnesses as under the early chancery practice.³

Order of Proof.—The order in which the evidence shall be introduced may be determined by the court in the exercise of a sound discretion.⁴ Generally, the testimony should be introduced in the logical order of the allegations of the petition, viz., residence of one or both parties within the state and other facts showing the jurisdiction of the court, marriage of the parties, and the causes for divorce. The application for temporary alimony may be determined at any stage of the case before a final decree.⁵ Testimony concerning the property of the parties and the amount of permanent alimony which should be awarded may be heard at the trial, but is usually postponed until after the court determines that a divorce shall be granted.⁶

Open and Close.—Where a defense is interposed the trial will follow the usual course of proceedings; the party assuming the burden of proof will have the right to open and close the case.⁷

1. Where the statute provides that "if the bill is taken as confessed, the court shall proceed to hear the cause by examination of witnesses in open court," a decree cannot be granted upon the testimony of one witness and the deposition of another. *Suesemilch v. Suesemilch*, 43 Ill. App. 573.

Under section 6260 How. Stat., declaring that parties shall only be examined in open court, the testimony of the plaintiff who claims to be the lawful wife of the defendant cannot be admitted where it was taken before a commissioner. *Cross v. Cross*, 55 Mich. 280.

2. *Suesemilch v. Suesemilch*, 43 Ill. App. 573; *Hobart v. Hobart*, 45 Iowa 501.

3. *Suesemilch v. Suesemilch*, 43 Ill. App. 573.

4. See generally article ORDER OF PROOF.

5. **The Application for Temporary Alimony** in a contested case is usually heard after an answer or demurrer has been filed. *Gray v. Gray*, 143 N. Y. 354; *Langan v. Langan*, 91 Cal. 654; *Disbrough v. Disbrough* (N. J. Eq. 1890), 20 Atl. Rep. 960; *Ex p. King*, 27 Ala. 387; *Miller v. Miller*, 33 Fla. 453; *Mix v. Mix*, 1 Johns. Ch. (N. Y.)

108; *Filer v. Filer*, 77 Mich. 469; *Storke v. Storke*, 99 Cal. 621; *Burrow v. Burrow*, 6 Lea (Tenn.) 499; *Friend v. Friend*, 65 Wis. 412; *Weishaupt v. Weishaupt*, 27 Wis. 621.

6. *Ex p. Ambrose*, 72 Cal. 398; *Coolledge v. Coolledge*, 1 Barb. Ch. (N. Y.) 77; *Lake v. King*, 16 Nev. 215; *Galusha v. Galusha*, 138 N. Y. 272; *Cullen v. Cullen*, 55 N. Y. Super. Ct. 346; *Ela v. Ela*, 63 N. H. 116; *Sheafe v. Sheafe*, 36 N. H. 155; *Folsom v. Folsom*, 55 N. H. 78; *Prescott v. Prescott*, 59 Me. 146; *In re Johnston's Petition*, 54 Kan. 726.

7. In *Razor v. Razor*, 149 Ill. 621, the defendant set up adultery as a defense in recrimination to the charge of desertion. The principal issue at the trial was concerning the adultery. The court refused the defendant the right to open and close. "Both the pleadings and proof sharply made an issue, to be determined by the jury, as to whether there had been a separation by the husband from the wife. If appellant [defendant] had desired, he might have eliminated this issue by justifying the separation upon the ground of adultery. This he did not do, but left the issue to be affirmatively maintained by the complainant in the

2. Default.—Where no appearance is made by the defendant, the plaintiff is not entitled to a decree as in other cases, but must establish a cause for divorce by sufficient allegations¹ sustained by full and satisfactory evidence.²

3. Reference. (See article REFERENCES.)—The general provisions of the statutes and codes for the trial of civil actions by a referee have been held to include suits for divorce.³ But in most of the states such provisions are not applicable, as the ecclesiastical practice is followed,⁴ or the special provisions of the divorce statutes require a trial in the open court⁵ or provide for a jury trial unless waived by the parties.⁶

4. Continuances. (See also article CONTINUANCES, vol. 4, p. 822.)—The court, as in other suits, may grant continuances for the amendment of pleadings and for other exigencies which may appeal to the discretion of the court.⁷ Where the continuance is granted on account of an absent witness, a party may admit that the witness would testify as stated in the affidavit, but the court may disregard such admission.⁸ The court may, on its

original bill. While the court might, in the exercise of sound discretion, have allowed the motion, yet, an issue remaining necessary to be affirmatively maintained by the complainant, its ruling was not reversible error."

1. *Phelan v. Phelan*, 12 Fla. 449.

2. *Barry v. Barry*, Hopk. (N. Y.) 118; *Palmer v. Palmer*, 1 Paige (N. Y.) 276; *Graves v. Graves*, 2 Paige (N. Y.) 62; *Hanks v. Hanks*, 3 Edw. Ch. (N. Y.) 469; *Lincoln v. Lincoln*, 6 Robt. (N. Y.) 525; *Mansfield v. Mansfield*, Wright (Ohio) 284; *Robinson v. Robinson*, 1 Barb. (N. Y.) 27; *Scott v. Scott*, 17 Ind. 309; *Welch v. Welch*, 16 Ark. 527; *Viser v. Bertrand*, 14 Ark. 267.

3. *Rand v. Rand*, 56 N. H. 421; *Moore v. Moore*, 56 N. H. 512; *Gibson v. Gibson*, 24 Neb. 394; *Emmons v. Emmons*, Walk. (Mich.) 533.

New York.—For the practice under the New York code, consult the following recent cases: *Ives v. Ives*, 7 Misc. Rep. (N. Y. Supreme Ct.) 328; *Smith v. Smith*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 386, 7 Misc. Rep. (N. Y.) 305; *Jones v. Jones*, 71 Hun (N. Y.) 519; *Matthews v. Matthews*, 53 Hun (N. Y.) 244; *Griffin v. Griffin*, 70 Hun (N. Y.) 73.

4. *Mangels v. Mangels*, 6 Mo. App. 481.

5. A divorce case cannot be tried by consent of the parties under a divorce statute requiring that "such actions shall be heard in open court on the

testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court." *Hobart v. Hobart*, 45 Iowa 501.

Under a divorce statute directing that "all such cases shall be tried by the court, and the like process and proceedings shall be had in such causes as are had in other civil suits, except the answer of the defendant shall not be under oath," a referee cannot be appointed as in other suits. *Mangels v. Mangels*, 6 Mo. App. 481.

6. *Winans v. Winans*, 124 N. Y. 140; *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561.

The statute may prohibit the referee from making findings. In such case the referee acts as a master in chancery to take testimony. *Baker v. Baker*, 10 Cal. 527.

7. **Where the Service Is Void or Defective** the suit will not be dismissed but will be continued for further service. *Chase v. Chase*, 61 N. H. 123; *Harter v. Harter*, 5 Ohio 318.

Party Unable to Be Present.—A continuance should not be denied where a party is unable to be present and it is clear that a fair trial cannot be had without her presence. But it is not an abuse of discretion to deny a continuance where the party attempts to subordinate the business of the court to her own convenience. *Barnes v. Barnes*, 95 Cal. 171.

8. See proceedings in *Hughes v.*

own motion, grant a continuance to promote a reconciliation of the parties, or to obtain further evidence on the testimony of a party who refuses to appear,¹ or until an insane defendant has recovered her reason.²

5. Change of Venue.—The statutes providing for a change of venue in civil actions are applicable to suits for divorce, and such change may be made under the same circumstances as in other cases.³

6. Discontinuances.—The plaintiff may discontinue his suit for divorce at any time before the defendant or the public has acquired a right to have the issues tried and a decree entered.⁴ But the plaintiff has no absolute right to discontinue a divorce suit, and the court may, to protect the public, refuse an application to discontinue on any terms.⁵

Hughes, 44 Ala. 698; Scripture v. Scripture, 70 Hun (N. Y.) 432. See showing held sufficient in Bostwick v. Bostwick, 73 Tex. 182.

During a suit for divorce the defendant was in another proceeding adjudged to be a habitual drunkard, and a committee of his estate was appointed and granted leave to assist in the defense of the divorce suit. On motion of the committee the cause was continued until the further order of the court. The continuance was held error, as the plaintiff had a right to proceed in the absence of any showing to the contrary. Gregg v. Gregg, 48 Hun (N. Y.) 451.

1. See dicta in Foster v. Redfield, 50 Vt. 285.

2. Stratford v. Stratford, 92 N. Car. 297.

3. Powell v. Powell, 104 Ind. 18; Evans v. Evans, 105 Ind. 204; Craven v. Craven, 27 Wis. 418; Moe v. Moe, 39 Wis. 309; Usher v. Usher (Cal. 1894), 36 Pac. Rep. 8; Warner v. Warner, 100 Cal. 11.

The case of Musselman v. Musselman, 44 Ind. 107, to the contrary, is overruled. Evans v. Evans, 105 Ind. 204.

Pending a motion for a change of venue the court may make an order for temporary alimony. Moe v. Moe, 39 Wis. 309.

Upon a proper showing the defendant is entitled to the order as a matter of right, and it is error to require the payment of temporary alimony as a condition precedent. Hennessy v. Nicol, 105 Cal. 138.

A defendant is entitled to have the proceedings removed to the court of the county in which he resides. Moe

v. Moe, 39 Wis. 309; Hennessy v. Nicol, 105 Cal. 138.

Bias of Judge.—A change of venue should be granted on the ground of bias and prejudice of the judge. Powell v. Powell, 104 Ind. 18; McPike v. McPike, 10 Ill. App. 332.

Application for Alimony.—But a change of venue for this cause will not be granted on an application for a modification of a decree of alimony. Hopkins v. Hopkins, 40 Wis. 462; Bacon v. Bacon, 34 Wis. 594. But see *contra*, McPike v. McPike, 10 Ill. App. 332.

Local Prejudice and Undue Influence.—A statute providing for a change of venue on account of local prejudice or undue influence applies to suits for divorce. Evans v. Evans, 105 Ind. 204.

4. Clark v. Clark, 29 Ill. App. 257; Courtney v. Courtney, 4 Ind. App. 221. See generally article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

After a Cause has been Finally Submitted, leave may be granted to dismiss without prejudice, under some circumstances, although the defendant insists that a decree be rendered upon the merits. Ashmead v. Ashmead, 23 Kan. 262.

5. Where the validity of two marriages and the legitimacy of a child are involved in a suit for divorce, the plaintiff cannot dismiss the suit as a matter of right. "In the prompt disposition of that question the public was interested. Its duty is to see that all contracts shall be fulfilled beneficially to progeny who are to be enrolled amongst the citizens of the state, and it owed the mother the duty

After a Cross-bill has been Filed the plaintiff cannot dismiss his bill and thus deprive the defendant of affirmative relief, but the defendant may proceed with the cause and obtain a decree of divorce¹ or a decree for alimony without divorce.²

Alimony and Counsel Fees.—Where the wife discontinues her suit after temporary alimony and counsel fees have been awarded, the order will be rescinded as to the temporary alimony, but not as to the counsel fees.³

Leave—Terms.—Where the husband is plaintiff he cannot discontinue as in other cases by payment of costs, but he must obtain leave to discontinue on such terms as the court may determine.⁴ At such time the court should order the payment of a reasonable sum as attorneys' fees.⁵ But in some cases the courts have refused to make an order for attorneys' fees when the litigation is terminated and the parties are reconciled.⁶

to have determined as speedily as the due administration of justice would permit whether she was wife in fact or only in name. And the court having regard, as was its duty, for the interests of the public, determined that the plaintiff ought not to be allowed to discontinue." *Winans v. Winans*, 124 N. Y. 140.

Where the Marriage is Not Denied the public has no interest in preventing a discontinuance, and the application will not be denied on the ground that the wife's character is aspersed. *Moore v. Moore* (Supreme Ct.), 51 N. Y. St. Rep. 911, 138 N. Y. 679 (Ct. App.), 53 N. Y. St. Rep. 401. But see *contra*, *Campbell v. Campbell*, 12 Hun (N. Y.) 636.

After a Reference has been Ordered at request of defendant the plaintiff cannot dismiss on payment of costs. *Clutton v. Clutton* (Mich. 1895), 64 N. W. Rep. 744.

1. *Butler v. Butler*, 38 N. J. Eq. 626; *Ficke v. Ficke*, 62 Mo. 335; *Campbell v. Campbell*, 12 Hun (N. Y.) 636; *Mott v. Mott*, 82 Cal. 413.

See *contra*, under statute in *Indiana*, *Armstrong v. Armstrong*, 27 Ind. 186; *Barr v. Barr*, 31 Ind. 240; *Stoner v. Stoner*, 9 Ind. 505; *Jenness v. Jenness*, 24 Ind. 355. But under a later statute the defendant may proceed to trial without further notice to the adverse party. *Musselman v. Musselman*, 44 Ind. 106.

2. *Deweese v. Deweese*, 55 Miss. 315; *Butler v. Butler*, 38 N. J. Eq. 626.

3. In *Weaver v. Weaver*, 33 Ga. 172, the court said: "That the order al-

lowing alimony to the wife should be rescinded, we think quite clear. For a payment to her after the libel for divorce is dismissed is nothing but a payment to the husband. He would have the right to receive the money. But counsel fees stand on a different footing, and the only question is, shall counsel be driven to his action at law to recover his fees, or shall the order already passed by the court for that purpose be enforced? We see no reason for compelling counsel to resort to an independent action when his fees have been already adjudged by the proper court."

4. *Leslie v. Leslie*, 10 Abb. Pr. N. S. (N. Y. Ct. App.) 64; *Green v. Green*, 40 How. Pr. (N. Y. C. Pl.) 465; *Smith v. Smith*, 35 Hun (N. Y.) 378.

5. *Burgess v. Burgess*, 1 Duv. (Ky.) 287; *Waters v. Waters*, 49 Mo. 385; *Thorndike v. Thorndike*, 1 Wash. Ter. 175; *Williams v. Monroe*, 18 B. Mon. (Ky.) 518; *Ballard v. Caperton*, 2 Metc. (Ky.) 412; *Clutton v. Clutton* (Mich. 1895), 64 N. W. Rep. 744.

6. *Newman v. Newman*, 69 Ill. 167; *McCulloch v. Murphy*, 45 Ill. 256; *Moore v. Moore* (Supreme Ct.), 22 N. Y. Supp. 451.

In *Reynolds v. Reynolds*, 67 Cal. 176, the court reversed an order for attorneys' fees, saying: "When the husband and wife forgave and were forgiven, and abandoned their criminalations and recriminations, the attorneys had but to gather up their briefs and retire. The court should at once have dismissed the case and made no further order in it."

The Husband cannot Escape Liability for temporary alimony and counsel fees by dismissing his suit while the court has the application for such relief under consideration,¹ or after the order is made.²

Rights of Attorneys.—Although the parties have dismissed the suit by stipulation the attorneys for the wife may have the dismissal set aside and an order made for the payment of a certain sum as attorneys' fees.³

7. Trial by Jury.—Generally, the divorce suit is tried by the court according to the chancery practice without the aid of a jury.⁴ Under such practice the court may direct certain issues to be tried by a jury;⁵ but such order is discretionary, and it is

The wife employed an attorney to enforce an agreement to pay alimony and gave the attorney a written promise to be governed by his advice and to make no settlement without his consent. The husband and wife compromised the matter without the knowledge or consent of the attorney, and they moved to dismiss the suit. It was held that in the absence of any proof of fraud or collusion the suit would be dismissed without requiring the husband to pay counsel fees. *Gregory v. Gregory*, 32 N. J. Eq. 424.

A Wife may Dismiss her suit and release her husband from imprisonment on a writ *ne exeat* although her attorney notifies the sheriff not to release the husband until the costs and attorney's fees are paid. In such case the sheriff is not guilty of contempt in releasing the husband without an order of court. *Kirby v. Kirby*, 1 Paige (N. Y.) 565.

1. In *Waters v. Waters*, 49 Mo. 385, the court said: "I cannot imagine that he could defeat the application in this way, although the fact that the prosecution was to end should affect the amount to be allowed. If the friends of the wife gave her such credit as to enable her to properly appear to the suit, trusting to her ability to obtain an allowance to reimburse them after she had appeared and applied for the proper sum, the application is not only made pending the suit, but it would be a fraud upon her rights to permit the husband to defeat it by then dismissing the proceeding."

2. *People v. Second Judicial Dist. Ct.* (Colo. 1895), 40 Pac. Rep. 460; *Weaver v. Weaver*, 33 Ga. 173; *Traylor v. Richardson*, 2 Ind. App. 452.

3. *Courtney v. Courtney*, 4 Ind. App. 221; *Thorndike v. Thorndike*, 1

Wash. Ter. 175; *Aspinwall v. Sabin*, 22 Neb. 73; *Louden v. Louden*, 65 How. Pr. (N. Y. C. Pl.) 411; *Chase v. Chase*, 65 How. Pr. (N. Y. Supreme Ct.) 306, reversed in 29 Hun (N. Y.) 527, for lack of proper notice; *Lamy v. Catron* (N. Mex. 1890), 23 Pac. Rep. 773; *Moore v. Moore*, 10 Ont. Pr. 284; *Davis v. Davis*, 141 Ind. 367. But see *contra*, *Wagner v. Wagner*, 34 Minn. 441.

Where a statute permits the parties to discontinue during vacation, the court will not have jurisdiction to make an order for attorneys' fees at the next term of court. *Thompson v. Thompson*, 3 Head (Tenn.) 527.

4. *Cassidy v. Sullivan*, 64 Cal. 266; *Mead v. Mead*, 1 Mo. App. 247; *Madison v. Madison*, 1 Wash. Ter. 60; *Suesemilch v. Suesemilch*, 43 Ill. App. 573; *Simpson v. Simpson*, 25 Ark. 487; *Allison v. Allison*, 46 Pa. St. 321; *Carre v. Carre*, 2 Yeates (Pa.) 207; *Coffin v. Coffin*, 55 Me. 361.

In Some States a trial by jury in suits for divorce is required by statute, and is a matter of right unless waived. *Poertner v. Poertner*, 66 Wis. 644; *Montfort v. Montfort*, 88 Ga. 641; *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Galusha v. Galusha*, 43 Hun (N. Y.) 181; *Dietz v. Dietz*, 2 Hun (N. Y.) 339, 4 Thomp. & C. (N. Y.) 565; *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561; *Whale v. Whale*, 1 Code Rep. (N. Y.) 115; *Winans v. Winans*, 54 N. Y. Super. Ct. 542.

The statute relating to jury trials in divorce suits in *Michigan* was adopted from *New York*, with the construction given it by the New York courts. *Schafberg v. Schafberg*, 52 Mich. 429.

5. *Brinkley v. Brinkley*, 56 N. Y. 192.

not error to refuse a trial by jury.¹

8. Instructions.—Where the trial is by jury, instructions or charges to the jury are given as in other cases.²

9. Verdict and Special Findings—Special Findings.—Under frequent statutory provisions, interrogatories may be submitted to the jury to obtain their special findings³ in addition to their general

Where the code requires the divorce suit and certain other actions to be tried by the court, unless a reference thereof is made, the court cannot submit an issue of fact to a jury. *Hobart v. Hobart*, 51 Iowa 512.

1. Anonymous, 35 Ala. 226; *Leffel v. Leffel*, 35 Ind. 76; *Cleghorn v. Cleghorn*, 66 Cal. 309.

2. *Smith v. Smith*, 72 N. Car. 139; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Black v. Black*, 5 Mont. 15; *Leffel v. Leffel*, 35 Ind. 76; *Harrington v. Harrington*, 107 Mass. 329. And see generally article INSTRUCTIONS.

It is the duty of the court to instruct the jury "as to the law of the case, and never leave it, by instruction, to be found by them." *Henderson v. Henderson*, 88 Ill. 248.

Residence.—An instruction asked by appellant read as follows: "To constitute residence, there must be a fixed abode and an intention to remain permanently, or at least for a time, for business, or for other reasons not solely connected with the bringing of a suit for divorce." It was held that it was not error to strike out the words "permanently or," as the effect of the instruction was not changed by such modification. *Chapman v. Chapman*, 129 Ill. 386.

Desertion.—"The jury are further instructed that the only issue presented by the pleadings in this case for your consideration is whether or not the complainant and defendant were living together as husband and wife in —, on —, and whether or not, on that day, the defendant wilfully and without just or reasonable cause deserted the complainant and his said home, and whether or not the defendant had wilfully remained absent therefrom, without just or reasonable cause, for the space of two years prior to the filing of the complainant's bill for a divorce." Given in *Carter v. Carter*, 62 Ill. 439.

"That if the jury believe, from the evidence, that complainant, before the separation of the parties, was guilty of extreme and repeated cruelty, * * *

defendant was justified in leaving him, and the jury should find the issues for the defendant." Given in *Carter v. Carter*, 62 Ill. 439.

"The only issue for the jury to try in this cause is whether the defendant deserted or absented herself from the complainant, without any reasonable cause, for the space of two years prior to the commencement of this suit, and what constitutes such reasonable cause of abandonment is a matter to be determined by the jury, from all the facts and circumstances in evidence in this case." This instruction was held erroneous as conflicting with other instructions. *Carter v. Carter*, 62 Ill. 439.

Cruelty.—"Personal cruelty may consist in other wrongs than mere physical violence, and may be by any means that tend to render the life of the person wretched and miserable." Held erroneous under the *Illinois* statute. *Henderson v. Henderson*, 88 Ill. 248. For other instructions, see *Gholston v. Gholston*, 31 Ga. 634; *Albert v. Albert*, 5 Mont. 577.

Adultery.—"The jury are also further instructed that the law does not allow the jury to presume the adultery of the complainant where the facts or circumstances relied upon to establish the same may be as well attributed to an innocent intent or motive as a guilty one." *Approved* in *Carter v. Carter*, 62 Ill. 439.

3. *Morse v. Morse*, 25 Ind. 156; *Bradley v. Bradley*, 45 Ind. 67; *Callen v. Callen*, 44 Kan. 370; *Harrison v. Harrison*, 7 Ired. (N. Car.) 484.

In *Morrison v. Morrison*, 14 Mont. 8, it was objected that the verdict of the jury should have been general, and not based on special findings. The court said: "It appears from the record that the jury returned a general verdict in favor of plaintiff, but also returned special findings on several propositions submitted. There is no statute forbidding special findings in such a case, nor has appellant cited any authority to support his contention. Moreover, the statute of this

verdict.¹ In such case the court may make findings of fact in addition to those presented to the jury.² The special findings are not conclusive, and the court may grant a decree contrary to the general verdict.³

Conclusiveness of Verdict.—Where the court has submitted certain issues to the jury in accordance with the chancery practice the verdict is not conclusive as in an action at law, but merely advisory, and the court may enter a decree in opposition to the verdict.⁴ But where a jury trial is made a matter of right by the statute, the verdict has the same effect as at law, and the court must render a verdict in conformity with it, or, if not satisfactory, may grant a new trial.⁵

10. Conduct of the Court—Prevention of Collusion.—The public has an interest in all suits for divorce,⁶ and where no attorney is authorized to appear for the state it becomes the duty of the court, on its own motion, to take such part in the trial as will protect the public from fraud and collusion and prevent divorces except where the applicant therefor is an innocent and injured

state provides for submission of special findings to be returned by the jury (Code Civ. Pro., § 275), and there is no exception made as to divorced suits. Indeed, the divorce statute provides that the same rules of proceeding shall prevail 'as in other cases in chancery,' and special verdicts are common in chancery practice."

1. *Morse v. Morse*, 25 Ind. 156; *Morrison v. Morrison*, 14 Mont. 8.

2. Where all the evidence is presented at the trial to the court and jury, the court may, after trial, make additional findings without at the time reserving the cause for further consideration. *Schmitt v. Schmitt*, 31 Minn. 106.

3. *Morse v. Morse*, 25 Ind. 156.

4. *Beck v. Beck*, 6 Mont. 318; *Moore v. Moore*, 22 Tex. 237; *Paulson v. Paulson* (Tex. Civ. App. 1893), 21 S. W. Rep. 778; *Lewis v. Lewis*, 9 Ind. 105; *Gilpin v. Gilpin*, 12 Colo. 504.

Where the jury returns a verdict in favor of the wife but finds that she has not been a dutiful wife, the court may grant a divorce if the evidence is satisfactory to the court. *Thatcher v. Thatcher*, 17 Ill. 66.

Decree Contrary to Verdict.—Under a statute requiring "full and satisfactory evidence" of the cause for divorce, a court may render a decree in favor of defendant although a verdict was returned in favor of the plaintiff. The evidence must be satisfactory to the

judge as well as to the jury. *Haygood v. Haygood*, 25 Tex. 576.

But in such case the decree is subject to revision by the appellate court, which may render a decree in favor of plaintiff if the evidence is satisfactory. *Jernigan v. Jernigan*, 37 Tex. 420.

5. *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Carpenter v. Carpenter* (Supreme Ct.), 9 N. Y. Supp. 583.

In *Poertner v. Poertner*, 66 Wis. 644, the court said: "It is not quite accurate to say that the verdict on this issue [adultery] is merely advisory. Unlike most other equitable issues, it must be tried by a jury, unless a jury trial thereof is waived by the parties. Rev. Stat., § 2843. Hence, in the absence of such waiver, the court cannot give judgment thereon until the fact is found by the jury. In most other equity cases, wherein a verdict is taken on an issue of fact, the court may, if the testimony is sufficient, set aside the verdict and find the facts differently, and judgment may be entered on such findings. But if the court set aside the verdict on an issue of adultery, a new trial must be ordered."

6. *McBlain v. McBlain*, 77 Cal. 507; *Wadsworth v. Wadsworth*, 81 Cal. 182; *Cottrell v. Cottrell*, 83 Cal. 457; *Locke v. Locke*, 18 R. I. 716; *Winans v. Winans*, 124 N. Y. 140; *Dutcher v. Dutcher*, 39 Wis. 651; *Peck v. Peck*, 44 Hun (N. Y.) 290; *Sullivan v. Sullivan*, 41 N. Y. Super. Ct. 519.

party and has a valid cause for divorce under the statute.¹

Scope of Court's Inquiry.—The court is not bound, as in other causes, to confine the evidence to the issues made by the parties, but may lay hold of any facts disclosed by the witness which should prevent the parties from obtaining a divorce, although such defense is not pleaded.² While the parties are concluded by their pleadings as in other actions, the court is not, and may, to satisfy its conscience, enter into an inquiry of matters not within the issues.³

If Facts are Disclosed Which Arouse Suspicion that the plaintiff is not entitled to a divorce, it is the duty of the court to examine the witnesses and elicit the truth.⁴ This is, of course, the only method by which the collusion of the parties may be discovered and established.⁵ And the same method is applied to such defenses as recrimination,⁶ condonation,⁷ connivance,⁸ and

1. "The law has wisely enjoined upon the courts the duty of watching over these proceedings with the strictest scrutiny and interposing to prevent abuses of the delicate and responsible power confided to them to dissolve the marriage contract. What shall be deemed sufficient cause of divorce must ever be matter of law, and the law has made it the duty of the judge to refuse a decree, unless satisfied of the truth and sufficiency of the evidence by which those causes are established." *Moore v. Moore*, 22 Tex. 237.

2. **New Jersey.**—A different view is announced in New Jersey, where the statute provides that the "answer shall fully and plainly set forth the causes of his or her defense." In a case where the defendant offered proof of a defense in recrimination, under a general denial of adultery in her answer, it was held that the court could not dismiss the suit on the ground of recrimination where such defense was not pleaded. "This is a suit *inter partes*," the court said, "and the court cannot lay hold of any matter not properly put in issue on the ground that public policy and public morals require it. Collusion of the kind where both parties conspire to impose upon the court, and fraudulently to procure a release from their marriage vows against the provisions and policy of the law, is a very different case." *Jones v. Jones*, 18 N. J. Eq. 33. This ruling is contrary to the doctrine of the cases cited in this section.

3. See notes *supra*, under IV. *The Answer*. See also *Ribet v. Ribet*, 39

Ala. 348; *Moore v. Moore*, 41 Mo. App. 176; *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401; *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45.

4. *Dismukes v. Dismukes*, 1 Tenn. Ch. 266; *Mattox v. Mattox*, 2 Ohio 234; *Belz v. Belz*, 33 Ill. App. 105; *Thompson v. Thompson*, 70 Mich. 62.

Barret, J., in *Foster v. Redfield*, 50 Vt. 285, explains the method of conducting suits for divorce: "In *ex parte* trials, and also in contested cases, I am accustomed to examine witnesses sharply and thoroughly, to elicit as fully as possible all the facts and circumstances, not merely as bearing on the alleged cause, but as bearing on the interests of the children and of the public, to be affected by the result of the proceeding. I have known, in cases in which the statute does not make the parties witnesses, a continuance to be ordered by the court, where the libellee was not appearing, and such libellee ordered to appear and submit to examination by the court. Such a course is often the only means the court has to protect itself from being made the instrument of a fraud upon the law in collusive cases."

5. *Thompson v. Thompson*, 70 Mich. 62; *People v. Dawell*, 25 Mich. 247; *Belz v. Belz*, 33 Ill. App. 105; *Parker v. Parker*, 28 Ill. App. 22; *Costill v. Costill*, 47 N. J. Eq. 346. See also cases cited *supra*, under IV. 3. c. *Collusion*.

6. See *supra*, IV. 3. a. *Recrimination*; *Ribet v. Ribet*, 39 Ala. 348.

7. See *supra*, IV. 3. b. *Condonation*; *Moore v. Moore*, 41 Mo. App. 176; *Clague v. Clague*, 46 Minn. 461.

8. See *supra*, IV. 3. d. *Connivance*;

delay.¹

Vacating Decree.—It seems that the court may, on its own motion, vacate a decree of divorce on discovery that it was obtained by fraud or collusion.² But it is clear that in such case the parties should have notice of the proceeding and an opportunity to be heard.³

Other Powers of Court.—As the representative of the state, the court may, on its own motion, compel the defendant to appear as a witness,⁴ order a continuance,⁵ submit certain issues to a jury,⁶ enter a decree contrary to the verdict⁷ or the findings of a referee,⁸ order a new trial,⁹ or refuse to discontinue on motion of plaintiff,¹⁰ and may grant a decree of separation although the parties desire an absolute divorce.¹¹

11. Nonsuit.—Whenever there is such a failure of proof in a divorce suit that the court would be compelled to set aside the verdict, it has the power to withdraw the case from the jury or direct a verdict as in other cases.¹²

XII. ABATEMENT AND REVIVOR—1. **In General—Death of Party—Suit Dies with Party.**—Upon the death of either party the suit for divorce abates and cannot be revived against the legal representatives of the deceased.¹³ It is a personal action and cannot be

Peck *v.* Peck, 44 Hun (N. Y.) 290; Morrison *v.* Morrison, 136 Mass. 310.

1. See *supra*, IV. 3. *e. Delay*; Dutcher *v.* Dutcher, 39 Wis. 651.

2. Brown *v.* Brown, 53 Wis. 29.

In McIntyre *v.* McIntyre, 9 Misc. Rep. (N. Y. Super. Ct.) 252, the court discovered that a decree rendered more than one year before was obtained by collusion, and on its own motion set the decree aside without an application of either party. It appeared that the wife obtained the decree with the consent of her husband, and after her marriage to another returned to live with her first husband. In a suit for divorce by the second husband, on the ground of this adultery, the first husband asked leave to intervene, on the ground that he was innocent of the charges. On this application to intervene, the court, on discovering the facts, refused a divorce and entered an order vacating the former divorce. See also *infra*, XVII. *Proceedings to Vacate Decrees*.

3. In Morris *v.* Morris, 60 Mo. App. 86, the court, in another divorce suit heard at the same term, discovered that the plaintiff was guilty of such immoral conduct as not to be entitled to a decree of divorce, and, without notice to him, set the decree aside. It was held that the plaintiff should be given an

opportunity to be heard, and therefore the court had no power to vacate the decree.

4. See dictum in Foster *v.* Redfield, 50 Vt. 285.

5. Stratford *v.* Stratford, 92 N. Car. 297.

The court may withhold a decree and continue the case where a reconciliation is probable. Hacker *v.* Hacker, 90 Wis. 325.

6. Brinkley *v.* Brinkley, 56 N. Y. 192.

7. Haygood *v.* Haygood, 25 Tex. 576; Moore *v.* Moore, 22 Tex. 237; Morse *v.* Morse, 25 Ind. 156; Beck *v.* Beck, 6 Mont. 318.

8. Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519; Gibson *v.* Gibson, 24 Neb. 394.

9. Poertner *v.* Poertner, 66 Wis. 644.

10. Winans *v.* Winans, 124 N. Y. 140; Campbell *v.* Campbell, 12 Hun (N. Y.) 636.

11. Conant *v.* Conant, 10 Cal. 249; Irwin *v.* Irwin, 96 Ky. 318; Hacker *v.* Hacker, 90 Wis. 325.

12. Williams *v.* Williams, 1 Colo. App. 281. And see generally article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

13. Barney *v.* Barney, 14 Iowa 189; Wilson *v.* Wilson, 73 Mich. 620; O'Hagan *v.* O'Hagan, 4 Iowa 509; Zoellner *v.* Zoellner, 46 Mich. 511; Downer *v.*

maintained after the marriage has been dissolved by death.¹ See also article DEATH, vol. 5, pp. 811, 831.

Death after Cause Submitted.—If one of the parties dies after the cause has been tried and submitted to the court, a decree of divorce cannot be entered and by its terms relate back to a period before such death, as there is no relationship to dissolve when the decree is entered.² For the same reason a decree *nisi* cannot be made absolute after the death of one of the parties.³

2. Effect on Orders for Temporary Alimony and Costs.—But all orders for attorneys' fees, temporary alimony, or costs, entered before the death of the husband, are in the nature of ordinary judgments and may be enforced against his estate.⁴ The death of the husband terminates an order for temporary alimony during the pendency of the proceedings, whether in the lower or the appellate court, as the action abates and there is no longer a necessity of such allowance. After the death of the husband the

Howard, 44 Wis. 82; Grant v. Grant, 2 Swab. & T. 522; Brocas v. Brocas, 2 Swab. & T. 383.

1. McCurley v. McCurley, 60 Md. 185; Barney v. Barney, 14 Iowa 189; Pearson v. Darrington, 32 Ala. 227; Ewald v. Corbett, 32 Cal. 493; Kimball v. Kimball, 44 N. H. 122; Kirschner v. Dietrich, 110 Cal. 502.

The suit for divorce is said to be "a personal action, sounding in tort, and, by all the rules and maxims of law, lies with the person." Swan v. Harrison, 2 Coldw. (Tenn.) 534.

The Suit for Alimony is also a personal action and abates upon the death of either party. Swan v. Harrison, 2 Coldw. (Tenn.) 534.

2. In Wilson v. Wilson, 73 Mich. 620, it is held that "the doctrine of relation does not apply in such a case. There must be living parties or there can be no relationship to be divorced."

But it is held that where a party dies after a case has been argued and submitted on appeal, and the court has written an opinion affirming a decree of divorce, the decree will be entered as on the day the case was taken under advisement. Mead v. Mead, 1 Mo. App. 247.

In Webber v. Webber, 83 N. Car. 280, the defendant died during the trial and before the retirement of the jury, and a decree was granted as of the first day of the term. It was urged that as the marriage was dissolved by death, the decree was useless. "While the suggestion is not without force," said the court, "we can find no legal

ground for its exemption from the operation of a principle applicable to all other actions."

And see in general, as to decrees after death of party, article DECREES, vol. 5, p. 968.

3. "If a decree *nisi* is made and the husband dies before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. After this, how can a decree be made which would displace a dissolution of the marriage by death, and untie a knot that no longer exists? How can a woman, once a widow, be converted into a divorcee unless there is some enactment enabling the court to make such a retrospective order?" Stanhope v. Stanhope, 11 Prob. Div. 103.

4. In Francis v. Francis, 31 Gratt. (Va.) 283, the husband died during an appeal, leaving a will devising his estate to others. The Supreme Court affirmed the decree of the lower court denying him a divorce and allowing the wife alimony in instalments. The question was as to the effect on the decree for permanent alimony. The death of the husband, it was said, "puts an end to the provision in favor of the appellee [wife]. It could not, however, affect her right to those instalments which, under the decree of the court, accrued before the death occurred. So far as these instalments are concerned, the affirmance by this court of the decree leaves the appellee in the same condition as if no appeal had been taken."

court cannot make the executor a party to the proceeding for the purpose of answering the wife's application for counsel fees for services in preparing the suit for trial and to order the executor to pay the same.¹

3. Effect on Decree for Permanent Alimony.—Permanent alimony payable in instalments is generally terminated by the death of either party. If the alimony was allowed on a decree of separation, on the death of the husband the wife is entitled to her distributive share of the estate, and there is no necessity for the alimony.² If the alimony was granted on an absolute decree of divorce, the death of the husband may or may not terminate the allowance according to the nature and effect of the decree of divorce. If divorce does not extinguish the right of dower or the alimony is not granted in lieu of dower or restoration of property of the wife, it is held that the permanent alimony terminates on the death of the husband.³ But where the alimony is awarded partly as maintenance and partly in lieu of dower, the death of either party does not terminate the decree, as the parties are strangers after divorce, and the wife is a mere judgment creditor of the estate.⁴

4. Effect on Appeal.—Where a suit for divorce has been tried and a divorce is denied and the plaintiff appeals, the proceeding abates on the death of either party, for the suit cannot be revived in the name of an executor. There is no one to prosecute the action, and there is no relation to dissolve. But the suit may be

1. In *McCurley v. McCurley*, 60 Md. 185, it was said: "It is well settled that the death of either party to a divorce suit before decree, it being a personal action, abates the divorce proceedings; and this effect must extend to whatever is identified with those proceedings. The allowance of money to pay the wife's counsel fees is in furtherance of the procedure to obtain or prevent the divorce. When, therefore, the jurisdiction to pass a decree is ended, no jurisdiction can survive as to matters purely ancillary to that object."

2. See article ALIMONY, vol. 1, p. 407. See also *Lockridge v. Lockridge*, 3 Dana (Ky.) 28; *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485; *Field v. Field*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 434; 66 How. Pr. (N. Y.) 346; *Burr v. Burr*, 10 Paige (N. Y.) 20; *Ex p. Hart*, 94 Cal. 254; *Knapp v. Knapp*, 134 Mass. 355; *Casteel v. Casteel*, 38 Ark. 478; *Smith v. Smith*, 1 Root (Conn.) 349.

3. See *Field v. Field*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 434; *Storey v. Storey*, 125 Ill. 608, *revers-*

ing 23 Ill. App. 558; *Wren v. Moss*, 7 Ill. 72; *Knapp v. Knapp*, 134 Mass. 353; *Maxwell v. Sawyer*, 90 Wis. 352.

4. *Storey v. Storey*, 125 Ill. 608; *Dow v. Blake*, 148 Ill. 76; *Miller v. Clark*, 23 Ind. 370; *O'Hagan v. O'Hagan*, 4 Iowa 509; *Stratton v. Stratton*, 77 Me. 373; *Lockwood v. Krum*, 34 Ohio St. 2; *Olney v. Watts*, 43 Ohio St. 499. See *contra*, *Maxwell v. Sawyer*, 90 Wis. 352.

Death of Husband after Decree.—Where a decree of absolute divorce has been granted, and the decree, by its terms, reserved the question of permanent alimony until the further order of the court, the death of the husband after such decree will not prevent the court from granting permanent alimony out of the decedent's estate. *Seibly v. Ingham* Circuit Judge (Mich. 1895), 63 N. W. Rep. 528. The death of either party after the decree will not prevent an order taxing the costs in accordance with the general provisions of the statute relating to all civil suits. *Hawks v. Hawks*, 1 Prob. Div. 137.

revived in the name of the legal representative if there is a judgment for costs and attorneys' fees allowed on the decree of dismissal.¹ If an absolute divorce was granted upon the petition or cross-petition, and the party against whom the divorce is granted appeals, the appeal does not abate on the death of the other party.² But where the wife died after obtaining an absolute divorce and the custody of the children, and it does not appear that she had any real or personal property, the action abates and cannot be revived, because, from the nature of the case, there is nothing to survive, and a reversal of the decree would not affect the property rights of the husband.³ Where one party dies after a decree of divorce is rendered, or after an appeal is taken, the suit may be revived in the name of the executor or administrator, and all the heirs and other parties who may be affected by a reversal of the decree must be joined, as they are necessary parties.⁴

XIII. DECREES—1. Form and Contents—Finality—Date.—A decree

1. Where the wife died after the husband had appealed from an order dismissing the husband's suit for divorce and awarding the wife's costs and attorneys' fees, the action may be revived in the name of her administrator. The court may permit the attorneys for the wife to be made parties, so as to protect their interests on appeal. *Downer v. Howard*, 44 Wis. 82.

2. While it may be true in such case that on a reversal the suit cannot be retried, and that there is marriage existing after the death of one of the parties, yet the party found guilty has a right to have such decree reviewed, and if it should appear to the Supreme Court that she is not guilty the reversal of the decree will reinstate her as a widow, and she will be entitled to dower and a distributive share of her husband's estate. *Wren v. Moss*, 7 Ill. 72; *Israel v. Arthur*, 6 Colo. 85.

In such case the court will not grant alimony against the husband's estate. *Shafer v. Shafer*, 30 Mich. 163.

In *Danforth v. Danforth*, 111 Ill. 236, the husband died after the submission of the case in the Supreme Court on appeal from a decree of divorce affirmed in the Appellate Court, and it was contended that the death of one party put an end to all further proceedings as if no decree had been entered. "This is true," said the court, "where the death takes place before any final decree. * * * But where a decree of divorce has been improperly obtained, and the proceedings are erroneous, the party

whose property rights have been injuriously affected by such decree ought not to be concluded by reason of the subsequent death of the other party. While both parties live, a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife, in law, and after the death of one it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property divested erroneously by the decree. On the reversal of a decree of divorce, the parties will be placed in the position they occupied before the decree was entered, and if one of them has died between the date of the decree of divorce and its reversal, the survivor procuring the reversal will be entitled to all rights of succession or dower and the like in the estate of the other, the same as if no divorce had ever been had; but in such case the court need not ordinarily remand the case, as no other decree of divorce can ever be had."

3. *Barney v. Barney*, 14 Iowa 189.

4. *Wren v. Moss*, 7 Ill. 72; *Shafer v. Shafer*, 30 Mich. 163; *Danforth v. Danforth*, 111 Ill. 236; *Israel v. Arthur*, 6 Colo. 85.

If one party dies before the appeal is perfected, the proceedings must be revived in the lower court, according to the provisions of the code which are applicable to such cases. *Thomas v. Thomas*, 57 Md. 504.

of divorce should be a final decree,¹ and should disclose the date when it was rendered.²

On Default.—If the decree is rendered upon a default, it should contain a recital of the manner in which the summons was served or of the proceedings to obtain constructive service.³

Based on Pleadings.—The decree must be based upon the pleadings, as in other cases,⁴ and must disclose the cause or causes for which the divorce was granted.⁵

If a Cross-petition was Filed the decree should disclose which party obtained the divorce.⁶

Orders Contained in.—The decree of divorce may also contain an order for the custody and maintenance of the children,⁷ an order for permanent alimony⁸ or a division of the property,⁹ an order for attorneys' fees,¹⁰ an order of injunction restraining the husband

1. *In re Cook's Estate*, 77 Cal. 220.

2. *Cook v. Cook*, 144 Mass. 163.

3. *Cochnower v. Cochnower*, 27 Ind. 253; *Tucker v. People*, 122 Ill. 583; *State v. Armington*, 25 Minn. 29.

See form of decree where the service is by publication. *Smith v. Smith*, 19 Neb. 706.

If the Decree Recites the Mode of Service and does not show a compliance with the requirements of the statute, there is no presumption that the service was regular and valid. *Werner v. Werner*, 30 Ill. App. 159.

Duly Served.—A recital in a decree that defendant was duly served with process is not inconsistent with proof of service by publication and by mailing a copy of the complaint and summons. *In re Newman's Estate*, 75 Cal. 213.

The Evidence.—A decree on default should show that the evidence was heard by the court, but the evidence need not be preserved in the record. *Hawes v. Hawes*, 33 Ill. 286; *Davis v. Davis*, 30 Ill. 180; *Wheeler v. Wheeler*, 18 Ill. 39.

4. *Weber v. Weber*, 16 Oregon 163; *Haltenhof v. Haltenhof*, 25 Ill. App. 236; *Devoe v. Devoe*, 51 Cal. 543; *Ward v. Ward*, 20 Wis. 252; *Bokel v. Bokel*, 3 Edw. Ch. (N. Y.) 376.

5. *Young v. Young* (Tex. Civ. App. 1893), 23 S. W. Rep. 83.

6. **Findings upon Cross-petition.**—If it does not appear which party obtained the divorce, a decree granting alimony and the custody of the children to the wife is presumed to be in her favor. *Eskholm v. Rau*, 34 La. Ann. 546.

Where a cross-petition is filed, the

findings of the court must refer to the issues presented by the cross-petition. *Haley v. Haley*, 44 Ark. 429; *Cassidy v. Cassidy*, 63 Cal. 352. But see *contra*, *Lount v. Lount*, 1 Arizona 422.

A finding of the court that plaintiff was guilty "as charged in the answer" was held a sufficient compliance with the code provision requiring separate findings of fact. *Pollock v. Pollock*, 71 N. Y. 137.

Findings are not required where no answer is filed. *Reading v. Reading*, 96 Cal. 4.

7. See decree in *Luthe v. Luthe*, 12 Colo. 421.

8. For decree granting permanent alimony, making it a lien on real estate and awarding execution, see *Robinson v. Robinson*, 79 Cal. 511.

For decree awarding alimony in gross payable in instalments, see *Gibbs v. Gibbs*, 18 Kan. 419.

For decree securing alimony by mortgage and appointing trustees, see *Maxwell v. Sawyer*, 90 Wis. 352.

9. *Brandon v. Brandon*, 14 Kan. 342; *Webster v. Webster*, 64 Wis. 438; *Donovan v. Donovan*, 20 Wis. 586; *Ensler v. Ensler*, 72 Iowa 159; *Chenault v. Chenault*, 5 Sneed (Tenn.) 248; *Webster v. Webster*, 2 Wash. 417; *Van Brunt v. Van Brunt*, 52 Kan. 380; *Wuest v. Wuest*, 17 Nev. 217; *Harran v. Harran*, 85 Wis. 299; *Boyd v. Boyd* (Cal. 1893), 31 Pac. Rep. 1108; *Johnson v. Johnson* (Cal. 1894), 35 Pac. Rep. 637; *Blake v. Blake*, 68 Wis. 303.

10. The attorneys' fee should be made payable to the wife or to the clerk of the court, for the use of the wife, and not to the attorneys, who are not parties to the suit. *People v. Second Judicial*

and third persons from conveying property to defeat the order for alimony,¹ or an order setting aside fraudulent conveyances and declaring certain property subject to the decree for alimony.² Such orders may be entered after the decree of divorce, as the practice in contested cases is to grant the divorce and reserve other questions for future consideration and on additional evidence.³

2. Decree of Separation—On Suit for Divorce.—Where a decree of separation is permitted by the statute, the court may, in its discretion, grant the same although the plaintiff has prayed for an absolute divorce.⁴

Duration of Separation.—The decree of separation may be "until the parties shall be reconciled to each other"⁵ or "forever."⁶

Vacation on Reconciliation.—As the fact of reconciliation may often be in dispute, the decree should provide that it may be vacated on the joint application of both parties upon proof of their reconciliation.⁷

Dist. Ct. (Colo. 1895), 40 Pac. Rep. 460; *Storke v. Storke*, 99 Cal. 621; *Robinson v. Robinson*, 79 Cal. 511; *Van Duzer v. Van Duzer*, 65 Iowa 625; *Sharon v. Sharon*, 75 Cal. 1; *Parker v. Parker*, 71 Miss. 164.

New York.—The order is not made a part of the final decree in New York. *Williams v. Williams*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 297; *Mercer v. Mercer*, 73 Hun (N. Y.) 192; *Straus v. Straus*, 67 Hun (N. Y.) 491.

1. *Damon v. Damon*, 28 Wis. 510.

2. *Busenbark v. Busenbark*, 33 Kan. 572.

3. *Coolidge v. Coolidge*, 1 Barb. Ch. (N. Y.) 77; *Ex p. Ambrose*, 72 Cal. 398; *Knowlton v. Knowlton*, 40 Ill. App. 588; *Seibly v. Ingham Circuit Judge* (Mich. 1895), 63 N. W. Rep. 528; *Lake v. King*, 16 Nev. 215; *Galusha v. Galusha*, 138 N. Y. 272; *Cullen v. Cullen*, 55 N. Y. Super. Ct. 346; *Woods v. Waddle*, 44 Ohio St. 449.

4. *Hacker v. Hacker*, 90 Wis. 325; *Irwin v. Irwin*, 96 Ky. 318; *Rutledge v. Rutledge*, 5 Sneed (Tenn.) 554; *Collier v. Collier*, 1 Dev. Eq. (N. Car.) 356; *Whittington v. Whittington*, 2 Dev. & B. (N. Car.) 64; *Moss v. Moss*, 2 Ired. (N. Car.) 55.

In construing the ordinary form of statute permitting the court to grant divorce from bed and board or from the bonds of matrimony, the court said: "It was never intended that either should be indifferently granted according as the prayer of the applicant asked for one or the other modes of relief. It was intended that a certain discretion should be exercised by the

courts according to the special circumstances of each suit, acting upon the settled principles of the common law as applicable to this class of cases." *Conant v. Conant*, 10 Cal. 249.

Public Policy.—In some cases it is held to be against public policy to grant this form of divorce, especially where there is no probability that the parties will resume cohabitation. *Burlage v. Burlage*, 65 Mich. 624; *Walsh v. Walsh*, 61 Mich. 554.

5. See authorities cited in *Barrere v. Barrere*, 4 Johns. Ch. (N. Y.) 187.

6. *Hacker v. Hacker*, 90 Wis. 325. See form of decree in *Jones v. Jones*, 78 Wis. 446, and *Jones v. Jones* (N. J. Eq. 1894), 29 Atl. Rep. 502.

7. Chancellor Kent, in order to prevent disputes concerning reconciliation, directed that the decree should provide "that the plaintiff and defendant be separated from bed and board forever, provided, however, that the parties may at any time hereafter, by their joint and mutually free and voluntary act, apply to the court for leave to be discharged from this decretal order." *Barrere v. Barrere*, 4 Johns. Ch. (N. Y.) 187; *followed in Jones v. Jones*, 90 Hun (N. Y.) 414; *Pool v. Pool*, 2 Edw. Ch. (N. Y.) 192.

A decree of divorce from bed and board is not annulled by the subsequent cohabitation of the parties where the statute provides that the parties must apply to the court to have the decree vacated. *Jones v. Jones*, 90 Hun (N. Y.) 414; *Jones v. Jones* (N. J. Eq. 1894), 29 Atl. Rep. 502; *Nathans v. Nathans*, 2 Phila.

3. Decree Nisi.—A decree *nisi* is a conditional decree which may be made absolute by a further decree,¹ on the application of the party obtaining the first decree² and proof that the parties have lived apart during the required time.³ The decree absolute dates from the time it is rendered, and does not relate back to the time the decree *nisi* was rendered.⁴

XIV. DIVISION AND RESTORATION OF PROPERTY—1. In General.—Where the plaintiff desires a division or restoration of property on divorce, the property of both parties should be described in the petition and a prayer made for such relief.⁵

The Decree awarding real estate should contain an accurate description of the property and must be based on the pleadings.⁶

2. Revision of the Decree.—The award on divorce is in the nature of a final accounting, and the court has no power to revise or vacate the order relating to the distribution of property after the close of the term,⁷ unless a showing is made of fraud or mistake.⁸ The decree is not merely a provision for the mainte-

(Pa.) 393; *Tiffin v. Tiffin*, 2 Binn. (Pa.) 202.

1. This form of decree was first authorized by the English divorce act, which permitted the courts to grant absolute divorces. For practice in *England*, see *Ellis v. Ellis*, 8 Prob. Div. 188, *overruling* *Latham v. Latham*, 2 Swab. & T. 299; *Collins v. Collins*, 9 Prob. Div. 231; *S. v. B.*, 9 Prob. Div. 80; *Patterson v. Patterson*, L. R. 2 P. & D. 192; *Langworthy v. Langworthy*, 11 Prob. Div. 85; *Noble v. Noble*, L. R. 1 P. & D. 691; *Prole v. Soady*, L. R. 3 Ch. 220.

For interpretations of the various statutes in *Massachusetts*, see *Edgerly v. Edgerly*, 112 Mass. 53; *Wales v. Wales*, 119 Mass. 89; *Pratt v. Pratt*, 157 Mass. 503; *Peaslee v. Peaslee*, 147 Mass. 171; *Darrow v. Darrow*, 159 Mass. 262; *Moors v. Moors*, 121 Mass. 232.

2. *Johnston v. Johnston*, 32 La. Ann. 1139; *Von Hoven v. Weller*, 38 La. Ann. 903; *Daspit v. Ehringer*, 32 La. Ann. 1174.

In *Massachusetts* either party may apply to have the decree made absolute. *Graves v. Graves*, 108 Mass. 314; *Bigelow v. Bigelow*, 108 Mass. 38.

Under a later act the application must be made by the party obtaining the decree *nisi*. *Sparhawk v. Sparhawk*, 114 Mass. 355.

3. *Whiting v. Whiting*, 114 Mass. 494.

4. *Cook v. Cook*, 144 Mass. 163.

5. *Ross v. Ross*, 21 Oregon 9, and cases cited; *Howe v. Howe*, 4 Nev.

469; *Philbrick v. Andrews*, 8 Wash. 7; *Cummings v. Cummings*, 75 Cal. 435.

As to the substantive doctrines governing the division and restoration of property on divorce, see *Am. and Eng. Encyc. of Law*, tit. Divorce.

In *Iowa* the term alimony is held to include a division of property, and the court may set apart specific property as alimony although such property was not described or prayed for. *Twing v. O'Meara*, 59 Iowa 326; *Zuver v. Zuver*, 36 Iowa 190.

Where the prayer is for alimony and temporary alimony, the court cannot grant a division of property on a decree by default, as such relief would exceed that demanded in the complaint. *Hoh v. Hoh*, 84 Wis. 378.

6. A decree awarding real estate and describing it by reference to certain deeds, without identifying the deeds, will be remanded for correction. *Young v. Young* (Tex. Civ. App. 1893), 23 S. W. Rep. 83.

7. *Bacon v. Bacon*, 43 Wis. 197; *Blake v. Blake*, 68 Wis. 303; *Petersine v. Thomas*, 28 Ohio St. 596; *Webster v. Webster*, 64 Wis. 438.

It may be shown, however, that the allowance was in fact alimony and not a sum in lieu of a distribution, and in such case the court may modify the decree if the circumstances of the parties have changed. *Blake v. Blake*, 68 Wis. 303.

8. The proportion of property may be increased on a showing that the husband had other property not dis-

nance of the wife, like the permanent alimony of the common law,¹ but is a final division or restoration of property, which will not be modified according to the changed circumstances of the parties after divorce,² and is not terminated by the death³ or marriage of either party.⁴

3. Recovery of Dower on Divorce.—Where the statute provides that the wife, on obtaining a divorce from the husband, shall be entitled to dower "as if he were dead,"⁵ the courts have refused to make an assignment of dower in the decree of divorce.⁶ The wife must recover her dower as if she were a widow.⁷ The value of the wife's inchoate right of dower is, however, usually estimated by the court and included in the decree for permanent alimony,⁸ and where this appears in the decree the wife cannot recover dower.⁹

XV. CUSTODY AND MAINTENANCE OF CHILDREN—1. In General.—On granting a decree of divorce, it is the duty of the court to provide for the custody and maintenance of the children, although neither party has prayed for such relief.¹⁰

closed to the court when the award was made. *Wright v. Wright*, 7 Tex. 526; *Lyon v. Lyon*, 21 Conn. 185.

1. *Miller v. Clark*, 23 Ind. 370; *Bacon v. Bacon*, 43 Wis. 197; *Mitchell v. Mitchell*, 20 Kan. 665; *Blake v. Blake*, 68 Wis. 303; *Maxwell v. Sawyer*, 90 Wis. 352; *Ex p. Spencer*, 83 Cal. 460.
2. *Bacon v. Bacon*, 43 Wis. 197; *Petersine v. Thomas*, 28 Ohio St. 596.
3. *Miller v. Clark*, 23 Ind. 370; *Dinet v. Eigenmann*, 80 Ill. 275; *Dow v. Blake*, 148 Ill. 76.

4. On an application to vacate a decree of alimony because the divorced wife had married another and did not need the alimony, the court said that if it should "appear that the former decree, instead of being in the nature of alimony, payable in instalments for the support of the wife, was in the nature of a permanent division of the husband's property, and that the parties fixed the same by their own agreement, * * * this, if alleged and proved, may furnish a complete defense." *Olney v. Watts*, 43 Ohio St. 499. But see *contra*, under *Illinois* statute, *Stillman v. Stillman*, 99 Ill. 196, reversing 7 Ill. App. 524.

5. See statutes cited and construed in *Davol v. Howland*, 14 Mass. 219; *Harding v. Alden*, 9 Me. 140; *Smith v. Smith*, 13 Mass. 231; *Percival v. Percival*, 56 Mich. 297; *Orth v. Orth*, 69 Mich. 158; *Owen v. Yale*, 75 Mich. 256; *Bowles v. Hoard*, 71 Mich. 150; *Rea v. Rea*, 63 Mich. 257.

6. *Holmes v. Holmes*, 54 Minn. 352.

7. *Smith v. Smith*, 13 Mass. 231.

As to her right of dower in proceedings after divorce, see *Bowles v. Hoard*, 71 Mich. 150; *Harding v. Alden*, 9 Me. 140; *Davol v. Howland*, 14 Mass. 219; *Kruger v. Day*, 2 Pick. (Mass.) 316; *Runnells v. Webber*, 59 Me. 488; *Arnold v. Donaldson*, 46 Ohio St. 73.
8. *Reed v. Reed*, 86 Mich. 600; *Plaster v. Plaster*, 47 Ill. 290; *Gercke v. Gercke*, 100 Mo. 237.

9. *Owen v. Yale*, 75 Mich. 256; *Tatro v. Tatro*, 18 Neb. 395; *Adams v. Storey*, 135 Ill. 448.

Michigan and Minnesota.—When the marriage is dissolved on account of the misconduct of the husband, "the wife shall be entitled to her dower in his lands in the same manner as if he were dead, but she shall not be entitled to dower in any other case of divorce." *Percival v. Percival*, 56 Mich. 297; *Orth v. Orth*, 69 Mich. 158; *Holmes v. Holmes*, 54 Minn. 352.

Massachusetts.—"After a divorce, a wife shall not be entitled to dower in the lands of her husband, except when the divorce was for the cause of adultery committed by the husband, or because of his sentence to confinement at hard labor, in which cases she shall be entitled to her dower in the same manner as if he were dead." Pub. Stat. Mass. 1882, c. 146, § 28.

10. *Snover v. Snover*, 10 N. J. Eq. 261; *Parker v. Parker*, 8 Ohio Cir. Ct. Rep. 363; *Ex p. Gordan*, 95 Cal.

The Order should be that a certain party have the custody of the children until the further order of the court. It may also provide that the other party have access to the children at certain¹ times;² that the children be kept within the jurisdiction of the court;³ that the father pay a certain sum for their support⁴ and education⁵ to the wife or to some person for her use.⁶

In Selecting a Custodian, the welfare of the child is paramount to all other considerations, and the court must select the parent who has the better qualifications. If neither parent is qualified, the custody may be granted to other suitable persons.⁷

2. During Suit.—On the application of either party by motion, and a showing of sufficient facts, the court may award the custody of the children during the suit for divorce.⁸ The proceedings in such case are similar to the application for temporary alimony,⁹ and the court will not ordinarily examine the merits of the case or change the custody unless the welfare of the children requires it.¹⁰

3. Custody where Divorce Refused.—If, after the trial, a divorce is denied, the court may, under some statutes, award the custody of the children to one of the parties.¹¹ But this power is denied under some forms of the statute.¹²

374; *Zuver v. Zuver*, 36 Iowa 190; *Umlauf v. Umlauf*, 22 Ill. App. 580.

1. The order should be "until the further order of the court," as the order cannot provide for future contingencies. *Schammel v. Schammel*, 105 Cal. 258.

2. *Haley v. Haley*, 44 Ark. 429; *Campbell v. Campbell*, 37 Wis. 206; *Oliver v. Oliver*, 151 Mass. 349; *Bailey v. Bailey*, 17 Oregon 114; *Hill v. Hill*, 49 Md. 450; *Eckhard v. Eckhard*, 29 Neb. 457; *Burge v. Burge*, 88 Ill. 165.

The order may be that the children be kept within a certain county. *Umlauf v. Umlauf*, 35 Ill. App. 624; *Luck v. Luck*, 92 Cal. 653; *Ex p. Gordan*, 95 Cal. 374.

3. *Hewitt v. Long*, 76 Ill. 399; *Miner v. Miner*, 11 Ill. 43. See also *Campbell v. Campbell*, 37 Wis. 206.

Party about to Leave State.—The custody is generally denied to a party who is about to leave the state. *Adams v. Adams*, 1 Duv. (Ky.) 167; *Hewitt v. Long*, 76 Ill. 399; *In re Bullen's Petition*, 28 Kan. 781. See *contra*, *Stetson v. Stetson*, 80 Me. 483.

4. *Wuest v. Wuest*, 17 Nev. 217; *Webster v. Webster*, 3 Swab. & T. 106; *Plaster v. Plaster*, 53 Ill. 445, 67 Ill. 93; *Simpson v. Simpson*, 80 Cal. 237; *Miller v. Miller*, 64 Me. 484.

5. *Heninger v. Heninger*, 90 Va. 271.

6. *Schammel v. Schammel*, 105 Cal. 258; *Ex p. Gordan*, 95 Cal. 374.

7. See, for a full discussion of this subject, Am. and Eng. Encyc. of Law, tit. Divorce.

8. *In re Morgan*, 117 Mo. 249; *Green v. Green*, 52 Iowa 403; *Gilpin v. Gilpin*, 12 Colo. 504; *Putnam v. Putnam*, 3 Code Rep. (N. Y. Supreme Ct.) 122; *People v. Paulding*, 15 How. Pr. (N. Y. Supreme Ct.) 167. See *contra*, *Matter of De Angelis*, 1 Edm. Sel. Cas. (N. Y.) 476.

The trial court cannot fix the custody of the children after an appeal is granted. *King v. King*, 42 Mo. App. 454.

For form of order granting custody of children during suit, see *Traylor v. Richardson*, 2 Ind. App. 452.

9. *In re Morgan*, 117 Mo. 249.

10. *Ryder v. Ryder*, 2 Swab. & T. 225; *Boynton v. Boynton*, 1 Swab. & T. 324; *Curtis v. Curtis*, 1 Swab. & T. 75; *Thompson v. Thompson*, 2 Swab. & T. 402.

11. *Luck v. Luck*, 92 Cal. 653; *Brenot v. Brenot*, 102 Cal. 294; *Cornelius v. Cornelius*, 31 Ala. 479; *Anonymous*, 55 Ala. 428.

12. *Keppel v. Keppel*, 92 Ga. 506; *Davis v. Davis*, 75 N. Y. 221. See Am. and Eng. Encyc. of Law, tit. Divorce.

4. Order for Maintenance.—Where the custody is awarded to the mother, the court may make an order that the husband pay a certain sum to the wife for the maintenance of the children.¹ The order for support is of the same nature as an order for permanent alimony,² and may be secured as directed by the court,³ and enforced by execution or by contempt proceedings.⁴

The Amount Allowed for the maintenance of the children should be stated separately, and not included in the amount allowed to the wife as alimony;⁵ for where the decree awards the wife alimony and the custody of the children, it will be presumed that the alimony is for the wife alone.⁶

If the Decree Contains No Provision for the support of the children, the only remedy of the wife is to have the order modified by the court which granted it,⁷ and an order made for such maintenance,⁸ as the husband is not liable to his divorced wife for the support of the children after divorce unless the decree imposed such liability.⁹

1. *Plaster v. Plaster*, 53 Ill. 445, 67 Ill. 93; *Wuest v. Wuest*, 17 Nev. 217; *Schammel v. Schammel*, 105 Cal. 258; *Heninger v. Heninger*, 90 Va. 271.

Pleadings and Prayer.—Under the usual form of the statute, it is the duty of the court to provide for the custody and maintenance of the children although the pleadings contain no allegation as to the fitness of the parties for such custody, or their ability and willingness to support their children, and there is no prayer for such custody and maintenance. *Ex p. Gordan*, 95 Cal. 374.

2. *Ex p. Gordan*, 95 Cal. 374.

The Homestead may be assigned to the wife absolutely, but not "in trust for her support and for that of the children of the parties." *Simpson v. Simpson*, 80 Cal. 237. But see *Doscher v. Blackiston*, 7 Oregon 403.

3. A bond given to secure the payment of a certain sum quarterly for the support of the children, until the further order of the court, is not discharged by the death of the husband. *Miller v. Miller*, 64 Me. 484.

4. *Ex p. Gordan*, 95 Cal. 374.

5. *Johnson v. Johnson*, 36 Ill. App. 152; *Zuver v. Zuver*, 36 Iowa 190; *Whieldon v. Whieldon*, 2 Swab. & T. 388.

The order may be that the husband shall be entitled to the custody of the children if the amount paid for their support be diverted to other purposes. *Lancaster v. Lancaster*, 29 Ill. App. 510.

6. *Pretzinger v. Pretzinger*, 45 Ohio St. 452; *Rogers v. Rogers*, 51 Ohio St. 1; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Footo v. Footo*, 22 Ill. 425; *Dow v. Dow*, 38 N. H. 188.

7. *McNees v. McNees* (Ky. 1895), 30 S. W. Rep. 207; *Harvey v. Lane*, 66 Me. 536.

8. *Wilson v. Wilson*, 45 Cal. 399; *Plaster v. Plaster*, 47 Ill. 290; *Holt v. Holt*, 42 Ark. 495; *Buckminster v. Buckminster*, 38 Vt. 248; *King v. Miller*, 10 Wash. 274; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Washburn v. Catlin*, 97 N. Y. 623; *Wells v. Wells* (Buffalo Super. Ct.), 10 N. Y. St. Rep. 248; *Chamberlain v. Chamberlain*, 63 Hun (N. Y.) 96.

9. *Harris v. Harris*, 5 Kan. 46; *Chandler v. Dye*, 37 Kan. 765; *Rich v. Rich*, 88 Hun (N. Y.) 566; *Burritt v. Burritt*, 29 Barb. (N. Y.) 124; *Fulton v. Fulton*, 52 Ohio St. 229; *Fitler v. Fitler*, 33 Pa. St. 50; *Ramsey v. Ramsey*, 121 Ind. 215; *Brow v. Brightman*, 136 Mass. 187; *Johnson v. Onsted*, 74 Mich. 437; *Hall v. Green*, 87 Me. 122; *Gilley v. Gilley*, 79 Me. 292; *Brown v. Smith* (R. I. 1895), 33 Atl. Rep. 466; *Finch v. Finch*, 22 Conn. 411.

In some states it is held that the husband is liable to the wife for the support of their children after a decree of divorce which does not provide for custody or maintenance. *Buckminster v. Buckminster*, 38 Vt. 248; *Courtright v. Courtright*, 40 Mich. 633; *Holt v. Holt*, 42 Ark. 495; *Lusk v. Lusk*, 28 Mo. 91; *Chester v. Chester*,

Modification of Order.—The order awarding the custody of the children to one of the parties is an adjudication as to the rights of the parties and the welfare of the children at the time, and the court will not modify the order on a showing of other facts which existed at the time and were known to the applicant.¹ But facts which could not have been discovered with reasonable diligence before the trial,² or facts showing a change of circumstances, which render the applicant a better custodian of the children, may be shown.³

XVI. APPEAL—1. In General—Equity Cases.—Where jurisdiction to grant divorce is generally conferred upon courts of equity the appeal may be taken as from other decrees.⁴

In the *Code States* the provisions of the code in relation to appeals are held applicable to suits for divorce, and the appeal must conform to such provisions.⁵

17 Mo. App. 657; *Maddox v. Patterson*, 80 Ga. 719.

1. *Dubois v. Johnson*, 96 Ind. 6; *Teter v. Teter*, 88 Ind. 494; *White v. White*, 75 Iowa 218; *Reid v. Reid*, 74 Iowa 681; *Pfau v. Pfau*, 8 Ohio Cir. Ct. Rep. 87; *State v. Bechdel*, 37 Minn. 360; *Irwin v. Irwin*, 96 Ky. 318.

Under a *New York* statute the custody of the children could not be changed where the decree awarded such custody to the father. *Crimmins v. Crimmins*, 28 Hun (N. Y.) 200.

Notice of Application to Modify.—Where no notice of the application to modify a decree and to change the custody of the children is served on the adverse party, the order of the court modifying the decree is void. *Phillips v. Phillips*, 24 W. Va. 591.

2. *Semrow v. Semrow*, 23 Minn. 214.

3. *Flory v. Ostrom*, 92 Mich. 622; *Chandler v. Chandler*, 24 Mich. 176; *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. (N. Y.) 493; *Greenleaf v. Greenleaf* (S. Dak. 1894), 61 N. W. Rep. 42; *Boggs v. Boggs*, 49 Iowa 190; *Sherwood v. Sherwood*, 56 Iowa 608; *Oliver v. Oliver*, 151 Mass. 349; *Snover v. Snover*, 13 N. J. Eq. 261; *Valentine v. Valentine*, 8 N. J. Eq. 219.

The Marriage of Either of the Parties will not necessitate a change of custody unless such fact renders the applicant a better custodian. *Wand v. Wand*, 14 Cal. 512; *Welch v. Welch*, 33 Wis. 534; *In re D'Anna*, 117 N. Car. 463.

For Form of Order changing the custody of the children and modifying the order for maintenance, see *Umlauf v. Umlauf*, 35 Ill. App. 624.

4. *Sharon v. Sharon*, 67 Cal. 199; *Hitchcox v. Hitchcox*, 2 W. Va. 435; *Shafer v. Shafer*, 30 Mich. 163; *Simpson v. Simpson*, 25 Ark. 487; *Simpkins v. Simpkins*, 22 Mo. App. 25. See also *Jeans v. Jeans*, 3 Harr. (Del.) 136.

The oral testimony must be preserved by a bill of exceptions as in error proceedings. *Pillow v. Pillow*, 5 Yerg. (Tenn.) 420.

Where the divorce statute provides that the like process and proceedings should be had and pursued in such cases as were had and pursued in other chancery cases, the general statute providing for appeals from any final decree in chancery applies to suits for divorce. "These directions," it is held, "are too explicit and imperative for this court to disregard them, and to assume that the legislature did not intend what they have expressed in very plain terms, and to adopt a different construction, from any view of the injurious consequences which might otherwise ensue." *Fulton v. Fulton*, 36 Miss. 517.

In *Ohio* appeals are refused on the ground of public policy. "Although the proceeding in such cases is in form as in chancery, yet this court have long since decided that when the decree has been once made, there could be no review. *Bascom v. Bascom*, 7 Ohio (pt. 2) 125. And surely, if there could be no review, there can be no appeal." *Laughery v. Laughery*, 15 Ohio 404.

5. *Brotherton v. Brotherton*, 12 Neb. 72; *Barney v. Barney*, 14 Iowa 189.

And a like decision was made under the *Maryland* statutes. *Thomas v. Thomas*, 57 Md. 504.

Special Statutes.—In some states the appeal must conform to the special provisions of the divorce statutes.¹

A statute requiring chancery cases to be tried on written evidence, and providing that in such cases a trial *de novo* may be had on appeal, is not applicable to suits for divorce which are required to be tried in open court. The right of appeal exists regardless of such statute. *Sherwood v. Sherwood*, 44 Iowa 192.

In Ohio the provisions of the code relating to appeal do not apply to divorce proceedings. By provision of the divorce statute no appeal can be taken. *Tappan v. Tappan*, 6 Ohio St. 64.

Appeal Bond.—An appeal will be dismissed for the failure to file the usual bond conditioned to prosecute the appeal with effect. *Brom v. Brom*, 2 Whart. (Pa.) 94.

Stipulation for Affirmance.—A general provision of the code that no appeal from an order granting a new trial can be taken, unless the notice of appeal contains the consent of appellant that an absolute decree may be rendered against him if the order be affirmed, is applicable to suits for divorce, and an appeal will lie from an order granting a new trial. *Conger v. Conger*, 77 N. Y. 432.

No Cross-appeal—Appellee may Resist Appeal.—Where the decree dismisses a petition for divorce and a cross-petition for annulment of marriage, the failure of the plaintiff to appeal will not preclude her from resisting the defendant's appeal. *Nadra v. Nadra*, 79 Mich. 591.

Affidavit Denying Intent to Delay.—A general statute requiring an affidavit that the appeal was not intended for delay applies to appeals from decrees of divorce. Such affidavit may be supplied at any time before a motion is made to dismiss the appeal. *Brentlinger v. Brentlinger*, 4 Rawle (Pa.) 241.

Time of Taking Appeal.—An appeal must be taken within the required time after the entry of the decree although the decree granting the divorce reserves all questions relating to alimony and the custody of children for further consideration. *Waite v. Waite*, 18 Ill. App. 334.

1. **Kentucky.**—The Court of Appeals has no jurisdiction to review or reverse a decree of divorce. *Dejarnet v. De-*

jarnet, 5 Dana (Ky.) 499; *Pence v. Pence*, 6 B. Mon. (Ky.) 496; *Bourne v. Simpson*, 9 B. Mon. (Ky.) 454.

But that portion of the decree relating to property rights or the custody of children may be revised. *Hoover v. Hoover* (Ky. 1893), 21 S. W. Rep. 234; *Woolfolk v. Woolfolk*, 96 Ky. 657; *Thornberry v. Thornberry*, 4 Litt. (Ky.) 252; *Whitney v. Whitney*, 7 Bush (Ky.) 520; *Evans v. Evans*, 93 Ky. 510; *Irwin v. Irwin*, 96 Ky. 318.

A decree refusing a divorce may be reviewed by a writ of error. *Boggess v. Boggess*, 4 Dana (Ky.) 307.

In reviewing a decree of divorce and alimony the court may declare a divorce void for want of jurisdiction and reverse the decree as to alimony. *Maguire v. Maguire*, 7 Dana (Ky.) 181.

Where it appears that the divorce should have been granted to the wife instead of the husband, the case may be reversed with instructions to allow the wife alimony. *Davis v. Davis*, 86 Ky. 32; *Lacey v. Lacey*, 95 Ky. 110.

If it appears that a divorce was improperly granted to the wife, the amount of alimony may be reduced. *Beall v. Beall*, 80 Ky. 675.

Ohio.—No appeal is allowed in this state, the decree of the lower court being final as to decrees of divorce. *Tappan v. Tappan*, 6 Ohio St. 64; *Laughery v. Laughery*, 15 Ohio 404.

An appeal may be taken by either party to the District Court from a decree of the Court of Common Pleas for permanent alimony, but not for temporary alimony. *Taylor v. Taylor*, 25 Ohio St. 71.

Under section 5706 of the code, "no appeal shall be allowed from any judgment or order of the Court of Common Pleas under this chapter, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony." No appeal lies from an order modifying a decree and requiring the husband to pay a monthly stipend for support of the children. *Rogers v. Rogers*, 51 Ohio St. 1.

Where a petition for divorce or for alimony alone is dismissed on a final hearing in the Common Pleas, no appeal lies to the District Court. *Price v.*

2. Final Orders.—The decree for divorce must be final, as an appeal will not lie from a mere interlocutory order.¹

Order for Temporary Alimony.—It is a controverted question whether an order to the husband to pay temporary alimony or counsel fees is a final order which may be reviewed before a decree is rendered, but the weight of authority is that such order is a final

Price, 10 Ohio St. 316; Reed *v.* Reed, 17 Ohio St. 564.

In cases where the decree is rendered for both divorce and alimony, either party may appeal from any final judgment or order to the District Court, but the appeal shall apply only to that portion of the decree which relates to alimony. Cox *v.* Cox, 19 Ohio St. 502.

An appeal will lie from a decree refusing divorce and granting alimony. Graves *v.* Graves, 50 Ohio St. 196.

Indiana.—Decrees of divorce cannot be reviewed by proceedings to vacate, as in ordinary civil actions. Earle *v.* Earle, 91 Ind. 27, and cases cited and overruled. See also Keller *v.* Keller, 139 Ind. 38.

But an appeal may be taken as in other cases. Sullivan *v.* Sullivan, 34 Ind. 368; Garner *v.* Garner, 38 Ind. 139.

Where a default is entered on constructive service, and without notice to defendant, the only remedy is by appeal. Cochnower *v.* Cochnower, 27 Ind. 253.

Missouri.—In Missouri the appeal must be granted during the term, or the writ of error must be issued within sixty days after the decree was rendered. Judge *v.* Judge, 38 Mo. 160.

The term referred to is the term at which the motion for a new trial is overruled. State *v.* Smith, 104 Mo. 419.

The Supreme Court has no jurisdiction to review on appeal a decree of divorce rendered by the St. Louis Court of Appeals, but may modify a decree of alimony where it exceeds two thousand five hundred dollars. Golding *v.* Golding, 74 Mo. 123. See also State *v.* St. Louis Ct. App., 88 Mo. 135.

Appeal or Proceedings in Error.—Where the right of appeal is given by a special provision of the divorce statute, and the divorce statute is amended, an appeal can be taken from decrees rendered under the amended statute. Robbarts *v.* Robbarts, 9 S. & R. (Pa.) 191.

Under the divorce statute of Tennessee appeal is the only method of obtaining a review of proceedings in the lower court. Parmenter *v.* Parmenter, 3 Head (Tenn.) 225.

But a decree for alimony may be reviewed on a writ of error. McBee *v.* McBee, 1 Heisk. (Tenn.) 558.

1. Illustrations.—An order "that plaintiff's prayer for a decree of divorce be denied, and that defendant have judgment for costs," is not a judgment or final order, but a mere order for a judgment, and is not appealable. Macnevin *v.* Macnevin, 63 Cal. 186.

An order overruling a motion for a nonsuit is not a final order unless a divorce is granted. Christie *v.* Christie, 53 Cal. 26.

An order sustaining a demurrer and dismissing a cross-bill for divorce is a final order. Clutton *v.* Clutton (Mich. 1895), 64 N. W. Rep. 744.

An order refusing to vacate a decree of divorce is a final order. Haverty *v.* Haverty, 35 Kan. 438.

Appeal lies from an order overruling a plea denying the marriage. Cross *v.* Cross, 54 Mich. 115.

A decree of divorce, reserving the questions relating to a division of the property and the custody of the children for determination on further testimony to be taken by the court, is not a final order. Lake *v.* King, 16 Nev. 215.

In an action for separate maintenance, a decree upon a verdict in favor of the wife, reserving the amount of alimony for future determination, is not a final order. Hunter *v.* Hunter, 100 Ill. 519; Knowlton *v.* Knowlton, 40 Ill. App. 588.

A decree of absolute divorce and for permanent alimony is appealable although the decree orders a reference to determine the amount of permanent alimony. Shaw *v.* Shaw, 9 Mich. 164.

An order granting temporary alimony in a proceeding to modify a decree of divorce is a final order. Brotherton *v.* Brotherton, 19 Neb. 584.

order and in effect a decree.¹ Some well-considered opinions hold that such order is an interlocutory order, and, as it does not involve the merits of the case, cannot be reviewed except on an appeal from the decree granting or refusing a divorce.² It is

1. *Sharon v. Sharon*, 67 Cal. 185, and cases cited; *White v. White*, 86 Cal. 216; *Casteel v. Casteel*, 38 Ark. 477; *Hecht v. Hecht*, 28 Ark. 92; *Glenn v. Glenn*, 44 Ark. 46; *King v. King*, 38 Ohio St. 370; *Reed v. Reed*, 17 Ohio St. 563; *In re Finkelstein*, 13 Mont. 425; *Williams v. Williams*, 29 Wis. 517; *Daniels v. Daniels*, 9 Colo. 133; *State v. Seddon*, 93 Mo. 520; *Whitsell v. Whitsell*, 8 B. Mon. (Ky.) 50. See also article ALIMONY, vol. 1, p. 446.

In *Lochnane v. Lochnane*, 78 Ky. 467, the court said: "That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce."

In *Blake v. Blake*, 80 Ill. 523, a leading case on this question, the husband appealed from an order committing him to prison for contempt for non-observance of a decree for temporary alimony and attorney's fees. Pending this appeal the court entered another decree for temporary alimony, and the husband appealed. In holding that the second decree was a final order, the court said: "The question raised is one that has never been passed upon by this court, but upon first impression we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or, if payment was wilfully and contumaciously refused, the decree might be enforced by attachment, as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other, the decree could be enforced, and if defendant has property it could * * * be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies, this case affords an instance of a money de-

creed against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error, after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be reached. In the meantime he has been imprisoned for disobedience to the decree, or his property under process of law been subjected to the payment of the sum decreed. Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted."

An appeal may be taken from an order for temporary alimony under section 3164 of the *Iowa* code, permitting an appeal from an order which "grants or refuses, continues, or modifies a provisional remedy." "We understand," said the court, "that a 'provisional' remedy is one provided for temporary purposes, as to meet a present exigency. If the relief granted by the District Court be regarded as an order merely, we think an appeal may be taken from it." *Blair v. Blair*, 74 *Iowa* 311.

An Order to Show Cause why counsel fees and temporary alimony may not be allowed is not a final order. *Hayward v. Hayward* (Md. 1893), 26 *Atl. Rep.* 357.

Order Refusing to Reduce Amount.—An appeal will lie from an order refusing to reduce the amount of temporary alimony awarded. *State v. Third Judicial Dist. Ct.*, 14 *Mont.* 476.

2. *Wyatt v. Wyatt*, 2 *Idaho* 219; *Lapham v. Lapham*, 40 *Mich.* 527; *Cooper v. Mayhew*, 40 *Mich.* 528; *Ross v. Ross*, 47 *Mich.* 186; *Pearson v. Pearson*, Peck (Tenn.) 27; *Malony v. Malony*, 9 *Rob. (La.)* 116.

"The allowance of exceptions to such an order, and the delay that would be thereby occasioned, would in many cases leave the wife to starve, or force her to become a public charge, or to accept support at the hand of charity.

also held that such order is not a final order under the definitions of some of the codes.¹

Orders as to Children and Property.—An appeal will lie from final orders concerning the custody and maintenance of the children² or the division of property or alimony,³ whether such orders are included in the decree or entered separately.⁴

An Order Adjudging the Husband Guilty of Contempt for nonpayment of alimony and committing him to prison is of course a final order, and not interlocutory.⁵

3. Review of the Evidence.—While a decree of divorce is reviewed on appeal as a decree in equity,⁶ the courts decline to review questions of fact as on a trial *de novo*, or to determine the weight of evidence where it is conflicting.⁷

Where the Lower Court Heard and Saw the Parties and Their Witnesses, observed their demeanor while testifying, and may have had some acquaintance with them, the findings will not be disturbed on appeal merely because the appellate court arrives at a different conclusion from the evidence as it appears on paper.⁸

Such could never have been the intention of the legislature." *Call v. Call*, 65 Me. 407.

1. An order for temporary alimony is not appealable under section 581 of the *Nebraska Code*, which provides that "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." *Aspinwall v. Aspinwall*, 18 Neb. 463.

Such order is not one "that involves the merits of an action, or some part thereof." *Earls v. Earls*, 26 Kan. 178.

Appeal for Delay—Advancing Cause.—In *California* appeals from orders for temporary alimony are advanced on the calendar and heard without delay. If it should appear that the appeal is vexatious and taken for delay, the usual penalty will be imposed. *Langan v. Langan*, 86 Cal. 132.

Motion to Vacate Decree Pending.—An appeal will be dismissed where the record discloses that a motion to set aside a decree has not been disposed of. *Thomas v. Thomas*, 64 Mo. 353.

2. *Pittman v. Pittman*, 3 Oregon 472; *Evans v. Evans*, 93 Ky. 510; *Irwin v. Irwin*, 96 Ky. 318; *In re Laplain* (La. Ann. 1890), 8 So. Rep. 615. See *contra*, under *Ohio* statute, *Rogers v. Rogers*, 51 Ohio St. 1.

The order for the maintenance of children included in a decree of divorce is an incident of such decree, and cannot be reviewed unless the appeal is from the whole decree. *Thomson v. Thomson*, 5 Utah 401.

The order awarding the children to one of the parties is a discretionary order, and will rarely be disturbed on appeal. *Price v. Price*, 55 N. Y. 656; *Waring v. Waring*, 100 N. Y. 570.

3. *Lake v. Lake*, 17 Nev. 230; *Strozynski v. Strozynski*, 97 Cal. 189; *Boyd v. Boyd* (Cal. 1893), 31 Pac. Rep. 1108; *Brigham v. Brigham*, 147 Mass. 159.

4. *Strozynski v. Strozynski*, 97 Cal. 189.

5. *State v. Dent*, 29 Kan. 416; *Haines v. Haines*, 35 Mich. 138; *In re Bissell*, 40 Mich. 63; *Ross v. Ross*, 47 Mich. 185; *Rose v. Rose*, 53 Mich. 585; *In re Finkelstein*, 13 Mont. 425. See also *article APPEALS*, vol. 1, p. 129.

6. *Nichols v. Nichols*, 39 Mo. App. 291; *O'Bryan v. O'Bryan*, 13 Mo. 16; *Casteel v. Casteel*, 38 Ark. 477.

In *Tierney v. Tierney*, 1 Wash. Ter. 568, the divorce suit is said to be an action at law to be reviewed by a writ of error.

7. *Nichols v. Nichols*, 39 Mo. App. 291.

8. *Corrie v. Corrie*, 46 Mich. 235; *McGonegal v. McGonegal*, 46 Mich. 66; *Nicholas v. Nicholas*, 50 Mich. 162; *Grant v. Grant*, 5 S. Dak. 1; *Casteel v. Casteel*, 38 Ark. 477; *Moustier v. Meyer*, 47 La. Ann. 1445; *Clark v. Clark*, 48 Mo.

Where the Evidence is Conflicting the findings of the trial court are accorded the same weight as the verdict of a jury, and will not be set aside unless clearly erroneous.¹

Where the Decree is Based on the Findings of a Trial Judge or Referee, it will be set aside if, in the opinion of the appellate court, the evidence is not sufficient to sustain a decree of divorce.²

The Verdict of a Jury is entitled to the same effect in the review of a decree of divorce as in other cases,³ and will be set aside if not sustained by sufficient evidence.⁴

4. Decision, Modification, Reversal.—The decree of divorce may be affirmed so far as it relates to a dissolution of the marriage, and

App. 157; *Stevenson v. Stevenson*, 29 Mo. 95; *Gillespie v. Gillespie*, 28 Mo. 598; *Scanlan v. Scanlan*, 41 Ill. App. 449.

1. *Gibbs v. Gibbs*, 18 Kan. 419; *Powers v. Powers*, 20 Neb. 529; *Callahan v. Callahan*, 7 Neb. 38; *Nygren v. Nygren*, 42 Neb. 408; *Tierney v. Tierney*, 1 Wash. Ter. 568.

In *Davis v. Davis*, 60 Mo. App. 545, in reversing a decree of divorce, the court said: "It is true, as * * * shown by the numerous cases cited by counsel for plaintiff, that the rule of practice in equity and divorce cases, when the evidence is conflicting and the decision depends upon the credibility of the witnesses, is that the appellate courts are not bound by the findings of the lower court, but deference should, nevertheless, be paid to its findings."

The trial court granted the wife a divorce on the ground of cruelty, and overruled a motion for a new trial, assigning the following reasons: "While upon paper it may not appear that plaintiff had any great reason to complain on the score of mental anguish, yet the appearance of the parties in court, in connection with the evidence offered, entirely satisfied my mind that she was a keen sufferer by reason of the premeditated, persistent, and wilful system of persecution and annoyance adopted by the defendant towards her. The defendant is a strong, muscular, hearty man in the meridian of animal power, while the defendant is a weak, frail woman, and very evidently of an exceedingly nervous temperament." On appeal to the Supreme Court, on the ground that the evidence was conflicting and not sufficient to sustain the findings and decree, the court applied the rule that where the findings are based upon conflicting evidence the decree will be affirmed as

in other cases tried by the court on oral testimony. *Matthai v. Matthai*, 49 Cal. 90.

2. *Clark v. Clark*, 48 Mo. App. 157.

In reversing a decree on the report of the referee, the court said: "While we are not unmindful of the superior advantages possessed by the referee, who saw the witnesses, heard their testimony, and had an opportunity to observe their demeanor while testifying, and while we recognize the ability of the learned referee before whom this action was tried, still a careful examination of the evidence has led us to the conclusion that the findings of the referee are not sustained by that fair preponderance of evidence which would justify us in upholding the judgment." *Huntley v. Huntley*, 73 Hun (N. Y.) 261.

3. *O'Bryan v. O'Bryan*, 13 Mo. 16; *Fuller v. Fuller*, 17 Cal. 605; *Carter v. Carter*, 152 Ill. 434.

In *Gilpin v. Gilpin*, 12 Colo. 504, the court, in discussing the weight of a verdict where the statute requires contested cases to be tried by a jury, said: "Whatever may be the precise effect of a verdict in divorce cases, and whatever power the trial judge may possess over the same, we are clearly of the opinion that when an issue is framed and submitted to a jury wherein one party charges and the other denies the commission of a matrimonial offense, the verdict returned thereon is entitled to great weight. Indeed, we are not prepared to say that under the statute it should not be held as conclusive as a common-law verdict upon the trial court as well as upon the appellate court. But it certainly is not entitled to greater consideration than verdicts in strictly common-law actions."

4. *Pollock v. Pollock*, 71 N. Y. 137.

the portion of the decree relating to alimony may be modified¹ or remanded to the lower court.² Where an appeal is taken from the decree so far as it relates to alimony, the court will not disturb the decree of divorce because the evidence is not satisfactory, but the amount of alimony may be changed.³

Appellant Remarrying.—If the appellant accepts the benefit of the decree by marrying another the appeal will be dismissed.⁴ But in such case the court may examine that portion of the decree relating to alimony.⁵

XVII. PROCEEDINGS TO VACATE DECREES—1. In General.—Decrees of divorce are not opened, set aside, or vacated under the same circumstances or for the same reasons as ordinary judgments or decrees.⁶ After a decree of divorce is rendered, other marriages may be contracted and children born, and it is against public policy to vacate the decree, as such order would render innocent parties guilty of bigamy and their children illegitimate. Accordingly the courts have sometimes refused to vacate decrees of divorce.⁷

1. *Andrews v. Andrews*, 69 Ill. 609; *McGrady v. McGrady*, 48 Mo. App. 668; *Small v. Small*, 28 Neb. 843; *Ensler v. Ensler*, 72 Iowa 159; *Sleeper v. Sleeper*, 65 Hun (N. Y.) 454; *Hamilton v. Hamilton*, 37 Mich. 603.

Ordinarily a decree for permanent alimony should not be entered in the appellate court, but the case should be remanded for further proceedings in conformity with the opinion, as the condition of the parties and the value of their property may have changed during the appeal. *Yost v. Yost*, 141 Ind. 584.

2. *Reynolds v. Reynolds*, 92 Mich. 104; *Ross v. Ross*, 78 Ill. 402; *Cowan v. Cowan*, 16 Colo. 335; *Turner v. Turner*, 80 Cal. 141; *Hickling v. Hickling*, 40 Ill. App. 73; *Rourke v. Rourke*, 8 Ind. 427.

3. *Ensler v. Ensler*, 72 Iowa 159.

4. *Stephens v. Stephens*, 51 Ind. 542.

In *Garner v. Garner*, 38 Ind. 139, the husband married after the decree and before the appeal was taken. In dismissing the appeal the court said: "If we should reverse the judgment, the effect would be to leave the appellant with two women, each with at least apparent claims to be his lawful wife; the petitioner, because she would be unquestionably his wife after the judgment for divorce was reversed, and the other female, because she had married him while the judgment of divorce was in full force and unreversed, and while he was consequently single and unmarried.

It seems to be the law that a party cannot be relieved from a judgment of divorce after he has used the privileges of the judgment. Having availed himself of the benefits of the decree or judgment he must bear its burdens."

5. *Garner v. Garner*, 38 Ind. 139.

Death of Party—Effect on Appeal.—On the death of either party an appeal from a decree of divorce will abate. But an appeal from a decree granting divorce does not abate upon the death of the appellee. See *supra*, XII. *Abatement and Revivor*.

6. As to vacation and modification of decrees in general, see article DECREEs, vol. 5, p. 946.

7. *Lucas v. Lucas*, 3 Gray (Mass.) 136; *Greene v. Greene*, 2 Gray (Mass.) 361. And see *McQuigg v. McQuigg*, 13 Ind. 294.

The writ of review is denied as to decrees of divorce in *Ohio* and *Massachusetts*, on the ground that such relief was not contemplated by the legislature and that such relief would so disturb the status of the divorced parties as to be against public policy. *Lucas v. Lucas*, 3 Gray (Mass.) 136; *Bascom v. Bascom*, 7 Ohio (pt. 2) 125.

In *New Hampshire* the statute relating to new trial was held applicable to proceedings after the common law only and not to decrees of divorce and alimony. *Sheafe v. Sheafe*, 29 N. H. 269.

A Decree of Separation Forever will not be corrected to a mere decree of separa-

Statutory Prohibition.—And in some states the legislatures have prohibited any action of the courts disturbing decrees of divorce either by appeal,¹ by proceedings to set aside defaults,² by new trials,³ or by bills of review.⁴

Time Limit.—In many states it is wisely provided that proceedings to vacate or reverse decrees of divorce must be commenced within a certain time, generally a shorter period of time than is allowed for the vacation of other decrees.⁵

Where the Divorce is Obtained by Fraud in proving a domicil within the state, or in concealing notice of the proceedings from the defendant, it is held that it is not against public policy to vacate the decree.⁶

On Court's Own Motion.—The court may, in the exercise of a sound

ration for a limited time, as prayed in the petition, where the motion for such relief is not made at the same term at which the decree was rendered. *Jones v. Jones*, 78 Wis. 446.

Application by Both Parties.—The husband and wife may, by joint application, have a decree of absolute divorce vacated, the proceedings dismissed, and the marriage reinstated. *Colvin v. Colvin*, 2 Paige (N. Y.) 385.

1. See *supra*, XVI. *Appeal*.

2. See statutes and cases cited *infra*.

3. See *infra*, XVII. 2. *New Trials*; *Ewing v. Ewing*, 24 Ind. 475.

4. See *infra*, XVII. 4. *Decrees on Constructive Service*, and 5. *Decrees Obtained by Fraud*; *Owens v. Sims*, 3 Coldw. (Tenn.) 544; *McJunkin v. McJunkin*, 3 Ind. 30.

Missouri.—Section 4511, Rev. Stat. of Missouri, provides that "no petition for review of any judgment for divorce, rendered in any case arising under this chapter, shall be allowed, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases." *Childs v. Childs*, 11 Mo. App. 395; *Salisbury v. Salisbury*, 92 Mo. 683; *Nave v. Nave*, 28 Mo. App. 505; *Richardson v. Stowe*, 102 Mo. 33; *Hansford v. Hansford*, 34 Mo. App. 262.

A decree may be corrected by a *nunc pro tunc* entry after the term in which it was entered. *Moster v. Mosier*, 53 Mo. 326.

5. **Indiana.**—Section 627, Rev. Stat. 1894, makes provision for bills of review in civil cases, but provides that

"no complaint shall be filed for a review of a judgment of divorce." *Willman v. Willman*, 57 Ind. 500; *Earle v. Earle*, 91 Ind. 27. But section 1042 provides that where the decree is obtained upon constructive service it may be vacated at any time within two years.

A decree cannot be modified so far as it concerns the custody and maintenance of the children, unless the power is expressly reserved in the decree. *Sullivan v. Learned*, 49 Ind. 252.

Where a decree for divorce and alimony is obtained on constructive service, the defendant cannot have the same reviewed without a showing of a defense and the want of actual notice. *Keller v. Keller*, 139 Ind. 38.

Nebraska.—Consol. Stat. 1893, c. 13, § 1464, provides that "no proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only questions of alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced unless within six months after the rendition of such decree, or in case the person entitled to such proceedings is an infant or a person of unsound mind, within six months, exclusive of the time of such disability." See *dicta* in *Smithson v. Smithson*, 37 Neb. 535, in which this statute is overlooked.

Where a decree of divorce was obtained by the husband upon service by publication, the decree may be modified and alimony awarded to the wife on her application after the expiration of six months. *Cochran v. Cochran*, 42 Neb. 612.

6. See *infra*, XVII. 5. *Decrees Obtained by Fraud*; *Edson v. Edson*, 108

discretion, vacate a decree of divorce on its own motion,¹ but such power to vacate decrees is limited to the term at which the decree is rendered,² and notice should be given to the parties.³

2. New Trials.—In general, new trials are granted in suits for divorce as in other suits in equity, or as in actions under the codes.⁴

The Only Exception to the General Rules relating to new trials is that for reasons of public policy a new trial is readily granted where a decree of divorce has been obtained without a fair trial on the merits,⁵ and refused where the rights of an innocent person will

Mass. 590; *Childs v. Childs*, 11 Mo. App. 395.

1. *McIntyre v. McIntyre*, 9 Misc. Rep. (N. Y. Super. Ct.) 252; *Brown v. Brown*, 53 Wis. 29. See *contra*, *Morris v. Morris*, 60 Mo. App. 86.

2. *Brown v. Brown*, 53 Wis. 29.

3. *Morris v. Morris*, 60 Mo. App. 86.

Decree Prematurely Entered.—Where a decree is prematurely entered and the record does not disclose a stipulation for a hearing at that time or that the defendant had notice of the time of the hearing or entered his appearance, the decree will be vacated. *McKinney v. McKinney*, 36 Mich. 37.

4. *Forrest v. Forrest*, 25 N. Y. 501; *Ulrich v. Ulrich*, 8 Kan. 402; *Meyar v. Meyar*, 3 Metc. (Ky.) 298; *Mercer v. Mercer*, 1 MacArthur (D. C.) 655; *Matthai v. Matthai*, 49 Cal. 90; *Sharon v. Sharon*, 79 Cal. 633; *Chapman v. Chapman*, 129 Ill. 386; *Tierney v. Tierney*, 1 Wash. Ter. 568; *Janvrin v. Janvrin*, 58 N. H. 144; *Hills v. Hills*, 76 Me. 486; *Gholston v. Gholston*, 31 Ga. 625; *Rindge v. Rindge*, 22 Ind. 31; *Mercer v. Mercer*, 114 Ind. 558.

Practice under the English Divorce Act.—See *Dolby v. Dolby*, 2 Swab. & T. 228; *Stoate v. Stoate*, 2 Swab. & T. 384; *Hill v. Hill*, 2 Swab. & T. 407; *Bacon v. Bacon*, 2 Swab. & T. 53; *Jago v. Jago*, 3 Swab. & T. 103; *Hitchcock v. Hitchcock*, 2 Swab. & T. 513; *Fitzgerald v. Fitzgerald*, 3 Swab. & T. 400; *Godrich v. Godrich*, L. R. 2 P. & D. 392; *Morphett v. Morphett*, L. R. 1 P. & D. 702; *Lee v. Lee*, L. R. 2 P. & D. 409; *Taplin v. Taplin*, 13 Prob. Div. 100; *Ahier v. Ahier*, 10 Prob. Div. 110.

A Provision of the Code that "at any time within one year after notice thereof the court may relieve a party from a judgment, order, or other proceeding taken against him through

his mistake, inadvertence, surprise, or excusable neglect" is applicable to suits for divorce although the divorce statute contains a special provision relating to new trials. *Amory v. Amory*, 6 Robt. (N. Y.) 514.

An Appeal may be Taken from an order granting a new trial under the general provisions of the code. *Conger v. Conger*, 77 N. Y. 432.

At What Time.—The provisions of the code relating to new trials after the term in which the decree was rendered, or within one year, do not apply to decrees of divorce, as a new trial for such causes would be against public policy. *Ewing v. Ewing*, 24 Ind. 475.

A Rehearing will not be granted to permit the defense of condonation when the defendant has had the benefit of several continuances, and has not pleaded such defense. *Mumford v. Mumford*, 13 R. I. 19.

By Supreme Court.—Where a petition does not state a cause for divorce the Supreme Court will not dismiss the case if a cause for divorce was proved, but will grant a new trial. *Callen v. Callen*, 44 Kan. 370; *Jackson v. Jackson*, 105 N. Car. 433.

5. *Bostwick v. Bostwick*, 73 Tex. 182; *Dunn v. Dunn*, 11 Mich. 284.

Newly Discovered Evidence.—A new trial will be readily granted on the ground of newly discovered evidence that plaintiff was not a resident of the state. *Grant v. Grant*, 5 S. Dak. 1.

Connivance.—Where the jury finds that the libellant connived at the alleged offense, and the court is of the opinion that the evidence of connivance is not sufficient, a decree of divorce should not be entered, but a new trial should be granted. *Cairns v. Cairns*, 109 Mass. 408.

suffer by a vacation of the decree.¹

As to Certain Issues.—Where a decree of divorce has been granted, and the court subsequently tries the issues relating to alimony and division of the property, a new trial may be granted as to such issues.²

3. Opening Defaults—To Protect Public Interests.—Where a default has been entered against defendant the court will readily set the same aside in order that defense may be interposed and the interests of the public protected by a trial upon the merits.³ Not only the parties but the public have an interest in the result of every suit for divorce, and the court should afford a hearing to protect the interests of the state.⁴

Court's Discretion.—The court is not bound in all cases to open a default, but may, in its discretion, refuse to do so where defendant had knowledge of the suit or acquiesced in the decree.⁵

Where the Court is Not Satisfied with the Verdict of a jury and the right to a jury trial is given by statute, the court cannot disregard the verdict, but may grant a new trial. *Poertner v. Poertner*, 66 Wis. 644.

1. *Ewing v. Ewing*, 24 Ind. 468.

2. *Lake v. Bender*, 18 Nev. 361.

3. Liberality in Opening Defaults.—“The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.” *McBlain v. McBlain*, 77 Cal. 507. See also *Wadsworth v. Wadsworth*, 81 Cal. 182; *Cottrell v. Cottrell*, 83 Cal. 457; *Barnes v. Barnes*, 95 Cal. 182; *Mulkey v. Mulkey*, 100 Cal. 91.

“The Law Encourages Defenses of Divorce Suits. In such cases as the present, where the marriage occurred abroad, * * * where the wife is the defendant and lives in a distant state, and is not found or served within the jurisdiction of the court, and where she appears and proposes not only to defend upon the merits, * * * but to show that a fraud is being practiced upon the jurisdiction of the court, we think she ought to be encouraged and helped by the exercise of every legitimate power of the court.” *Bostwick v. Bostwick*, 73 Tex. 182.

4. *Locke v. Locke*, 18 R. I. 716.

5. *Barnes v. Barnes*, 95 Cal. 171; *Bowman v. Bowman*, 64 Ill. 75; *Holbrook v. Holbrook*, 114 Mass. 568; *Whiting v. Whiting*, 114 Mass. 494.

A default will not be opened to modify the decree as to alimony where the wife accepted service of the summons and acquiesced in the decree until after the plaintiff had married. *Rouse v. Rouse*, 47 Iowa 422.

Refusal to vacate a default judgment in a divorce case upon motion is an abuse of discretion where it appeared that defendant, who was a nonresident, immediately upon receiving the summons employed counsel where she lived, who at once wrote to a local attorney inquiring whether he would appear for defendant; that the latter appeared in the case, but, after securing plaintiff's acceptance of a compromise as to alimony which he understood he was authorized to offer on behalf of defendant, wrote that he would withdraw from the case unless such compromise was accepted by defendant; that defendant refused such proposed compromise by telegraph, and followed the same with letters explaining such refusal, but which were returned unopened; that upon receipt of such message he declined to file defendant's answer, which he had in his possession, and which disclosed a meritorious defense; and, refusing to take further action, suffered the case to go by default. *Simpkins v. Simpkins*, 14 Mont. 386.

In *Mulkey v. Mulkey*, 100 Cal. 91, a judgment by default in an action for divorce on the ground of adultery, which awarded the husband the four minor children, three of whom were girls, the eldest being about eight years old, and assigning to him all the community property, was set aside, the affidavit of the wife specifically deny-

Where Defendant Had No Notice.—Generally, a default is opened where the defendant had no notice of the proceeding, and the return of the officer who served the summons may be contradicted for this purpose.¹

The Fact that the Plaintiff has Married before the application is made will not prevent the court from granting this relief, but the application may be denied if the defendant has been guilty of estoppel, acquiescence, or inexcusable delay.²

The Application should set out the facts showing the excusable neglect, want of notice, mistake, or inadvertence,³ together with a showing of a valid defense.⁴

Counter Affidavits and other evidence may be considered on the hearing.⁵

If the Decree is Set Aside the case is tried in the usual manner.⁶

The General Provisions of the Statutes relating to the opening of defaults in civil cases are applicable to suits for divorce.⁷

4. Decrees on Constructive Service.—It is a controverted question whether a decree of divorce obtained upon service by publication may be opened and the defendant allowed to answer. In some instances the courts have refused to open such decrees on the ground that it would be against public policy to disturb the marriage status of innocent persons, and because it would render second marriages bigamous, and the children of such marriages illegitimate.⁸

ing the material allegations of the complaint, and stating facts showing either collusion or gross deception.

1. It may be shown that the summons was not served on a member of the family as stated. *Brown v. Brown*, 59 Ill. 315.

The Wife may Deny that a Summons was Served upon her, and the default will be opened where there is circumstantial evidence that she was not the person served. *Locke v. Locke*, 18 R. I. 716.

2. *Scripture v. Scripture*, 70 Hun (N. Y.) 432; *Simpkins v. Simpkins*, 14 Mont. 386. And see *Wortman v. Wortman*, 17 Abb. Pr. (N. Y. Supreme Ct.) 66.

3. See showing in *Simpkins v. Simpkins*, 14 Mont. 386; *Bostwick v. Bostwick*, 73 Tex. 182; *Locke v. Locke*, 18 R. I. 716; *Savage v. Savage*, 10 Oregon 331; *Barnes v. Barnes*, 95 Cal. 171.

4. *Blank v. Blank*, 107 N. Y. 91; *Locke v. Locke*, 18 R. I. 716; *Phelps v. Phelps*, 7 Paige (N. Y.) 150; *Burge v. Burge*, 88 Ill. 164.

Where an answer was filed but a default subsequently taken without notice no affidavit of merits is required. *Cot-*

trell v. Cottrell, 83 Cal. 457; *McBlain v. McBlain*, 77 Cal. 507.

5. *Bowman v. Bowman*, 64 Ill. 75.

The merits of the case should not be determined in such application on the affidavits and counter affidavits. *Thelin v. Thelin*, 8 Ill. App. 421.

6. *Thelin v. Thelin*, 8 Ill. App. 421.

7. *Locke v. Locke*, 18 R. I. 716. See also *R. v. R.*, 20 Wis. 331.

But see *infra*, XVII. 4. *Decrees on Constructive Service.*

Under a provision of the code that "the court may * * * relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," the court may vacate a decree upon default where a nonresident defendant employed an attorney who withdrew from the case and permitted a default to be taken because defendant refused to accept a compromise as to alimony. *Simpkins v. Simpkins*, 14 Mont. 386.

8. The divorce statute of *Ohio* provided that "no appeal shall be obtained from the decree, but the same shall be final and conclusive." This

Application of Usual Statutes.—It is held in some states that the usual provisions of the statute for vacating decrees obtained by service by publication or by personal service in another state do not apply to suits for divorce.¹ The opposite view is that such statutes provide for the vacation of all such decrees, and the legislatures having made no exceptions, the courts will decline to do so on the ground of public policy.²

Code Provisions.—Although the provisions of the code for opening decrees obtained upon service by publication do not apply to decrees of divorce or exclude such decrees by express provision, courts of equity are not thereby prevented from vacating such decrees.³

provision is said to be "nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society and the happiness and well being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation." *Parish v. Parish*, 9 Ohio St. 534.

The code of *Tennessee* provides that a decree of divorce can only be reversed by appeal, and that, in case of absolute divorce, either party is at liberty to marry again. In construing all the statutes together it was held that a decree would become final unless reversed on appeal, and that a provision of the code that decrees *in rem* do not become absolute for three years does not apply to suits for divorce. "The legal consequence of such a construction of the statute will lead to results so anomalous and absurd that it is clear the legislature never intended it to be applied to divorce cases." *Owens v. Sims*, 3 Coldw. (Tenn.) 544.

1. *Gilruth v. Gilruth*, 20 Iowa 225; *Owens v. Sims*, 3 Coldw. (Tenn.) 544; *Lewis v. Lewis*, 15 Kan. 181; *O'Connell v. O'Connell*, 10 Neb. 390.

The statutes of *Indiana* at one time provided that "the practice and proceedings in suits to obtain divorce shall be the same as in other cases in chancery," and also provided that at any time within five years the defend-

ant against whom a decree was obtained by service by publication might have such decree vacated by giving notice to the original complainant or his heirs, devisees, executors, and administrators, upon filing a full answer to the original bill with an affidavit, etc. The court held that the latter provision had no application to suits for divorce, as it referred to heirs, etc., and required an answer under oath, which was contrary to other provisions of the divorce statutes. "The rights of *bona fide* purchasers of property * * * are protected by another section, but no provision is made that children born of a second marriage, before the opening of the decree, shall be legitimate; and upon the whole, taking all the provisions of both chapters, and the consequences which would follow a different decision, into consideration, we think the judgment of the Circuit Court should be affirmed." *McJunkin v. McJunkin*, 3 Ind. 30, approved and followed in *O'Connell v. O'Connell*, 10 Neb. 390; *Lewis v. Lewis*, 15 Kan. 181.

By section 1042, Rev. Stat. Ind. 1894, such decrees may be opened at any time within two years.

2. *Meyar v. Meyar*, 3 Metc. (Ky.) 298.

Where the divorce statute provides that the proceedings shall be the same in divorce suits as in other suits in chancery, a general provision for vacating decrees in equity is applicable to suits for divorce. *Lawrence v. Lawrence*, 73 Ill. 577; *Smith v. Smith*, 20 Mo. 166; *Mansfield v. Mansfield*, 26 Mo. 163.

3. *R. v. R.*, 20 Wis. 331.

The *New York* code (§ 135) provides that decrees obtained on service by publication may be opened, and the defendant allowed to defend, at any time within seven years, "except in an

Special Statutory Provision.—As decrees of divorce are different in many respects from other decrees, the divorce statutes sometimes contain special provisions concerning the vacation of such decrees.¹

The Weight of Authority is that where the plaintiff resorts to service by publication in order to conceal the proceedings and prevent a defense, or procures such service to be made by false testimony, the court may open the decree by virtue of its inherent power to vacate decrees obtained by fraud.²

Revision Expressly Prohibited.—The revision of decrees of divorce is prohibited in some states by express provisions of the divorce statutes, and this prohibition includes decrees obtained by constructive service,³ even though such decrees were obtained by fraud.⁴

5. Decrees Obtained by Fraud—The Applicant.—A decree of divorce

action for divorce." It was held that such provision did not interfere with the power of the court to vacate its decrees under the practice before the adoption of the code. "It is not contended that section 135, or any other, takes away the power of the court to open a judgment of divorce entered upon default where the summons has been personally served, and it would indeed be an anomaly to give so much greater effect to one entered upon publication." *Brown v. Brown*, 58 N. Y. 609, *overruling* 1 Hun (N. Y.) 443, 3 Thomp. & C. (N. Y.) 477.

Under the general provisions of the code permitting all decrees obtained upon constructive service to be vacated, the wife may have a decree of divorce opened and modified by inserting an order for permanent alimony based on the amount of property owned by the husband at the time the decree was rendered. *Cralle v. Cralle*, 79 Va. 182. See also *Cochran v. Cochran*, 42 Neb. 612.

1. Section 4511, Rev. Stat. *Missouri*, prohibits the vacation of such decrees.

The divorce statutes of *Indiana* (Rev. Stat., § 1042) provide that a decree of divorce rendered without other notice than publication in a newspaper may be opened at any time within two years, so far as it relates to the care, support, and custody of the children. *Sullivan v. Learned*, 49 Ind. 252; *Keller v. Keller*, 139 Ind. 38.

2. *Edson v. Edson*, 108 Mass. 590; *Carley v. Carley*, 7 Gray (Mass.) 545; *Adams v. Adams*, 51 N. H. 388; *Holmes v. Holmes*, 63 Me. 420; *Britton v. Brit-*

ton, 45 N. J. Eq. 88; *Whitcomb v. Whitcomb*, 46 Iowa 437; *Caswell v. Caswell*, 120 Ill. 377; *Yorke v. Yorke*, 3 N. Dak. 343; *Everett v. Everett*, 60 Wis. 200; *Wisdom v. Wisdom*, 24 Neb. 551; *Earle v. Earle*, 91 Ind. 27; *Stephens v. Stephens*, 62 Tex. 337; *Boyd's Appeal*, 38 Pa. St. 241.

Subsequent Marriage.—The fact that the party obtaining the divorce has married another will not prevent the vacation of the decree. *Edson v. Edson*, 108 Mass. 590; *Stephens v. Stephens*, 62 Tex. 337; *Bomsta v. Johnson*, 38 Minn. 230; *Wisdom v. Wisdom*, 24 Neb. 551.

The Death of One of the Parties is not a bar to proceedings to vacate a decree on service by publication. *Boyd's Appeal*, 38 Pa. St. 241; *Bomsta v. Johnson*, 38 Minn. 230; *Johnson v. Coleman*, 23 Wis. 452; *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242.

3. *Parish v. Parish*, 9 Ohio St. 534; *Richardson v. Stowe*, 102 Mo. 33.

This statute does not prohibit the annulment of a decree where it is void for want of jurisdiction. *Willman v. Willman*, 57 Ind. 500.

4. *Parish v. Parish*, 9 Ohio St. 534; *Childs v. Childs*, 11 Mo. App. 395; *Salisbury v. Salisbury*, 92 Mo. 683; *Nave v. Nave*, 28 Mo. App. 505; *Hansford v. Hansford*, 34 Mo. App. 262.

A court of equity has the inherent power to vacate decrees obtained by fraud, and is not prevented by statutes prohibiting a review of decrees of divorce. *Earle v. Earle*, 91 Ind. 27, *overruling* *McQuigg v. McQuigg*, 13 Ind. 294; *Hoffman v. Hoffman*, 15 Ind. 278.

obtained by fraud will not be annulled or vacated on the application of third persons;¹ the innocent and injured party must make the application.²

The Allegations.—The fraud should be alleged with the same particularity as in other cases,³ and if there has been some delay the circumstances should be explained by alleging the date of the discovery of the fraud.⁴ It should also be alleged that the applicant had no notice of the proceedings,⁵ or was misled by the misrepresentations of the successful party.⁶

The Application to set aside the decree may be in the nature of a motion to set aside a default, sustained by affidavits and accompanied with an answer.⁷ But the application is usually in the form of a petition to set aside a decree or a bill of review,⁸ and

1. Where a decree of divorce is obtained by fraud, a person who marries one of the divorced parties cannot avail himself of such fraud in order to obtain a decree annulling his marriage. *Ruger v. Heckel*, 21 Hun (N. Y.) 489; *Kinnier v. Kinnier*, 45 N. Y. 543.

A maternal grandmother and her grandchildren cannot maintain an action to have a decree of divorce set aside on the ground of collusion of the father and mother. *Baugh v. Baugh*, 37 Mich. 59.

In an action for conversion, a son cannot impeach a decree of divorce, on the ground of fraud, in order to avoid his father's marriage with his step-mother. *Waldo v. Waldo*, 52 Mich. 94.

A decree of divorce will not be opened on the ground of fraud where both the parties are satisfied with the decree and the application is made by the wife's mother. *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299.

2. *Elliott v. Wohlfrom*, 55 Cal. 384.

The Court has Power, upon petition of the party aggrieved, to vacate a decree of divorce obtained at a former term, against the petitioner, by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the other party, and of which the court had only apparent jurisdiction, founded on false allegations of domicile. *Edson v. Edson*, 108 Mass. 590, *distinguishing* the case of *Greene v. Greene*, 2 Gray (Mass.) 361, wherein it was held that a decree cannot be invalidated on the ground of fraud in its procurement, in a separate and independent libel, subsequently brought

between the same parties, where it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon the evidence offered.

3. *Olmstead v. Olmstead*, 41 Minn. 297; *Brown v. Grove*, 116 Ind. 84; *Sloan v. Sloan*, 102 Ill. 581; *Edson v. Edson*, 108 Mass. 590; *Caswell v. Caswell*, 120 Ill. 377.

Knowledge of the defendant's address should be alleged where it is claimed that the plaintiff has procured service by publication by a false affidavit in order to conceal the proceedings. *Crouch v. Crouch*, 30 Wis. 667; *Britton v. Britton*, 45 N. J. Eq. 88; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388; *Whitcomb v. Whitcomb*, 46 Iowa 437; *Everett v. Everett*, 60 Wis. 200.

4. *Sloan v. Sloan*, 102 Ill. 581; *Daniels v. Benedict*, 50 Fed. Rep. 347; *Colby v. Colby*, 59 Minn. 432.

5. *Larimer v. Knoyle*, 43 Kan. 338; *Bulkley v. Bulkley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 307; *Yorke v. Yorke*, 3 N. Dak. 343; *Golden v. Golden*, 102 Ala. 353.

6. *Daniels v. Benedict*, 50 Fed. Rep. 347; *Young v. Young*, 17 Minn. 181; *Nicholson v. Nicholson*, 113 Ind. 131; *Scanlan v. Scanlan*, 41 Ill. App. 449.

7. *Mulkey v. Mulkey*, 100 Cal. 91; *Beach v. Beach*, 6 Dakota 371; *Wortman v. Wortman*, 17 Abb. Pr. (N. Y. Supreme Ct.) 66; *Bulkley v. Bulkley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 307.

8. See petitions held sufficient in *Spinney v. Spinney*, 87 Me. 484; *Rawlins v. Rawlins*, 18 Fla. 345; *Colby v. Colby*, 59 Minn. 432; *Cochran v. Cochran*, 42 Neb. 612; *Lord v. Lord*, 66 Me. 265; *Rush v. Rush*, 46 Iowa 648.

should be made to the court which rendered the decree,¹ with personal service upon the defendant.²

Collateral Attack.—But the decree may be attacked and avoided in other proceedings where the decree or rights arising under it are sought to be enforced.³

Showing Defense.—The applicant should also tender an answer or make some showing of a defense to the action.⁴

Notice of the Application must be served on the party who obtained the decree or on his attorney of record.⁵

Necessary Parties.—The second husband or wife⁶ and the heirs and legal representatives of the party obtaining the divorce are necessary parties.⁷

Defenses.—As a defense to the petition to set aside a decree of divorce, it may be alleged that the applicant delayed after discovery of the fraud until the party who obtained the divorce had married another;⁸ or that the applicant has accepted the benefits of the decree and married another, and is estopped to attack the decree on the ground of fraud or lack of jurisdiction.⁹ The statute of limitations is also a defense.¹⁰ A court of equity may refuse to vacate a decree where there has been unreasonable delay although such defense has not been pleaded.¹¹

1. *Smithson v. Smithson*, 37 Neb. 535.

2. *Ellis v. Ellis*, 13 Neb. 91.

3. See proceedings in *Larimer v. Knoyle*, 43 Kan. 338; *Daniels v. Benedict*, 50 Fed. Rep. 347.

4. *Long v. Long*, 59 Mich. 296.

5. *Beach v. Beach*, 6 Dakota 371; *Yorke v. Yorke*, 3 N. Dak. 343; *Britton v. Britton*, 45 N. J. Eq. 88; *Wanamaker v. Wanamaker*, 10 Phila. (Pa.) 466.

6. *Carlisle v. Carlisle*, 96 Mich. 128.

7. *Bomsta v. Johnson*, 38 Minn. 230; *Johnson v. Coleman*, 23 Wis. 452; *Rawlins v. Rawlins*, 18 Fla. 345; *Watson v. Watson*, 47 How. Pr. (N. Y. Supreme Ct.) 240; *Boyd's Appeal*, 38 Pa. St. 241. See also *Israel v. Arthur*, 6 Colo. 85; *Danforth v. Danforth*, 111 Ill. 236.

8. See answer in *Webster v. Webster*, 54 Iowa 153, where this defense was sustained. See also *Yorston v. Yorston*, 32 N. J. Eq. 495; *Thompson v. Thompson*, 91 Ala. 591; *Nicholson v. Nicholson*, 113 Ind. 131.

The fact that the party obtaining the divorce by fraud has married another before the discovery of the fraud will not prevent the court from vacating the decree. *Allen v. Maclellan*, 12 Pa. St. 328; *Smith v. Smith*, 20 Mo. 167; *Stephens v. Stephens*, 62 Tex. 337; *Wisdom v. Wisdom*, 24 Neb. 551;

Whitcomb v. Whitcomb, 46 Iowa 437; *Bomsta v. Johnson*, 38 Minn. 230; *Edson v. Edson*, 108 Mass. 590.

9. *Richardson's Estate*, 132 Pa. St. 292; *Ellis v. White*, 61 Iowa 644; *In re Ellis's Estate*, 55 Minn. 401; *Marvin v. Foster* (Wis. 1895), 63 N. W. Rep. 484; *Mohler v. Shank* (Iowa 1895), 61 N. W. Rep. 981; *Richeson v. Simmons*, 47 Mo. 20.

10. *Prewett v. Dyer*, 107 Cal. 154; *Sloan v. Sloan*, 102 Ill. 581; *Bourlon v. Waggaman*, 28 La. Ann. 481; *Larimer v. Knoyle*, 43 Kan. 338; *Linn v. Linn* (Supreme Ct.), 2 N. Y. Supp. 578.

11. In *Sedlak v. Sedlak*, 14 Oregon 540, the court quotes and approves the following rule of laches stated in *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 807: "To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is not necessary that a foundation be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainant, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances. Sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in

Effect of Vacating Decree.—When the decree is vacated the case will not be dismissed by the court, but a new trial will be granted.¹ If the court has no jurisdiction to grant a divorce the suit will be dismissed.²

Permanent Alimony Instead of Vacating Decree.—Under some circumstances the decree of absolute divorce will not be vacated, but the court may enter an order for permanent alimony.³

some cases a shorter period is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and decide accordingly."

1. *Yorke v. Yorke*, 3 N. Dak. 343; *Edson v. Edson*, 108 Mass. 590; *Adams v. Adams*, 51 N. H. 388; *Stephens v. Stephens*, 62 Tex. 337; *Whitcomb v. Whitcomb*, 46 Iowa 437.

But where the parties are before the court, and it appears that the plaintiff is not the wife of the defendant, the

court may vacate the decree and dismiss the libel. *Wiley v. Wiley*, 161 Mass. 446.

Temporary Alimony may be granted in such proceeding as in the ordinary suit. *Everett v. Everett*, 60 Wis. 200; *Ex p. Smith*, 34 Ala. 455.

Finality of Order.—The order refusing to vacate a decree of divorce is final. *Haverty v. Haverty*, 35 Kan. 438.

2. *Crouch v. Crouch*, 30 Wis. 667; *Lord v. Lord*, 66 Me. 265; *Smith v. Smith*, 4 Greene (Iowa) 266.

3. *Cochran v. Cochran*, 42 Neb. 612; *Golden v. Golden*, 102 Ala. 353.

DOCKET.

See articles *APPEALS*, vol. 2, pp. 83, 104, 105, 321, 352; *CALENDARS AND TRIAL DOCKETS*, vol. 3, p. 801.

DOUBT.

See article *CERTIFICATE OF DOUBT*, vol. 3, p. 914.

DOWER.

BY WILLIAM T. NELSON AND WILLIAM L. DREW.

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I. DEMAND OF DOWER—1. Necessity of Demand.—At common law no demand was necessary to enable the widow to maintain proceedings for recovery of dower.¹ The rule in the American states is not uniform and ordinarily is governed by statutes.²

1. The rule is so stated in 2 Scribner on Dower (2d ed.), p. 109. In support of the text is cited Park on Dower 303-305. An examination of this last reference will show that the doctrine as gleaned therefrom is inferential rather than direct. On page 303 of the latter work it is said: "And even the heir himself may * * * save himself from damages if he comes in upon the summons the first day, and acknowledges the action and pleads *tout temps prist*, i. e., avers that he was at all times ready to render dower, if it had been demanded. * * * For this reason it is that Lord Coke observes: 'It is necessary for the wife, after the death of her husband, as soon as she can, to demand her dower before good testimony; for otherwise she may, by her own default, lose the value after the decease of her husband, and her damages for detaining of dower.'"

On page 304 it is said: "Of course, if the heir controverts the title of dower, he cannot avail himself of the plea of *tout temps prist*; and therefore, whatever delay may have been made by the widow, she will, if judgment be given in her favor, be entitled to damages from the death of the husband."

If the common-law doctrine had been that a prior demand was necessary to the maintenance of the action, it would be necessary to aver in the declaration that a demand had been made, which averment, if untrue, would be traversed in the plea. As is seen from the above quotation, however, the practice was, if there had been no demand, for the defendant to plead *tout temps prist* for the purpose of barring the recovery of damages for detention of dower and of mesne

profits from the death of the husband to the commencement of the action.

2. Demand Unnecessary.—Under a statute providing that the action of ejectment might be brought by any widow entitled to dower after the expiration of six months from the time her right accrued, it was held that the action could be maintained without prior demand. *Ellicott v. Mosier*, 7 N. Y. 209. And see *Jackson v. Churchill*, 7 Cow. (N. Y.) 287. *Semble*, *Conover v. Wright*, 6 N. J. Eq. 617; *Strawn v. Strawn*, 50 Ill. 256.

Demand Necessary.—Under a statute which provided that if dower was not assigned within thirty days next after demand, it might be assigned by commissioners to be appointed by the court, it was held that no action would lie for assignment of dower until thirty days after demand had expired, and as the evidence failed to disclose when demand was made there could be no recovery. *Hasselman v. Allen*, 42 Ind. 257. See also *Wells v. Sprague*, 10 Ind. 305; *Spinning v. Rowland*, 7 Blackf. (Ind.) 7; *Dunn v. Loder*, 5 Blackf. (Ind.) 446; *Ford v. Erskine*, 45 Me. 484. *Semble*, *Luce v. Stubbs*, 35 Me. 92; *Burbank v. Day*, 12 Met. (Mass.) 557.

Infants.—It was early provided by statute in *Indiana* that a demand of dower of infants is unnecessary. *McCormick v. Taylor*, 2 Ind. 336.

Divorced Husband.—Under a statute which provided that where husband and wife were divorced, the wife should have dower in the husband's real estate, "to be recovered and assigned to her as if he were dead," the general statute for assignment of dower providing that an action could not be commenced before the expiration of one month from the time of making

Damages for Detention.—Irrespective of this question, however, it is commonly held that damages for detention of dower can be recovered only from the time of demand made upon the proper person, to set off the widow's dower, if such person, when sued, acknowledges the widow's right;¹ but some courts hold that a demand is not necessary even for this purpose.²

Effect of Failure to Demand.—It has been held that failure to make demand on the tenant in possession, before the institution of the action, would not relieve him from the costs and expenses of the admeasurement proceedings.³

demand, it was held that demand upon the divorced husband was necessary before suit under the statute could be legally brought. *Merrill v. Shattuck*, 55 Me. 370.

1. Such was the rule at common law. *Watson v. Watson*, 10 C. B. 3, 70 E. C. L. 3. And such is the usual rule in the *United States*. *Strawn v. Strawn*, 50 Ill. 256; *Atkin v. Merrell*, 39 Ill. 62; *Rankin v. Oliphant*, 9 Mo. 245; *Spencer v. Weston*, 1 Dev. & B. (N. Car.) 216; *Humphrey v. Phinney*, 2 Johns. (N. Y.) 484. *Semble*, *Ellis v. Ellis*, 4 R. I. 110. So held as against the husband's alienee. *Layton v. Butler*, 4 Harr. (Del.) 507.

Must be Plead.—But the defendant cannot take advantage of the fact that no demand was made upon him if he failed to properly plead it as a defense. *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 296.

Infants.—Although, in *Illinois*, damages are recoverable from time of demand, it was said by the court in *Bonner v. Peterson*, 44 Ill. 253, that as an infant cannot make an assignment of dower which will be binding upon him, he cannot be in default in not making an assignment when it is demanded. Damages, therefore, will not be recoverable from time of demand, but from time of bringing suit.

Land of Which Husband did Not Die Seized.—In *New Jersey* the ordinary rule prevails as regards those lands of which the husband did not die seized. In such a case, where it was decreed that the value of the widow's life estate should be estimated and paid in money, it was therefore held that the widow was entitled to dower only from the time of demand, or, if no demand was made, from the time of filing her bill, and not from the time of the death of her husband. *Chiswell v. Morris*, 14 N. J. Eq. 105.

In *Missouri* it is provided by statute that damages for detention shall be recovered from the time of the husband's death if he died seized, or from the time of demanding dower if he did not die seized. *Rannels v. Washington University*, 96 Mo. 226.

2. **The Statute in New Jersey** provided that "if she [the widow] be de-forded of her dower, or cannot have it without suit, or if it be not assigned to her in forty days from the death of her husband," she may sue for and recover the same, with damages from the death of her husband. Construing this statute in *Hopper v. Hopper*, 22 N. J. L. 721, it is said by Chancellor Halsted, in the opinion: "The peace of families will be much better promoted by making it the duty of the devisee or heir to assign dower within the forty days, and subjecting him to the payment of the value of it if he does not, than by furnishing him with a motive to neglect it until demand be made, by allowing him the use of it for nothing until the widow shall learn that a demand is necessary, and make demand. The plain reading of the act imposes this duty, and there is nothing in the nature of the requirement to induce us to doubt that it was the intention of the legislature. No sufficient reason can be assigned, in my judgment, why the devisee or the heir should occupy land to which the widow is entitled for her dower, without compensating her for the use of it. Instead of resorting to the decisions in *England*, or their statute, it seems to me we are required to say, that our legislature, by the different structure and language of our act, intended to introduce a different rule." (Judges *Randolph* and *Porter dissenting*.) The above case *overrules* in part *Woodruff v. Brown*, 17 N. J. L. 246.

3. *Harshaw v. Davis*, 1 Strobb. (S.

2. Sufficiency of Demand—Written or Oral.—Unless the statute provides that the demand must be made in writing, an oral demand is sufficient.¹

No Particular Formality.—It is not necessary that it should be made with any particular formality. Negotiations of the parties by letters or conversations, for the purpose of effecting an amicable settlement without resorting to legal proceedings, may constitute a sufficient demand.²

Method of Assignment.—The demand need not specify how the widow desires her dower set out. It is sufficient if it demands the assignment of her dower generally.³

Description of Land.—The demand should contain such a description of the estate as will give notice of what land dower is demanded, but it will be sufficient if it designates the premises with reasonable certainty.⁴ There may be cases when a demand

Car.) 74. Frost, J., in delivering the opinion of the court said: "The act * * * prescribes the manner and form of proceeding by which dower may be admeasured to the widow, in the lands of her deceased husband; and it is provided that 'the expenses which may be incurred in making such admeasurement shall be paid by the persons who shall claim the property or be in possession of the land.' In directing the expense of the proceedings to be paid by the person claiming, or in possession of, the land, the act does not provide for litigated cases only, but also that where there is no opposition, the share of the widow shall be assigned and delivered to her, without any charge. * * * The widow is the tenant of the heir or owner for the land held in dower, and it is his duty to measure and set out a part of the land, to be held by her, and to put her in possession. He may assign to the widow her share of the land, or make any composition in lieu of dower; and if she is satisfied and accepts it, no legal proceeding is necessary. He must defray the expense of assigning the dower, whether by his own act or by legal proceeding; and he cannot exempt himself from the charge by a return to the summons that he was ready and offered to assign the demandant her dower before the summons was issued."

1. Page v. Page, 6 Cush. (Mass.) 196; Newton v. Cook, 4 Gray (Mass.) 46; Merrill v. Shattuck, 55 Me. 370; Lothrop v. Foster, 51 Me. 367. *Semble*, Curtis v. Hobart, 41 Me. 230; Luce v. Stubbs, 35 Me. 92; Baker v. Baker, 4 Me. 67.

2. Thus, where the attorney of a divorced wife wrote to the former husband, suggesting a reference, and mentioning the names of persons who would be acceptable to the demandant as appraisers; and although in this or subsequent letters the property was not described, but it was certain that the defendant understood what property was meant, it was held that there was a sufficient demand. Merrill v. Shattuck, 55 Me. 370.

Where the widow proposed to one of the heirs to have her dower assigned without the expense and delay of a suit for that purpose, but he said they could never agree, it was held that no further demand was necessary. Strawn v. Strawn, 50 Ill. 256.

The Essential Thing is that the person whose duty it is to assign the widow's dower, should be apprised with reasonable certainty of the claim which is made upon him. Davis v. Walker, 42 N. H. 482; Haynes v. Powers, 22 N. H. 590; Fulton v. Fulton, 19 N. H. 168.

3. Land Subject to Mortgage.—Thus, where the widow's right to dower in the land was subject to a mortgage, it was not necessary that the demand on the tenant should signify whether the widow would redeem or be endowed of the equity only. Newton v. Cook, 4 Gray (Mass.) 46.

4. Davis v. Walker, 42 N. H. 482.

Illustrations.—Thus, where the demand described the land by reference to a deed, giving the book and page where it was recorded, the tenant having been a party to the deed, it was held that the property was sufficiently

will be held good although it contains no description of the land, as when, from the circumstances of the case, it is certain that the tenant knew what property was referred to.¹

Claiming Too Much Land.—The demand will not be vitiated because it embraces more land than the widow is entitled to, or because the measure of her right of recovery is incorrectly stated.²

Specifying Time.—Neither will the demand be vitiated by requiring dower to be set off within a specified time, the statute not requiring any time to be specified in the demand.³

Signature.—It is sufficient if the demand be signed by the widow's attorney.⁴

Place of Demand.—It is not necessary that the demand should be made upon the land in which dower is claimed.⁵

described. *Atwood v. Atwood*, 22 Pick. (Mass.) 283.

But where the only description of the land was by reference to a deed to a third person forty years before and not recorded, it was held that the land was not sufficiently described, as the tenant, not being a party to the deed and not being shown to have access to it, would be unable to determine from such demand what property was referred to. *Ford v. Erskine*, 45 Me. 484.

The land was held to be sufficiently designated in the following demand: "Lydia Baker, widow of Josiah Baker, late of Westbrook, deceased, demands of you her dower in the land you purchased of said Josiah, and you are hereby required to set off her just third part of said land." *Baker v. Baker*, 4 Me. 67.

In *Haynes v. Powers*, 22 N. H. 590, the following demand was held good: "Sir, I demand of you my thirds before these witnesses, it being part of lot No. 10, the right of Isaac Fellows, it being the land my husband, James Haynes, deceased, once owned." Passing upon the sufficiency of this, the court said: "The demand was sufficient. It called for dower, of the defendant, of course, of land of which he was tenant; of part of lot No. 10, the right of I. Fellows, and being land which the husband, J. Haynes, once owned. No evidence was offered that the lot No. 10, in which the demanded premises were situate, was the right of I. Fellows. Nothing was shown in regard to that; that circumstance in the description is, therefore, to be disregarded. As it appeared that there were several lots numbered 10 in the town, the description of the premises in which dower

was demanded, as No. 10 alone, would be bad for uncertainty. But when it is said in the written demand of dower made on this tenant, 'part of lot No. 10, once owned by J. Haynes,' and there is no evidence that either J. Haynes or the defendant ever owned any part of any other lot No. 10, there is no pretense of uncertainty, or chance of mistake."

1. *Merrill v. Shattuck*, 55 Me. 370.

2. *Williams v. Williams*, 78 Me. 82; *Hamblin v. Cumberland Bank*, 19 Me. 66; *Davis v. Walker*, 42 N. H. 482; *Fulton v. Fulton*, 19 N. H. 168.

3. *Stevens v. Reed*, 37 N. H. 49.

4. *Stevens v. Reed*, 37 N. H. 49.

5. *Baker v. Baker*, 4 Me. 67, where the court said: "As to the demand being made upon the land, the statute does not require it; nor has any authority been adduced in which it has been deemed necessary. It has been supposed to be analogous to those cases where, in order to be entitled to enter for condition broken for non-payment of rent, it must on the day be demanded on the land. Great strictness was there required, because the estate was thereby defeated. In such cases the rent was to be paid on the day when demanded. If, in the assignment of dower, the law required that it should be done when demanded, or on the day of demand, there might be a propriety in holding that the demand should be made upon the land; otherwise, if demanded at a distance from the land, the party might not be able to assign dower on the day of demand, although he might be desirous of doing it. But the law allowing thirty days within which to perform the duty, after notice and demand of the claim, ample time is afforded to

Personal Service.—It is not necessary that a written demand should be served personally upon the tenant. It is sufficient if it comes into his possession and is read by him.¹

Election in Orphans' Court a Demand.—An election by the widow, filed in the orphans' court, not to accept a provision made for her by the will of her husband, has been held a sufficient demand of her dower.²

Commencement of Suit a Demand.—In those jurisdictions where demand of dower is necessary only as affecting the question of damages, the commencement of suit is a legal demand so that damages may be recovered from that time.³

3. Upon Whom Demand must be Made—Tenant of the Freehold.—Ordinarily the demand should be made of the person whose duty it is to assign the widow's dower. Usually this is the tenant who is seized of the freehold estate.⁴

Tenants in Common.—Where a divorced wife brings an action against her former husband, to recover her dower out of lands of which he is seized in common with others, it is not necessary to

make the assignment, without the necessity of a demand upon the land." See also *Luce v. Stubbs*, 35 Me. 95.

1. Thus where a paper addressed to the tenant and subscribed by the widow, containing in rightful form a demand of her dower, was seasonably left at the dwelling house of the tenant, there being evidence which justified the jury in finding that the tenant read such demand, it was held that the demand was sufficient. *Luce v. Stubbs*, 35 Me. 92.

Massachusetts.—But under the Massachusetts statute providing that "she [the widow] shall demand her dower of the person who is seized of the freehold at the time of making the demand," it was held that the statute contemplated a personal demand and that service by leaving an attested copy at the dwelling house was insufficient. The widow did not show that the copy was found and read by the tenant. *Burbank v. Day*, 12 Met. (Mass.) 557.

2. *Paul v. Paul*, 36 Pa. St. 270. The suit arose after the widow's death and was a suit in equity brought by her personal representatives to recover rents and profits to which the widow was entitled.

3. *Atkin v. Merrell*, 39 Ill. 62; *Bonner v. Peterson*, 44 Ill. 253. *Semble*, *Layton v. Butler*, 4 Harr. (Del.) 507.

Two Suits.—But where two suits were commenced against a minor heir, the first of which was reversed on a bill of review for error, it was held that such

illegal suit did not constitute a demand, but that damages could be recovered only from the time of the commencement of the second suit. *Bonner v. Peterson*, 44 Ill. 260.

4. *Burbank v. Day*, 12 Met. (Mass.) 557; *Parker v. Murphy*, 12 Mass. 485; *Cook v. Walker*, 70 Me. 232; *Freeman v. Freeman*, 39 Me. 426; *Luce v. Stubbs*, 35 Me. 92.

If there Is More than One such tenant, a demand must be made on each. *Burbank v. Day*, 12 Met. (Mass.) 557.

Where the land of which the widow is entitled to dower is held by two or more persons in severalty, a separate demand must be made on each. Thus, where the husband had, in his lifetime, conveyed certain land, which, at the time of the demand, was owned in severalty by two persons, it was held that a demand addressed to both, requiring both to assign dower to the widow, and describing the land so as to include the land held by each in severalty, was sufficient, the court saying: "If such demand thus made on two persons, having distinct interests in distinct parcels, was a good demand, it would be equally so if it had included ten, or even an hundred, adjacent owners of distinct parcels. In such cases, the actions must be distinct and the demands should also be several, requiring of each to assign dower to the widow in land of which he was tenant of the freehold." *Pond v. Johnson*, 9 Gray (Mass.) 193.

make a demand upon his cotenants.¹

The Obligee in a Bond to Convey Land has not such an interest in it as to be a proper person upon whom to make demand.²

Where Tenant of Freehold Is out of State.—It is sometimes provided by statute that where the tenant who is seized of the freehold is absent from the state the demand may be made upon the tenant in possession.³

Guardian of Minor Heir.—If the tenant of the freehold is a minor, demand is properly made of his guardian.⁴

Demand Continues Good.—If, at the time of demand, it was made on the proper person it will be sufficient, although before suit is brought the land has been conveyed to another.⁵

4. Who must Make Demand.—Demand need not be made by the

1. *Williams v. Williams*, 78 Me. 82, where the court said: "It is claimed that the demand is insufficient because it is a demand of dower in an undivided share of the lands owned by the tenant in common with others, and no demand was made on his cotenants. The statute does not require it. The demand must be made upon the person who is seized of the freehold. The demandant does not seek to recover her dower in the whole of the lands, but in the undivided share of the tenant. He is tenant of the freehold of such share. His cotenants are not seized of his share as tenants of the freehold. They have no interest in the demandant's claim, and no demand on them is required."

2. "The bond conveys no interest whatever in the land, nor does it purport to convey any. It is a personal obligation, in no respect touching the realty." *Cook v. Walker*, 70 Me. 232.

3. *Freeman v. Freeman*, 39 Me. 426; *Luce v. Stubbs*, 35 Me. 92.

Foreign Corporation.—Where the statute provided that the widow "must demand her dower of the person who is at the time seized of the freehold, if in the state, otherwise of the tenant in possession," it was held that where a foreign corporation was seized of the real estate and had a tenant thereon, the demand might be made of such tenant. *Stevens v. Rollingsford Sav. Bank*, 70 Me. 180.

Tenant for Years.—Under the statutes of some states it has been held that a demand may be made on the tenant for years in possession, irrespective of the question as to whether the tenant of the freehold was within or without the state. So held where the stat-

ute provided that "the widow may sue for and recover her dower by writ of dower to be brought against the tenant in possession, or the tenant of the next immediate estate of freehold." *Ellis v. Ellis*, 4 R. I. 110.

Agent.—If the owners of the land are out of the state it may be sufficient to make the demand of their agent, whose duty it is to care for and protect their interests in the land. So held under the *Maine* statute providing that demand shall be made "of the person who is, at the time, seized of the freehold, if in the state; otherwise, of the tenant in possession." In this case the claimant of dower, and not the agent, was in possession of the land. *Hunt v. Hotchkiss*, 64 Me. 241.

4. This is true if, under the laws of the state, the guardian has authority to assign dower to the widow. *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Young v. Tarbell*, 37 Me. 509; *Curtis v. Hobart*, 41 Me. 230; *Robinson v. Miller*, 1 B. Mon. (Ky.) 88.

Where the demand was made on the minors and their guardian, it was held sufficient, although the guardian was not named as such. *Young v. Tarbell*, 37 Me. 509.

Under the statute of *Illinois* the guardian has no authority to assign dower. *Ex p. Guernsey*, 21 Ill. 451.

It is sometimes provided by statute that no demand is necessary where the tenant of the freehold is an infant. *McCormick v. Taylor*, 2 Ind. 336.

5. So held where the suit was brought against the grantee of the person on whom the demand was made. *Barker v. Blake*, 36 Me. 433; *Parker v. Murphy*, 12 Mass. 485.

widow personally.¹ It may be made by an agent, and where the statute does not require a written demand it is not necessary that he should have a written authority.² But if the demand is made by an agent, it is necessary that he should act with sufficient authority, and when his authority is conferred by a written power of attorney it must describe the land of which he is authorized to make demand.³

II. WHO MAY INSTITUTE PROCEEDINGS—Widow.—Ordinarily, proceedings for recovery of dower must be instituted by the widow. A person having no legal interest in the land cannot commence such proceedings.⁴

Assignee.—The right to dower, before dower has been set off to the widow, is a chose in action, and at common law was therefore unassignable. It follows that one to whom the widow had assigned her right of dower could not, at common law, maintain an action in his own name to have the dower set off.⁵ In equity

1. *Watson v. Watson*, 10 C. B. 3, 70 E. C. L. 3.

2. *Lothrop v. Foster*, 51 Me. 367; *Baker v. Baker*, 4 Me. 67. *Semble*, *Luce v. Stubbs*, 35 Me. 92.

In *Newton v. Cook*, 4 Gray (Mass.) 46, the agent had a written power of attorney from the widow to demand dower, but made an oral demand.

Demand by Attorney.—A demand of dower may be made by attorney, and the bringing an action upon it will be competent proof of his authority. *Stevens v. Reed*, 37 N. H. 49.

3. **The Power of Attorney** authorized the agent to demand dower "in any and all of the before-mentioned premises or any other." No premises whatever were mentioned in the instrument. It was held that the instrument conferred no authority on the agent to demand dower. *Sloan v. Whitman*, 5 Cush. (Mass.) 532.

4. Thus an assignment of dower is invalid where it was made in proceedings instituted by a person claiming an interest by virtue of a deed which conveyed no title. *Shields v. Batts*, 5 J. J. Marsh. (Ky.) 12.

And an assignment was held erroneous where the order of the court appointing the commissioners to make the assignment, failed to state upon whose application the order was made, the court saying: "The county courts are only authorized to appoint commissioners to make an allotment of dower when the application is made by the widow, or some other person whose duty it is to make the applica-

tion; and the order in such case, we apprehend, ought, therefore, to show upon whose application it was made; and as the order appointing the commissioners at the April term, 1819, does not show upon whose application it was made, it must be deemed erroneous, and, consequently, the order approving and recording the allotment made by those commissioners, must be erroneous." *Smith v. Maxwell*, 3 Litt. (Ky.) 471. And see *semble*, *Taylor v. Lusk*, 7 J. J. Marsh. (Ky.) 636; *King v. Merritt*, 67 Mich. 194.

5. *Jackson v. Aspell*, 20 Johns. (N. Y.) 411; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167. And see 4 Kent's Com. 61; *Strong v. Bragg*, 7 Blackf. (Ind.) 62.

Where proceedings were instituted by the widow's assignee in his own name, and dower was admeasured by commissioners appointed by the surrogate, the heir and his guardian consenting, in a subsequent action of ejectment brought for possession of the premises it was held that the surrogate was without jurisdiction and the assignment was void. *Jackson v. Aspell*, 20 Johns. (N. Y.) 411.

Proceeding in Name of Assignor.—But the action may be maintained at law by the assignee in the name of the assignor. *Lamar v. Scott*, 4 Rich. (S. Car.) 516.

And where the assignee brought a writ of dower in the names of the widow and her second husband, under a power of attorney from them, authorizing the use of their names by him, it was

the rule was otherwise, and the assignee of the widow's right to dower could sue in his own name.¹ And in those jurisdictions where the common-law rule has been changed and the assignee of a chose in action can sue in his own name, there is no reason why one to whom the widow has assigned her right of dower should not, in his own name, institute proceedings at law to have the dower set off.²

Persons Having Interest in Land.—Whether or not persons having an interest in the land and not claiming through the widow, such as heirs, devisees, purchasers, etc., can institute proceedings for admeasurement of the widow's dower, is to be determined by an examination of the statutes where each case arises.³

III. SUMMONS.—Modern statutes usually provide uniform methods for issuing and serving summons in all actions. Cases interpreting such statutes, having no peculiar relation to the law of dower, are treated elsewhere. Cases needing special mention here are collected below.⁴

held that the writ was well brought. *Robie v. Flanders*, 33 N. H. 524.

1. *Strong v. Clem*, 12 Ind. 37; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152; *Parton v. Allison*, 109 N. Car. 674, 111 N. Car. 429.

Such a suit was maintained in *Morgan v. Blatchley*, 33 W. Va. 155. But see *contra*, *Jacoway v. McGarran*, 21 Ark. 347; *Carnall v. Wilson*, 21 Ark. 62.

2. *Dobberstein v. Murphy* (Minn. 1896), 66 N. W. Rep. 204; *Strong v. Clem*, 12 Ind. 37; *Payne v. Becker*, 87 N. Y. 153. *Semble*, *Serry v. Curry*, 26 Neb. 363.

Receiver.—Where such is the rule, a receiver appointed to take charge of the widow's property and apply the same to the satisfaction of a judgment against her may bring an action in his own name for admeasurement of her dower. *Payne v. Becker*, 87 N. Y. 153.

3. Where the statute named, as persons entitled to apply for assignment of dower, the widow, heir or heirs, guardian of any minor child or children entitled to any estate in the lands, or any purchaser thereof, it was held that a devisee of a portion of the lands had no authority to make the application. *In re Hopper*, 6 N. J. Eq. 325.

Where the widow is in possession of the dwelling house in which her husband most usually dwelt next before his death, it is not her duty, but the duty of him who is entitled to the fee, to become the actor in procuring the

assignment of her dower. *Shelton v. Carrol*, 16 Ala. 148.

4. For notice of application for assignment of dower by summary statutory proceedings, and other questions of notice in such proceedings, see *infra*, VIII. 4.

Service of Writ of Dower.—In *Kentucky*, in 1831, it was held that the common-law procedure, with a few modifications, was still an appropriate remedy for recovery of dower. Where, therefore, a writ of dower was sued out, the proper method of serving the tenant was by a personal service of the writ upon him. As, by a statute in that state regulating common-law procedure, a judgment might be obtained at the appearance term after ten days' personal service of the writ, neither the grand nor petty *cape* was applicable or proper, and service of the writ alone was all that was necessary. *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

Writ of Summons and Attachment.—In *Massachusetts*, in 1874, a writ of dower, made in the form of a writ of summons and attachment, was held to be proper; and such a writ was properly served by a nominal attachment of the tenant's goods and delivering a summons to him. The return of the sheriff was that he had attached a chip, the property of the tenants, and "summoned them to appear and answer at court as within directed, by giving each a summons in hand." The court said: "As the writ contained a

IV. PROCEEDINGS AT LAW—1. In General.—At common law the writ of right of dower or the writ of dower *unde nihil habet* was a legal remedy to enforce an assignment of dower, and to recover damages for the detention of dower. It was not a possessory action, but after the dower was assigned the widow could recover possession by ejectment.¹ The action could only be maintained by the widow against the tenant of the freehold, and other parties claiming an interest in the property could not be joined,² and their rights could only be adjudicated in subsequent proceedings at law or in equity. For these reasons, and for other considerations to be noted hereafter, the proceeding at law was rarely resorted to, and the practice is now nearly obsolete both in England and the United States.³ Dower is now recovered by summary statutory proceedings,⁴ by proceedings in equity or under the codes of civil procedure,⁵ and in some states by ejectment for dower.⁶

2. Præcipe.—The first step in the common-law proceedings for

command to attach the property of the tenants, a separate summons to each tenant was proper, and the service returned by the officer was legal, although he delivered to each of the tenants the original of such a summons, and not an attested copy thereof." *Harrington v. Conolly*, 116 Mass. 69.

Form of Summons.—It was held in *South Carolina*, in 1802, that the proper form of a summons was an order or rule and not a writ requiring a return and a seal, and that such order ought not to be directed to the sheriff, but to the party to be summoned. Where, however, the form of a writ had been used, it was not therefore void, but would be quashed if it was not made returnable according to a statute requiring judicial process to be returnable fifteen days before court. *Ellis v. Falconer*, 1 Brev. (S. Car.) 77.

Description of Land.—Where the tenant was in possession of two pieces of land, and a demandant brought an action for dower in the more valuable piece, but by some mistake the copy of the summons served upon the tenant described the less valuable piece of land, the tenant having made default and the demandant having obtained judgment for dower in the other piece of land, the court ordered the judgment and all other proceedings to be set aside. *Williams v. Lanneau*, 4 Strobb. (S. Car.) 27.

When Returnable.—In *North Carolina* proceedings for recovery of dower are "special proceedings" within the

meaning of the statute providing that the summons in such proceedings shall be returnable before the clerk at any time, instead of before the judge in term time, as is the case in "civil actions." *Tate v. Powe*, 64 N. Car. 644.

1. *Park on Dower* 283; *Doe v. Nutt*, 2 C. & P. 430, 12 E. C. L. 205; *Bradshaw v. Callaghan*, 5 Johns. (N. Y.) 80; *Coles v. Coles*, 15 Johns. (N. Y.) 319.

2. See *infra*, 5. *Parties—*a. *Plaintiffs*; b. *Defendants*.

3. See *infra*, VII. *Proceedings in Equity*.

In *Park on Dower* (1836), the writer said: "The prosecution of a writ of dower has become a matter of some rarity. Dower, however, being a legal right, can only be regularly tried at law; and therefore, whenever the title of the dowress is disputed, upon a bill in equity for a commission to set out dower, the plaintiff is sent to law to try her right, which can only be done by a writ of dower; this writ therefore cannot be considered as obsolete."

In *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586 (1831), the common-law writ was said to be an unusual, but appropriate, remedy for obtaining dower, but the bill in equity has superseded the real action of the common law.

4. See *infra*, VIII. *Summary Statutory Proceedings*.

5. See *infra*, VII. *Proceedings in Equity*.

6. See article EJECTMENT.

dower was a præcipe for the writ of dower.¹

3. Writ of Dower.—Upon the filing of the præcipe the writ of dower *unde nihil habet*² was issued to the sheriff in cases where no dower had been assigned, but in cases where a part of the dower had been assigned, the writ of right of dower was issued.³ Where the heir, on arriving at majority, sought to recover a re-assignment of dower after it had been assigned while a minor, the writ of admeasurement of dower was issued; but this writ is now obsolete.⁴

4. Summons.—The summons contained the same command as the writ, and was served by two summoners, either by personal service on the tenant or at his place of abode on the lands demanded.⁵

5. Parties.—*a.* PLAINTIFFS.—The widow, an heir, or the guardian of an heir, or the tenant of the freehold, are the only proper parties as plaintiffs.⁶

1. The præcipe was in the following form: "Command A B [tenant] that justly and without delay he render to C D, widow, who was the wife of T D, her reasonable dower, which falleth to her of the freehold which was of the said T D, late her husband, in the parish of E, whereof she has nothing, as she says. Returnable," etc. See *William v. Gwyn*, 2 Saund. 43; *Fulliam v. Harris*, Cro. Jac. 217. See also article PRÆCIPE.

2. Form of writ: "William the Fourth, etc., to sheriff of (Essex), Greeting. Command C D (repeating the præcipe) that justly and without delay he render to A B, widow, who was the wife of E B, now deceased, her reasonable dower, which falleth to her of the freehold which was of the said E B, her late husband, in the parish of E, whereof she has nothing, as she says, and whereof she complains that the said C D deforceth her, and unless he shall so do, and if the said A B shall give you security to prosecute her claim, then summon by good summoners the said C D that he be before our justices of our great sessions of your county," etc. *William v. Gwyn*, 2 Saund. 43.

3. "If she has received part of her dower of the tenant himself in the same vill, the proper remedy is the writ of right of dower, which is a more general writ, extending either to a part or to the whole; and is, with respect to the claim of dower, of the same nature and efficiency as the grand writ of right, respecting a claim to an estate in fee simple." Park on Dower,

citing Gilbert on Devises, 357 and 374.

The proceedings under this writ were substantially the same as under the writ of *unde nihil habet*. See *William v. Gwyn*, 2 Saund. 44, note.

4. This writ is described by Chief Baron Gilbert as follows: "The writ of admeasurement of dower lieth where the heir, when he is within age, endoweth the wife of more than she ought to have dower of, or if the guardian endoweth the wife of more than one-third part of the land of which she ought to have dower, then the heir at full age may sue this writ against the wife, and thereby she shall be admeasured, and the surplusage she had in dower shall be restored to the heir; but in such case there shall not be assigned anew any lands to hold in dower, but to take from her so much of the lands as surpasseth the third part whereof she ought to be endowed; and he need not set forth of whose assignment she holds." See *Stoughton v. Leigh*, 1 Taunt. 402; *McCormick v. Taylor*, 2 Ind. 336.

5. By statute 31 Eliz., c. 3, § 2, a proclamation of the summons was required to be made on Sunday, immediately after divine services, and by 1 Vict., c. 45, § 2, by posting notice on the door of the church. *Furnis v. Waterhouse*, 1 Mod. 197.

For form of summons, see *William v. Gwyn*, 2 Saund. 44, note; *Allen v. Walter*, Hob. 133. See also article SUMMONS.

6. See *supra*, III. *Who may Institute Proceedings*. *Norwood v. Mar-*

Assignee.—In some states the right of dower is held to be assignable as a right of action, and the assignee may maintain the action in his own name,¹ or the action may be in the name of the widow, for the benefit of the assignee.²

b. DEFENDANTS—Tenant of Freehold.—In an action at law for the assignment of dower the owner or tenant of the freehold is the only necessary defendant, as such person is the only one who could have assigned the dower to the widow.³ If the party in possession is a vendee under a contract for a deed, he is held to be a tenant of the freehold in such action.⁴

row, 4 Dev. & B. (N. Car.) 442; Galbraith v. Fleming, 60 Mich. 408.

Where the widow marries during suit the husband should be joined as a plaintiff, but the objection cannot be raised on *scire facias*. Walker v. Gilman, 45 Me. 28.

1. Strong v. Clem, 12 Ind. 37; Payne v. Becker, 87 N. Y. 153, reversing 22 Hun (N. Y.) 28; Potter v. Everitt, 7 Ired. Eq. (N. Car.) 152.

At common law the widow may relinquish her right before assignment to a person holding the legal title, but not to a stranger. She can assign her right to a stranger so as to confer on him a right of action in his own name. Carnall v. Wilson, 21 Ark. 62; Smith v. Howell, 53 Ark. 279.

But the rule is otherwise in equity. See *infra*, VII. 1. a. *Plaintiffs*.

2. Lamar v. Scott, 4 Rich. (S. Car.) 516; Rowe v. Johnson, 19 Me. 146; Thomas v. Simpson, 3 Pa. St. 60.

"The writ of dower must be in her name, and cannot be maintained in the name of an assignee or purchaser. There is no ground to hold that her right to dower would be forfeited by an attempt to sell and convey. The party who takes a conveyance of the right of dower would have an equitable interest, and in this case he has express authority from the widow to prosecute the suit in her name. It could not be prosecuted in any other, and we think the suit might be carried on by the assignee in the name of the widow, though according to his contract with her the recovery might be for his benefit." Robie v. Flanders, 33 N. H. 524.

3. Ellicott v. Mosier, 7 N. Y. 201; Hurd v. Grant, 3 Wend. (N. Y.) 340; Drost v. Hall, 52 N. J. Eq. 68; Galbraith v. Green, 13 S. & R. (Pa.) 94; Drum v. Wartman, 6 Phila. (Pa.) 45; Miller v. Beverly, 1 Hen. & M. (Va.) 368; Boyden v. Lancaster, 2 Patt. & H. (Va.) 198.

The action could not be brought against the guardian in socage, or any person having a mere chattel interest as a tenant by *elegit*, tenant for years, or other person having a less estate than demandant. Park on Dower 285; Drost v. Hall, 52 N. J. Eq. 68.

Although several parties have had possession of the land and received the rents and profits, the tenant of the freehold at the time of commencing the action is the only person against whom the action can be maintained. Seaton v. Jamison, 7 Watts (Pa.) 533; Belfield v. Rowse, Moore 80; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290; Lyle v. Richards, 9 S. & R. (Pa.) 368.

A Tenant for Years was not a necessary party, as he could not have assigned dower to the widow on her demand. Miller v. Beverly, 1 Hen. & M. (Va.) 368.

Lands Purchased at Administration Sale.—In an action for dower in lands purchased at administrator's sale, the heirs of the deceased husband are not necessary parties, as their interest passed by such sale. The purchaser in possession is the only necessary defendant. Webb v. Smith, 40 Ark. 17.

Tenants of Fee.—It is not necessary that the defendants be tenants of the fee; if they are tenants of the freehold, it is sufficient. Seaton v. Jamison, 7 Watts (Pa.) 533.

Widow Renting to Tenant.—Where a widow in possession of the real estate rents it to her tenant, she cannot have dower assigned against the tenant, but must pursue the ordinary remedy against tenants. Collier v. Wheldon, 1 Mo. 1.

Defendant a Minor.—A guardian *ad litem* must be appointed where the defendant is minor. Hillyer v. Larzelere, 9 Johns. (N. Y.) 160.

4. Plantt v. Payne, 2 Bailey (S. Car.) 319; Jones v. Patterson, 12 Pa. St. 149.

Under Some Statutory Provisions, other persons in possession of the land or claiming an interest in it are necessary parties.¹

Land in Parcels.—Where the husband divided his land into parcels and conveyed the parcels to different purchasers, dower must be assigned in each parcel and not in the whole tract. Only those persons interested in one parcel of the land are proper parties defendant.² Or where the husband's grantee has divided the land into parcels and sold them to different purchasers, only the owners of one parcel are properly joined.³

The Present Owner and occupant is the only necessary defendant, although the land has been conveyed to him through several intermediate conveyances.⁴

6. Essoin.—The excuse of the tenant for his nonappearance on the return day of the writ, called his *essoin*, is not permitted in the *United States*, where the practice in making up the issues is regulated by statute.⁵

7. View.—The common-law right of the defendant to a view of the premises before plea, was recognized in some of the states, but only upon a showing by defendant that a view was necessary,⁶

See also *Kennedy v. McAliley*, 9 Rich. (S. Car.) 395.

1. Under the *New York* statute the action must be brought against the actual occupant of the land, although he is a tenant for years and not the owner or tenant of the freehold. *Ellicott v. Mosier*, 7 N. Y. 201; *Sherwood v. Vandemburgh*, 2 Hill (N. Y.) 307; *Shaver v. McGraw*, 12 Wend. (N. Y.) 558; *Connolly v. Newton*, 85 Hun (N. Y.) 552.

Where the occupant, a lessee for life, is a married woman, her husband is a necessary party. *Libbey v. Staples*, 39 Me. 166.

The *Rhode Island* statute permitted a writ against "the tenant in possession or the tenant of the next immediate estate of freehold." *Ellis v. Ellis*, 4 R. I. 110.

Where a statute provides that a summons in dower shall be directed to the heir at law, or his guardian, or to the executor or administrator if there be no guardian, or to any person or persons in possession, it was held that title of the party in possession was immaterial and the writ would lie against one claiming under a bond for a deed although the legal estate was in another. *Plantt v. Payne*, 2 Bailey (S. Car.) 319.

Under such statute all persons in possession who have an interest in the real estate and the right to be heard

before dower is assigned, may be made parties. *Kennedy v. McAliley*, 9 Rich. (S. Car.) 395.

2. *Allen v. McCoy*, 8 Ohio 418; *Fosdick v. Gooding*, 1 Me. 30; *Barney v. Frowner*, 9 Ala. 901; *In re Garrison*, 15 N. J. Eq. 396; *Droste v. Hall* (N. J. Eq. 1894), 29 Atl. Rep. 437; *Coulter v. Holland*, 2 Harr. (Del.) 330; *Doe v. Gwinnell*, 1 Q. B. 682, 41 E. C. L. 728; *Ellicott v. Mosier*, 11 Barb. (N. Y.) 574.

Where land is devised in parcels to three devisees, the widow may demand dower in one parcel without joining the other devisees. *Shelton v. Shelton*, 20 S. Car. 560.

In *Coburn v. Herrington*, 114 Ill. 104, it is said that the widow may maintain an action against all the purchasers, but she is not compelled to do so.

3. *Thomas v. Hesse*, 34 Mo. 13; *Boyd v. Carlton*, 69 Me. 200.

4. The wife has no claim against the intermediate parties through whom the legal title may have passed from the husband. *Blair v. Thompson*, 11 Gratt. (Va.) 441.

5. See statutes of *Virginia* and *Kentucky*, cited in *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

For practice at common law, see *Anson v. Jefferson*, 2 Wils. 164; *Twynning v. Lowndes*, 10 Bing. 65, 25 E. C. L. 31; *Allen v. Walter*, Hob. 133.

6. *Ostrander v. Kneeland*, 2 Johns.

as where the boundaries were in dispute.¹

8. **Imparlanee.**—The practice of granting an imparlanee was followed in some of our early cases,² but under the practice acts and codes of procedure such practice is now obsolete.³

9. **Grand and Petit Cape.**—Where the defendant fails to appear in answer to the summons, or neglects to appear on the adjournment day of the essoin, the plaintiff is entitled to a writ of *grand cape* directing the sheriff to take into his possession a third part of the estate, and to summon the defendant to appear; and if the defendant fails to appear, the defendant is entitled to a judgment of seizin and writ of inquiry as to damages.⁴

10. **Declaration**—*a.* IN GENERAL.—In modern proceedings at law for recovery of dower, the form of the declaration was at first substantially the same as at common law.⁵ But many statutory provisions have modified and enlarged the remedy, and the declaration must be changed accordingly.⁶

(N. Y.) 276. See also *Davis v. Lees*, Willes 344; *Herbert v. Vernon*, 2 Dyer 179a; *Whelpdale v. Whelpdale*, 3 Lev. 169.

1. *Vischer v. Conant*, 4 Cow. (N. Y.) 396.

2. *Vischer v. Conant*, 4 Cow. (N. Y.) 396; *Ostrander v. Kneeland*, 20 Johns. (N. Y.) 276; *Haviland v. Bond*, 4 Johns. (N. Y.) 309.

A **Plea in Abatement** will not be received after a general imparlanee. *Martin v. Com.*, 1 Mass. 347; *Campbell v. Stiles*, 9 Mass. 217.

3. "In our practice an imparlanee is merely a continuance of the cause to the next term of court. And it may be with or without a saving of all exceptions to the writ. It is not (except in a few particular cases) a matter of course or of right. The court may generally grant or refuse it, to either party, at their pleasure; not, indeed, arbitrarily, but according to a sound discretion, regulated by their own rules and the established course of practice." *Stearns on Real Actions* 104, 105.

The right of imparlanee was abolished in *Virginia* in 1748, and in *Kentucky* in 1796. See *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

4. For form of the *grand cape*, see *William v. Gwyn*, 2 Saund. 43.

Where the defendant appears in answer to the *grand cape*, the plaintiff must count or declare by filing a declaration. See proceedings in *William v. Gwyn*, 2 Saund. 44.

A *petit cape* lies on default at any

other term after the defendant has entered an appearance. *William v. Gwyn*, 2 Saund. 46.

The *grand* and *petit cape* are not resorted to under our practice, where the action is commenced by ordinary summons. *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

5. *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

The declaration for dower was as follows: "A B, widow, who was the wife of E B, esquire, deceased, by —, her attorney, demands against C D the third part of [description of lands], with the appurtenances, in the parish of —, in the county of —, as the dower of the said A B of the endowment of the said E B, deceased, heretofore her husband, whereof she has nothing, as she says," etc. 3 Chitty Pl. 1315–1316. This form was approved in *Foxworth v. White*, 5 Strobb. (S. Car.) 115. But where the action is to recover both dower and damages the declaration must allege that the husband died seized. *Taylor v. Brodrick*, 1 Dana (Ky.) 345; *Jones v. Jones*, 2 Crompt. & J. 601.

6. See statutory provisions concerning complaints in *New York*, *Illinois*, and *Michigan*.

Dower after Divorce.—The declaration for dower after divorce must allege a seizin of the husband during coverture, a divorce from the bonds of matrimony for his fault, a refusal to assign dower, and the damages incurred. See petition in *Stilphen v. Houdlette*, 60 Me. 447.

b. NECESSARY AVERMENTS—(1) *Marriage*.—The marriage of the widow and her deceased husband, although one of the essential facts, is not alleged in the declaration, it being sufficient to state the relation of the parties, as that the plaintiff, a widow, was the wife of the deceased.¹

(2) *Seizin and Title of Husband*.—Where the common-law forms are closely followed, a declaration in dower need not allege the seizin or title of the husband.² But in modern proceedings at law it is necessary to allege a seizin of the husband during coverture of some estate which is dowable.³ If damages are sought, the seizin of the husband must be alleged.⁴

(3) *Description of Property*.—The description of the property must be so certain that seizin may be delivered by the sheriff without reference to any other deed or portion of the record,⁵ but it is not always necessary to describe the lands by metes and bounds.⁶

Several Parcels.—All the various parcels of dowable property in possession of the defendant may be described in one count of the declaration.⁷

1. The marriage was set out in the replication, if denied in the plea. In the form adopted by Chitty the marriage is stated in the description of the demandant as the widow of —, etc., and the death of the husband was not named except in describing him as deceased. *Foxworth v. White*, 5 Strobbh. (S. Car.) 113.

Sufficient Averment.—An averment that T. D. was her husband at the time of his decease, and for many years prior thereto, etc., is a sufficient averment of marriage. *Draper v. Draper*, 11 Hun (N. Y.) 616. But in summary proceedings see, *contra*, *Martin v. Martin*, 22 Ala. 86.

2. *Foxworth v. White*, 5 Strobbh. (S. Car.) 115.

The usual form was to describe the property at length and with the further description, "as the dower of — of the endowment of the said —, heretofore her husband." See *Dennis v. Dennis*, 2 Saund. 329; 3 Chitty Pl. 1315.

3. *Freeman v. Freeman*, 39 Me. 426; *Wing v. Ayer*, 53 Me. 465; *Hutchins v. Burrill*, 72 Me. 311; *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586; *Knighton v. Young*, 22 Md. 359; *Yancy v. Smith*, 2 Metc. (Ky.) 411.

An allegation that the husband was seized of an estate of inheritance is sufficient without setting out the nature of the estate. *Lecompte v. Wash*, 9 Mo. 551.

It is sufficient if the widow alleges in the declaration that the husband died seized of certain lands. If the husband had been induced to execute fraudulent deeds to the premises, and the wife claims that such deeds were void as to her, such facts are properly set up in the plea and replication. *McGee v. McGee*, 4 Ired. (N. Car.) 105.

4. *Jones v. Jones*, 2 Crompt. & J. 601; *Taylor v. Brodrick*, 1 Dana (Ky.) 345.

5. In *Atwood v. Atwood*, 22 Pick. (Mass.) 283, the description referred to a certain deed, and this was held insufficient. The court said: "Such a reference would be good in a conveyance of the land, or in a demand of dower before action brought, as has already been remarked. But when lands are demanded, the description of them must be so certain that seizin may be delivered by the sheriff, without reference to any description dehors the writ." The demandant was permitted to amend her declaration.

6. *Ayer v. Spring*, 10 Mass. 83.

Sufficient Description.—A description as the undivided third part of a certain described lot, of which the defendant is in possession under a purchase at sheriff's sale, on certain executions, is sufficiently certain, and a further description in the declaration, by reference to a record of partition in a public office, is surplusage. *Bear v. Snyder*, 11 Wend. (N. Y.) 592.

7. Each description of land or inter-

(4) *Demand*.—It is necessary to allege a demand in the states where demand is required,¹ although this was not necessary at common law, the failure to make a demand being a matter of defense.²

11. *Pleas*—*a*. GENERALLY.—The defendant may plead in abatement, or at bar, to the writ of *unde nihil habet*, as at common law.³

b. IN ABATEMENT—*Separate Tracts*.—As a plea in abatement the defendant may set up that the defendants hold separate tracts and should have been sued separately.⁴

Non-tenure and Disclaimer is held to be a plea in abatement.⁵ But in effect it shows that the plaintiff has no right of action at any time, and is therefore a plea in bar.⁶

That the Husband Was an Alien is a good plea in abatement, although it would seem to be also in bar.⁷

c. IN BAR.—The plea denying marriage (*ne unques accouple in loyal matrimonie*),⁸ or the elopement and adultery of demandant,⁹ or the failure to make a demand for dower (*tout temps prist*),¹⁰ or the retention of deeds and evidences of title

est in land does not furnish a separate cause of action, although the modes of setting off dower in each may be separate and distinct. Land in fee simple and in common, improved or unimproved, may be included. *Hutchins v. Burrill*, 72 Me. 311. See also *Taylor v. Brodrick*, 1 Dana (Ky.) 345.

1. *Freeman v. Freeman*, 39 Me. 426; *McCormick v. Taylor*, 2 Ind. 336; *Wells v. Sprague*, 10 Ind. 305; *Dunn v. Loder*, 5 Blackf. (Ind.) 446; *Spinning v. Rowland*, 7 Blackf. (Ind.) 7; *Boyers v. Newbanks*, 2 Ind. 388; *Hasselmann v. Allen*, 42 Ind. 257. See also *supra*, I. *Demand of Dower*.

2. See *infra*, II. *c*. *In Bar*.

3. A defendant cannot plead in bar the same matter which has been overruled as a plea in abatement in an action of dower. *Coxe v. Higbee*, 11 N. J. L. 395.

A plea in abatement may be put in at any time before imparlance. *Campbell v. Stiles*, 9 Mass. 217; *Martin v. Com.*, 1 Mass. 347.

4. *Fosdick v. Gooding*, 1 Me. 30; *Ellis v. Ellis*, 4 R. I. 110; *Jones v. Patterson*, 12 Pa. St. 154.

5. *Seaton v. Jamison*, 7 Watts (Pa.) 540; *Casporous v. Jones*, 7 Pa. St. 120; *Young v. Tarbell*, 37 Me. 509; *Lewis v. Meserve*, 61 Me. 374; *Manning v. Laboree*, 33 Me. 343.

The defendant may plead non-tenure in part, and in such case the demand-

ant may abridge her claim to the residue. *Cameron on Dower*, citing *Nolan v. Reid*, 1 Ont. Pr. 266.

Non-tenure cannot be pleaded with other pleas in bar. *Nolan v. Reid*, 1 Ont. Pr. 266.

6. *Merrill v. Russell*, 1 Mass. 469; *Robinet v. Lewis*, *Draper* (U. C.) 44.

7. *Coxe v. Gulick*, 10 N. J. L. 328. 8. *Freeman v. Freeman*, 39 Me. 426; *Robins v. Crutchley*, 2 Wils. 128.

A plea that demandant never was married to the husband during the time that the husband was seized of the land, admits the seizin and denies the coverture. *Losee v. Murray*, 24 U. C. Q. B. 586.

This plea cannot be joined with *ne unques seisie que dower*. *Anderson v. Anderson*, 2 W. Bl. 1157.

9. *Hetherington v. Graham*, 3 M. & P. 399; *Haworth v. Herbert*, 2 Dyer 1066; *Robinson's Entries* 230.

10. *Hopper v. Hopper*, 21 N. J. L. 543, 22 N. J. L. 715; *Woodruff v. Brown*, 17 N. J. L. 246; *Rankin v. Oliphant*, 9 Mo. 239; *Humphrey v. Phinney*, 2 Johns. (N. Y.) 484; *Perrine v. Perrine*, 35 Ala. 644; *Layton v. Butler*, 4 Harr. (Del.) 507; *Darnall v. Hill*, 12 Gill & J. (Md.) 388.

An alienee of the heir could not plead *tout temps prist*, because he was not in possession during all the period and could not have assigned dower at all

(detinue of charters),¹ are valid pleas in bar. It is a valid plea in bar, that dower has been assigned by the tenant and accepted by the widow,² or that the widow has accepted a devise in lieu of dower,³ or that she has relinquished her right of dower.⁴

Divorce.—It is generally a good plea, that the parties were divorced when the husband died and that demandant is not his widow.⁵ But in some states the plea must show that the divorce was granted to the husband for the fault of the wife.⁶ It is not a plea in bar that demandant obtained a divorce for the fault of the husband, and that the husband married another who is now his widow and entitled to dower.⁷

The Plea *Ne Unques Seisie que Dower* is the same as at common law, and is a plea that demandant's husband was never seized of such an estate that he could endow the demandant.⁸ The tenant, how-

times if requested by the widow. Co. Litt. 33a.

1. This plea is probably obsolete, owing to the general laws requiring the registration of titles. See 2 Scribner on Dower, p. 138.

Only the heir could make this plea, as others are not in privy. 9 Co. 18a.

2. Clark v. Muzzey, 43 N. H. 59; Johnson v. Morse, 2 N. H. 48; Conant v. Little, 1 Pick. (Mass.) 189.

But if the widow has been evicted from the land assigned to her by the heir, she may have dower assigned from the remaining estate in possession of the heir. French v. Pratt, 27 Me. 381.

3. White v. White, 16 N. J. L. 202.

4. Chicago Dock Co. v. Kinzie, 49 Ill. 289.

A Plea that the Wife Agreed to Release Her Dower is bad, and so is a plea that she released it without the further averment that it was released by deed or profert. White v. White, 16 N. J. Eq. 202.

A Plea that Demandant has Conveyed the Estate is bad on demurrer, unless it states that the wife acknowledged the deed on private examination. Tuthill v. Townley, 1 N. J. L. 281; Sheppard v. Wardell, 1 N. J. L. 516.

5. Barrett v. Failing, 6 Sawy. (U. S.) 473, 111 U. S. 523; Whitsell v. Mills, 6 Ind. 229; Levins v. Sleanor, 2 Greene (Iowa) 604; Marvin v. Marvin, 59 Iowa 699; Gleason v. Emerson, 51 N. H. 405; Calame v. Calame, 24 N. J. Eq. 440; Wood v. Wood, 59 Ark. 441; Frampton v. Stephens, 21 Ch. Div. 164. But see, *contra*, Wait v. Wait, 4 N. Y. 95, reversing 4 Barb. (N. Y.) 192; Price v. Price, 124 N. Y. 599.

6. Stilphen v. Houdlette, 60 Me. 447; Moulton v. Moulton, 76 Me. 85; Davol v. Howland, 14 Mass. 219. See also Am. and Eng. Encyc. of Law, tit. DOWER.

The Plea of Divorce for the Wife's Fault is a good plea in bar to the wife's action for dower in all the lands conveyed by the husband during coverture, or held by him at the time of his death. McKean v. Brown, 83 Ky. 208.

It is not a plea in bar that the parties were divorced unless it appears that the divorce was for the fault or aggression of the husband. McGill v. Deming, 44 Ohio St. 645; Gordon v. Dickison, 131 Ill. 141.

7. In Lamkin v. Knapp, 20 Ohio St. 454, the widow asked for dower in lands of which the husband was seized during coverture. The answer admitted the marriage and death of the husband, K., and the seizin of the husband during coverture of the lands described in the petition, but alleged that the wife had obtained divorce from the husband for his fault, and had married one L., who died before K., whereby she became the widow of L., and that after divorce K. married another, who survived him and was then his widow. A demurrer to this answer was sustained.

8. Morse v. Goddard, 13 Met. (Mass.) 177; Owen v. Robbins, 19 Ill. 545; Gully v. Ray, 18 B. Mon. (Ky.) 114; Kingman v. Sparrow, 12 Barb. (N. Y.) 201; Sparrow v. Kingman, 1 N. Y. 242; Finn v. Sleight, 8 Barb. (N. Y.) 401.

This plea admits the fact of marriage and the death of the husband. To support the issue on this plea the

ever, cannot interpose this plea where he claims under a conveyance from the demandant's husband.¹ Under such plea the defendant claims to be tenant of the freehold, and cannot set up title in a stranger under whom no one is claiming possession.²

Other Pleas Not a Bar.—That the husband was indebted at the date of his deed or at the time of his death,³ or that the defendant is a purchaser for a valuable consideration without notice of the demandant's claims,⁴ or that the demandant's husband was not seized at the time of his death,⁵ is not a bar to the action.

12. Replication.—Where the tenant pleads *ne unques accouple*, the replication is that demandant was married within a certain diocese.⁶

To the plea that the demandant eloped and lived in adultery during coverture, the replication is either a denial or that she was afterwards reconciled to her husband.⁷

A replication to a plea that the husband was an alien, need not lay a venue as to the place of birth within the allegiance, nor state of what parents he was born, and is properly concluded to the country.⁸

13. Trial.—The issues are tried to a jury as in other actions at demandant is not bound to prove a title in her husband, but only a seizin of the estate during coverture. Sheppard *v.* Wardell, 1 N. J. L. 516; English *v.* Wright, 1 N. J. L. 499.

The tenant cannot show under this plea that the demandant's husband, under whom the tenant claims, had only a colorable seizin because the deed was given to defraud creditors. Kimball *v.* Kimball, 2 Me. 226.

The defense of joint tenancy is not admissible under this plea. See 2 Scribner on Dower 135.

A plea that demandant has not complied with the condition of the will under which she claims is bad where it is not averred in the plea that the tenant is an heir of the testator. Throp *v.* Johnson, 3 Ind. 343.

The plea of *ne unques seisie que dower* cannot be joined with *ne unques accouple*. Anderson *v.* Anderson, 2 W. Bl. 1157; Hillier *v.* Fletcher, 2 W. Bl. 1207.

1. Hitchcock *v.* Carpenter, 9 Johns. (N. Y.) 344; Bancroft *v.* White, 1 Cai. (N. Y.) 185; Kimball *v.* Kimball, 2 Me. 226; Nason *v.* Allen, 6 Me. 243; Pledger *v.* Ellerbe, 6 Rich. (S. Car.) 266; Gayle *v.* Price, 5 Rich. (S. Car.) 525; May *v.* Specht, 1 Mich. 187; May *v.* Tillman, 1 Mich. 262; Thompson *v.* Boyd, 22 N. J. L. 543.

2. "When he appears as defendant and denies her right of dower, he there-

by claims to be tenant of the freehold, and it was proper to refuse to let him set up title in a mere stranger, under whom no one is claiming." Evans *v.* Evans, 29 Pa. St. 277.

3. Thomas *v.* Hesse, 34 Mo. 13.

4. Reil *v.* Elder, 62 Pa. St. 308; Larowe *v.* Beam, 10 Ohio 498; Sondley *v.* Caldwell, 28 S. Car. 580; McMorris *v.* Webb, 17 S. Car. 563; Ridgeway *v.* Newbold, 1 Harr. (Del.) 385; Williams *v.* Lambe, 3 Bro. C. C. 264; Collins *v.* Archer, 1 Russ. & M. 284; Phillips *v.* Phillips, 4 De G. F. & J. 208; Finch *v.* Shaw, 19 Beav. 500.

It is not a good plea in bar that the husband sold the land during his lifetime and that the defendant has made valuable improvements on the land. Coxé *v.* Higbee, 11 N. J. L. 395.

5. Coxé *v.* Higbee, 11 N. J. L. 395; Taylor *v.* Brodrick, 1 Dana (Ky.) 345.

6. When such replication was made, a writ was sent to the bishop of that diocese, requiring him to certify the fact to the court. The certificate did not contain the evidence received before the bishop. Robins *v.* Crutchley, 2 Wils. 122; Wickham *v.* Enfield, Cro. Car. 351. The replication need not state the date or form of ceremony of marriage or by whom performed. Williams *v.* Lee, 2 U. C. C. P. 175.

7. Haworth *v.* Herbert, 2 Dyer 106b.

8. Cameron on Dower 553.

common law. An issue concerning the marriage on a plea of *ne unques accouple in loyal matrimonie* was not tried in the common-law courts, but the matter was referred to the bishop, who certified his finding for or against the marriage.¹

The issue as to marriage is here submitted to the jury with other issues.²

The plaintiff is entitled to open and close as in other cases.³

14. Verdict.—The verdict in the action for dower is similar to other verdicts in actions at law, and may be either general or special.⁴

In Cases where Damages may be Recovered under the statute of Merton, if the jury find for the demandant they should also find the date of the husband's death, that he was seized of a certain estate at the time of his death, the annual value of the land, and the damages on account of the detention of dower.⁵

15. Judgment.—The judgment is that the plaintiff recover her seizin of a third part of the estate to hold to her in severalty by metes and bounds, and also damages for retention of dower in certain cases.⁶

1. If the marriage was celebrated beyond the kingdom the validity of the marriage was submitted to the jury as any other question of fact. *Ilderton v. Ilderton*, 2 H. Bl. 149.

2. In *Missouri* the suit for dower is held to be an action at law in which the parties are entitled to a jury unless waived. *Shipp v. Snyder*, 121 Mo. 155.

In *South Carolina* the defendant had a right to a jury trial under statute of 1786. *Righton v. Righton*, 1 Mill Const. (S. Car.) 130.

3. *Kendrick v. Ravens*, 47 Ga. 612.

4. *Gailbraith v. Green*, 13 S. & R. (Pa.) 85; *Shirtz v. Shirtz*, 5 Watts (Pa.) 255; *Shipp v. Snyder*, 121 Mo. 155. See special verdicts in *Bear v. Snyder*, 11 Wend. (N. Y.) 592; *Vadney v. Thompson*, 44 Hun (N. Y.) 1.

Sum in Lieu of Dower.—Where the usual issues are joined on the marriage of the demandant and the seizin of the husband, only such issues are to be passed upon by the jury. The jury cannot award a sum in lieu of dower. *Peay v. Pickett*, 1 Nott & M. (S. Car.) 16.

A Verdict in Favor of One Defendant. upon his separate plea, will not avail other defendants who are in default. *Lecompte v. Wash*, 9 Mo. 551.

Wife's Adultery.—Where a special verdict found that demandant had once left her husband and lived in adultery, but had not done so since a date named,

and did not find whether she had been reconciled to her husband, the court awarded a repleader, as no judgment could be rendered on such verdict. *Lecompte v. Wash*, 9 Mo. 551.

5. See note in *William v. Gwyn*, 2 Saund. 44.

In *Dennis v. Dennis*, 2 Saund. 331, the jury found that "Edward Dennis, heretofore the husband of the said Frances Dennis, was, on the day in which he married the said Frances, and after, seized of such estate of and in the within mentioned manors, tenements and rents, with the appurtenances and advowson within mentioned, that he could endow the said Frances thereof, as the said Frances has within alleged. And the jurors aforesaid, upon their oath aforesaid, further say that the said Edward Dennis, being so, as aforesaid, seized of such estate of and in the within mentioned manors, etc., died so thereof seized on * * *, and that said manors, etc., are worth by the year, in all issues besides reprises, £570, and they assess the damages of the said Frances, on occasion of the detention of her said dower, over and above the said value, and over and above her costs and charges by her about her suit in this behalf expended, to £12, and for those costs and charges to 40s."

6. *Dennis v. Dennis*, 2 Saund. 331.

Where the judgment is against several tenants in common, it must be

Against Whom.—Ordinarily the judgment for dower was against the tenant of the freehold only, and the interests of other parties in possession were not adjudicated, but in some cases the judgment reserved the rights of reversioners and lessees.¹ The rights of other persons not parties to the suit were determined in subsequent proceedings in equity or by ejectment.²

Judgment for Seizin and for Damages Distinct.—The judgment for seizin and the judgment for damages, under the statute of Merton, are separate and distinct judgments although rendered in the same action.³ The judgment for dower may be affirmed and the judgment for damages reversed,⁴ or released by the court,⁵ or treated as surplusage if erroneous.⁶

16. Writ of Seizin.—On a judgment for dower the sheriff proceeds to the admeasurement of dower and to deliver possession under the writ of *habere facias seisinam*.⁷ Under this writ all tenants were ousted, although they were not parties to the suit, and their title might be paramount to the right of dower.⁸

for "three parts to be divided," and not as in a case against one tenant where the judgment must be "in severalty by metes and bounds." *Glefold v. Carr*, Brownl. & G. 127.

1. Park on Dower 299.

A tenant having a prior term for years may have the judgment provide that the writ of seizin be stayed until the end of his term. *Wheatley v. Best*, Noy. 65. See also *Wheatley v. Best*, Cro. Eliz. 564.

The judgment may be that the demandant shall recover seizin of the reversion, or by a general judgment with a *cesset executio* during the term. *Bodmyn v. Child*, 1 Comyns 185; *Brown v. Gibbs*, Prec. Ch. 97; *Pheasant v. Pheasant*, 3 Ch. Rep. 69.

2. The judgment was binding on the tenant and all who might claim under him in a subsequent action in ejectment, and none of them could claim under a prior outstanding term. But they might prove that the lands claimed were not included in the dower assigned by the sheriff. *Booth v. Lindsey*, 2 Raym. 1293.

3. The judgment of seizin may be enforced by the *habere facias seisinam*, and in such case the damages are estimated only to the time the seizin was delivered. *Walker v. Nevil*, 1 Leon. 56.

The judgment for damages is rendered after the right of dower has been ascertained. See *Harvey v. Harvey*, T. Raym. 366; and *Butler v. Ayres*, 1 Leon. 92.

4. Park on Dower 308; Layton v.

Butler, 4 Harr. (Del.) 507; *Hammond v. Higgins*, 2 Har. & J. (Md.) 443.

5. Park on Dower 308; *Butler v. Ayres*, 1 Leon. 92.

6. Where the verdict is for both dower and damages, and no damages are recoverable under the circumstances of the case, the court may treat the finding as to damages as surplusage and render a judgment for seizin. *Shirtz v. Shirtz*, 5 Watts (Pa.) 255.

If the court improperly issue a writ of seizin and also a writ of inquiry of damages in a case where damages cannot be recovered, the judgment for dower will be sustained. *Taylor v. Brodrick*, 1 Dana (Ky.) 345.

In such case the plaintiff may release all but the judgment for seizin. *Barnett v. Barnett*, 16 S. & R. (Pa.) 51.

7. Park on Dower 299.

8. *Green v. Roe*, 2 Comyns 581.

In *Foliambes Case*, Godbolt's Rep. 165, all the justices said that "the sheriff should serve execution of the land as if there were not any lease for years, for it may be the lease for years is void. And although it be shewed in pleading, that there is a lease for years, the wife cannot answer to it; and it may be there is not any lease, and, therefore, the execution shall be general. And he who claims the lease for years may reënter into the land, notwithstanding the recovery and execution of the dower. And if he be ousted he shall have his action."

Scire Facias.—Where the time has expired for issuing a writ of seizin, *scire*

17. Admeasurement—By Sheriff.—Under the writ of seizin the sheriff enters upon the lands and assigns to the widow a one-third part of each tract of land by metes and bounds.¹ The sheriff should notify the parties interested,² but he cannot depart from the directions of the writ, as his duties are ministerial and not judicial.³

By Commissioners.—In some states the statutes provide for the appointment of commissioners, who perform the duties of the sheriff.⁴ Where the commissioners return that the property is not susceptible of division, or cannot be divided without great injury thereto, a court or jury may ascertain the annual value of the dower therein.⁵

18. Return — Description of Property.—The return showing the admeasurement of dower need not contain an accurate description of the property by metes and bounds if it appears that the dower was so assigned.⁶ But the return should show that a definite

facias lies to have such writ issued. In such action the defendant cannot raise the objection that the widow had married before judgment and the husband was not made a party. *Walker v. Gilman*, 45 Me. 28.

1. For the right of the widow to have money in lieu of dower, or an assignment of one tract instead of one-third of each tract, and other questions of substantive law, see Am. and Eng. Encyc. of Law, tit. DOWER.

Where the sheriff assigned a third part of each room in a house, it was held that a third of the rooms should have been assigned, and the sheriff was committed for disregarding the terms of the writ. *Abington's Case*, cited 1 Palm. 265.

2. In *Hoby v. Hoby*, 1 Vern. 218, 2 Ch. Cas. 160, a court of equity set aside an assignment because the defendant's father was the only person who appeared in behalf of the infants to see the dower admeasured, which looked like collusion.

Notice.—No notice is necessary to a party to the proceedings where the assignment is made by commissioners. *Ridgeway v. Newbold*, 1 Harr. (Del.) 385; *Beaty v. Hearst*, 1 McMull. (S. Car.) 31.

3. 1 Roll. Abr. 683; 2 Scribner on Dower 582.

If the parties are present and the heir directs the sheriff to assign in violation of the writ or not according to its directions, the assignment is good if ratified by the parties. *Fisher v. Grace*, 28 U. C. Q. B. 312.

4. *Schnebley v. Schnebley*, 26 Ill. 116; *Matter of Watkins*, 9 Johns. (N. Y.) 245; *Stevens v. Stevens*, 3 Dana (Ky.) 371; *Leonard v. Leonard*, 4 Mass. 533; *Miller v. Miller*, 12 Mass. 454; *McKibbin v. Folds*, 38 Ga. 235.

The Decree should not only appoint the commissioners by name, but also find that they are qualified as required by the statute. *James v. Fields*, 5 Heisk. (Tenn.) 394.

Where Commissioners Not Necessary.—Where it is stipulated or agreed that the land is not susceptible of division the appointment of commissioners is not necessary. *Strickler v. Tracy*, 66 Mo. 465.

The Commissioners should be instructed as to their duties in estimating dower. *Throp v. Johnson*, 3 Ind. 343. See *contra*, *Wright v. Jennings*, 1 Bailey (S. Car.) 277.

5. *Walker v. Walker*, 2 Ill. App. 418; *Scammon v. Campbell*, 75 Ill. 223; *Reily v. Bates*, 40 Mo. 468.

6. In *Howard v. Cavendish*, Cro. Jac. 621, the sheriff returned that he had delivered seizin to the widow "of one-third part of the honor, hundred, tenement, and advowson, viz., of one tenement or farm in C. called W., then or late in the occupation of U.," etc. It was objected that such description was uncertain. But it was held sufficient by the judges, as the return of the sheriff need not be as certain as declarations or indictments, as "it would be infinite to set down here every of them by itself; but when he saith in the end that he hath delivered them all by metes and bounds it sufficeth."

amount or proportion was awarded and that the boundary lines were fixed.¹

Sum in Lieu of Dower.—Where the statutes authorize the commissioners to allow a gross sum in lieu of dower, the return should show that the estate was of such nature that it could not be divided, and also the value of the entire estate.²

19. Writ of Inquiry for Damages.—The damages were usually assessed by the jury and included in the same verdict where a finding was made in favor of the demandant.³ But where it is not averred that the husband died seized, and the jury do not find such fact and fail to assess the damages, the writ of inquiry is issued to assess such damages.⁴

20. Vacating Assignment—Reassignment of Dower.—If the assignment made by the sheriff was erroneous or excessive, the tenant had several remedies. He could have the assignment amended,⁵ or

Indefinite Return.—A return by commissioners that they had assigned as dower "four acres around the house" was considered too indefinite. *Stevens v. Stevens*, 3 Dana (Ky.) 371.

1. In *Pierce v. Williams*, 3 N. J. L. 281, the sheriff returned on the writ of seizin that he had allotted to the widow one piece of land, giving the metes and bounds thereof; also, that he had allotted to the widow one-third of the house, barn, and orchard, the south end of the house and barn; no particular part of the orchard was mentioned. This return was quashed as too vague and uncertain. "It ought to describe the part allotted to the widow by metes and bounds, whenever the subject matter is capable of being so described."

In *Matter of Watkins*, 9 Johns. (N. Y.) 245, the admeasurers reported that they had set off to the widow one hundred and forty acres by metes and bounds, and the common use of the entry and stairs of the house, above and below stairs, and the right of partitioning off part of the cellar for her separate use, the privilege of using the well, room for a cow yard, and the separate use of the horse shed. The admeasurement was held to be just and convenient.

2. Where the commissioners have examined the land and ascertained its entire value they may be permitted to amend the return so as to show their assessment. *M'Creary v. Cloud*, 2 Bailey (S. Car.) 343.

3. *Dennis v. Dennis*, 2 Saund. 331.

4. *Butler v. Ayres*, 1 Leon. 92; *Wil-*

liam v. Gwyn, 2 Saund. 44; *Howard v. Cavendish*, Cro. Jac. 621.

In *Martin v. Martin*, 14 N. J. L. 125, it was said: "The writs of seizin and inquiry are generally blended or united in the same writ. When that is done, damages are properly assessed up to the suing out of the inquisition, as in this case. But this is a separate writ of inquiry, and may have been issued long after a writ of seizin had been sued out." See form of the writ in this case.

Where the Tenant Dies after a judgment of seizin and before a writ of inquiry, the action abates. *Aleworth v. Roberts*, 1 Lev. 38; *Mordant v. Thorold*, 1 Salk. 252, 3 Lev. 275.

Declaration Inadequate.—A writ of inquiry cannot be issued where the declaration does not contain allegations which entitle the demandant to damages. *Taylor v. Droderick*, 1 Dana (Ky.) 345.

Where the declaration contains no allegation that the husband died seized, no damages can be recovered, and a writ of inquiry is unauthorized. *Waters v. Gooch*, 6 J. J. Marsh. (Ky.) 586.

6. *Longvills Case*, 1 Keb. 743.

In *Howard v. Mansfield*, Palm. 264, it was said that if the sheriff commit error by assigning a larger part than he ought, a writ of admeasurement lies, but not of error, inasmuch as the judgment and award of execution are good. But in *Park on Dower* 271-274, it is shown that the writ of admeasurement of dower lies only to correct voluntary assignments.

proceed against the sheriff by assize,¹ or proceed by *scire facias* for a reassignment,² or apply to a court of equity for such relief.³

21. Costs.—Where the demandant recovered damages she was entitled to costs,⁴ but in other cases no costs were allowed.⁵

V. EJECTMENT FOR DOWER.—See article EJECTMENT.

VI. ACTIONS UNDER THE CODES.—Under the codes of civil procedure, which purport to abolish all distinctions between actions at law and suits in equity, dower may be recovered by a civil action, the nature of which does not require a special examination with reference to this subject.⁶ In general it may be said that the action for dower under the codes resembles a suit in equity, both in the pleading and practice and in the nature of the relief granted.⁷

VII. PROCEEDINGS IN EQUITY—1. **Jurisdiction**—Early Rule.—Jurisdiction over dower was not assumed by the court of chancery until the reign of Elizabeth,⁸ and at first such jurisdiction was only auxiliary, and in aid of the common-law courts.⁹ In the ordinary case of a widow claiming dower, equity had no jurisdiction.¹⁰

1. Park on Dower 272.

2. Park on Dower 271.

3. Hoby v. Hoby, 1 Vern. 218; Sneyd v. Sneyd, 1 Atk. 442.

4. Hillyer v. Larzelere, 10 Johns. (N. Y.) 216; Martin v. Martin, 14 N. J. L. 125; Benner v. Evans, 3 P. & W. (Pa.) 454; Dennis v. Dennis, 2 Saund. 328.

5. Fisher v. Morgan, 1 N. J. L. 147; Sheppard v. Wardell, 1 N. J. L. 516; Sharp v. Pettit, 4 Dall. (Pa.) 212.

Under Code.—Where the action for dower under the code of civil procedure is in the nature of an action at law and triable by jury, the plaintiff, on recovering a judgment, is entitled to costs as of course. Everson v. McMullen, 45 Hun (N. Y.) 578; Jones v. Emery, 1 Civ. Pro. Rep. (N. Y. Supreme Ct.) 338; Smith v. Smith, 6 Lans. (N. Y.) 313.

Where there Are No Provisions in Reference to Costs, they are in the discretion of the court. Aikman v. Harsell, 31 Hun (N. Y.) 634.

In South Carolina the statutes allow costs as in other cases. Smith v. Paysenger, 2 Mill Const. (S. Car.) 59; Vance v. Becknall, 1 Bailey (S. Car.) 140.

6. See McKay v. Freeman, 6 Oregon 449; Rice v. Nelson, 27 Iowa 148; Howard v. Watson, 76 Iowa 229; Everson v. McMullen, 113 N. Y. 293. See pleadings in Richardson v. Harms, 11

Misc. Rep. (N. Y. C. Pl.) 254; Munroe v. Crouse, 59 Hun (N. Y.) 248; Spalding v. Hershfield, 15 Mont. 253.

Dower may be admeasured in suits in equity, as the remedy provided by the code is not exclusive. Thomas v. Thomas, 73 Iowa 657.

7. Dower cannot be recovered in an equitable estate by summary proceedings. The remedy is by an action under the code similar to a suit in equity. Efland v. Efland, 96 N. Car. 488.

Costs.—A general statute relating to costs in all actions relating to real estate applies to the action of ejectment for dower. Walker v. Schuyler, 10 Wend. (N. Y.) 481; Yates v. Paddock, 10 Wend. (N. Y.) 529.

8. Wild v. Wells, 1 Dick. 3, Toth. 82. "From the very short notes of this case in the books, it is impossible to gather what the equity was founded on, unless, perhaps, upon the ground that the claim of arrears involved a species of account, and that the court, having thus obtained jurisdiction of the subject, would proceed to decree complete relief upon an admission probably of the legal title." Park on Dower *317.

9. Pomeroy Eq., § 1380, 1381.

10. In Shute v. Shute, Prec. Ch. 111, and in Wallis v. Everard, 3 Ch. Rep. 161, the court refused to entertain bills for dower, for the reason that "no impediment was shown in the way of proceeding at law." 2 Scrib. Dow. 146;

Grounds of Jurisdiction.—The jurisdiction over dower was assumed by equity courts, on the grounds of fraud,¹ the necessity of discovery to ascertain of what lands the widow was dowable where the title deeds were held by the heir,² the multiplicity of suits necessary at common law,³ undivided interests in complicated estates requiring partition,⁴ outstanding terms,⁵ the denial of damages at common law to the representatives of a widow, or to a widow when the tenant died after judgment and before assessment of damages,⁶ and the necessity of having an

Curtis v. Curtis, 2 Bro. C. C. 620; *Bolton v. Deane*, Prec. Ch. 516; *Norton v. Frecker*, 1 Atk. 524.

In some of the early cases the court refused to assign dower where the right was denied in the answer, but retained the bill until the widow could establish her right in an action at law; but this delay is not required where courts of equity have concurrent jurisdiction. See *infra*, 5. *Trial*.

1. The report of *Dolin v. Coltman*, 1 Vern. 294, is vague, inconsistent, and unsatisfactory; but there was a question of fraud in barring dower. The court also entertained the bill because, in case the estate were conveyed, the plaintiff might not know against whom to bring her writ of dower.

2. In *Dormer v. Fortescue*, 3 Atk. 131, an heir sued for rents and profits from the time his title accrued. Lord Hardwicke, by way of illustration, said: "If a widow is entitled to dower, and her claim is merely on her legal title, but she cannot ascertain the lands out of which she is dowable, this court will assist her to find out the lands, and the court will order her to proceed upon a particular part, and reserve the further consideration till after judgment, and if her title of dower is established will give her profits from the time not only of her demanding, which is the time from which she is to have it in her writ of dower, but will give it her from the time of her title accrued."

In *Moor v. Black*, Cas. temp. Talb. 126, the husband of the plaintiff died seized of an undivided interest in lands, and the defendants had possession of the title deeds, so that she was unable to bring her writ of dower at common law. The defendants demurred, alleging that the plaintiff had a right merely at law and had shown no impediment to her recovery at law. Lord Chancellor Talbot held that the plaintiff

was entitled to discovery because she could not recover without the assistance of the title deeds, and that she also had a right to come into equity because her husband's estate was complicated and she must resort to equity for partition; otherwise, every six months she would have to bring an action against those who held jointly with her for her share and for damages for the detainer.

Under modern registration laws discovery is not necessary, because the widow can ascertain from the record the lands in which she has a dower right.

3. *Moor v. Black*, Cas. temp. Talb. 126.

4. *Moor v. Black*, Cas. temp. Talb. 126.

5. In *Dormer v. Fortescue*, 3 Atk. 131, Lord Hardwicke said: "Suppose a widow entitled to dower of an estate, upon which a term for years was standing out, and she had her title of dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time her title accrued, and will set the term, as a satisfied one, out of the way; but if that term had been out of the way and she had no need to come into this court, it would have been otherwise."

6. *Curtis v. Curtis*, 2 Bro. C. C. *620, is a well-considered leading case. A widow brought suit against the heir for an accounting and for possession of one-third of her husband's freehold estates. The defendants answered that she was never married to her husband. The lord chancellor retained the bill for twelve months, allowing the plaintiff to bring her action at law to try her right to dower. Before issue joined the defendant died, leaving all his freehold estates in trust for his wife for life with remainders over to his first and other sons. The widow ex-

accounting.¹

Concurrent Jurisdiction.—In the later cases it was held that a court of equity had concurrent jurisdiction and might proceed to admeasure dower in cases where no impediment at law was alleged.² These decisions were followed in *New York* and *New*

hibited her bill of revivor against the wife of the heir, who pleaded that the plaintiff had never been married, and that her alleged husband had never been seized of the lands. The bishop of Bath certified the marriage, and the plaintiff had a verdict as to the seizin. The plaintiff and the wife of the heir died on the same day. The executor of the plaintiff filed a bill of revivor against the devisee of the heir and his personal representative. The Master of the Rolls ordered that the former decree be carried into execution, an account taken of the rents and profits of the estate after the decease of the plaintiff's husband until the death of the plaintiff; and that the executor of the plaintiff should have one-third of such account. On rehearing, Lord Alvanley, the Master of the Rolls, said: "Dower is a mere legal demand. But then the question comes, whether the widow cannot come either for a discovery of those facts which may enable her to proceed at law, and, on an allegation of impediments thrown in her way in her proceedings at law, this court has not a right to assume a jurisdiction to the extent of giving her relief for her dower, and, if the alleged facts are not positively denied, to give her the full assistance of this court. Her remedy at law is a writ of dower. Generally there are no damages in real actions, but so favorable was the law to this particular action that it provided a special relief for the widow by giving her damages. As to dower, the widow, at first, was only entitled to have an assignment of the land by metes and bounds. Then came the statute of Merton. The deforcers of dower are by that statute fined at the pleasure of the king." Then again, in arguing that a widow is on a par with an infant in coming into equity, the Master of the Rolls says: "She comes here and says, 'The law gives me dower out of the estates of my husband, and the mesne profits from his death. I do not know how to proceed; for if there should turn out to be any mortgage or term of years in my way, then I must pay the

costs. The defendant has all the title deeds in his hands and knows what the estates are; his conscience is affected, and yet, instead of putting me into possession, he turns me out of doors, and keeps all the title deeds.' If then, she comes here for a discovery of these matters, she shall have her complete relief in this court. If you deny her right to dower, the question must be tried at law, but when the fact is ascertained she shall have her relief here. It must be supposed the dowress has nothing to live upon but her dower, and the mesne profits are her subsistence from the time of her husband's death; and the course of this court seems, therefore, to have been to assign her dower, and universally to give her an account from the death of her husband. * * * Now, taking it for granted that the widow, coming after the death of the heir, would not be entitled to her mesne profits, it by no means follows that, when the widow is right in this court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits, for, unquestionably, if the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree for mesne profits, and his having thrown an impediment in her way shall not make the difference. At the same time, I must admit that the widow's right at law is gone by the death of the party."

1. *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. Jr. 122, 4 Bro. C. C. 295. In this case the widow prayed for an account of the arrears since the death of her husband, and that the dower might be assigned, and the future payment secured.

2. *Mundy v. Mundy*, 2 Ves. Jr. 122; *Pulteney v. Warren*, 6 Ves. Jr. 73.

"This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles, been expanded to the extent of affording complete relief between the parties. * * * Although it was thus, at one time, supposed that

Fersey.¹ It is now well established that courts of equity have concurrent jurisdiction in suits for the assignment of dower in legal estates, and such jurisdiction is exercised by both the federal and state courts.² Whether such power is derived from the general jurisdiction of courts of equity or from constitutional or statutory provisions, may be ascertained from the citations; but in nearly all the states where dower is not abolished, the suit in equity has almost superseded the suit at law.³

the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower or dower in legal estates." *Pomeroy's Eq. Jur.*, §§ 1380, 1382.

1. *New York*.—"It was a question of doubt for some time, how far a court of equity would take jurisdiction of a case for the assignment of dower. The jurisdiction of the court of chancery in *England* had long been sustained where there was any difficulty in the way of the widow's proceeding at law; as an outstanding term, the want of information as to the title, or the want of means to establish the title of the husband in a court of law, in consequence of the possession of the deeds by the heirs, etc. And finally it was decided, in the case of *Mundy v. Mundy*, 2 Ves. Jr. 122, that a demurrer to a bill for dower could not be sustained, although the bill did not contain any allegation that there was an impediment to the complainant's remedy in an action at law. It may therefore be considered as settled in *England* that the court of chancery has concurrent jurisdiction with courts of law in suits for the assignment of dower. * * * Chancellor Kent also considered the case of *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, as settling the jurisdiction of this court in the same way." *Badgley v. Bruce*, 4 Paige (N. Y.) 98; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448. See also *Hazen v. Thurber*, 4 Johns. Ch. (N. Y.) 604; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258; *Russell v. Austin*, 1 Paige (N. Y.) 192.

After dower has been assigned by a court of equity, the surrogate cannot order such land sold to pay debts of a deceased husband. *Lawrence v. Miller*, 2 N. Y. 245.

New Jersey.—In *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349, it was insisted

that the common-law courts had exclusive jurisdiction of dower. "Whatever difference of opinion on this subject might at one time have existed, I consider it settled at this day that in relation to both dower and partition the courts of law and equity hold a concurrent jurisdiction. * * * It is indispensable in many cases, for the sake of discovery by the oath of the defendant as to the property, its nature, and the incumbrances upon it, and sometimes for an account of the rents and profits, that the jurisdiction of this court should be maintained." See also *Wright v. Wright*, 8 N. J. Eq. 143; *Hinchman v. Stiles*, 9 N. J. Eq. 361, 454; *Opdyke v. Bartles*, 11 N. J. Eq. 133; *Rockwell v. Morgan*, 13 N. J. Eq. 119, 384; *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438.

2. *Herbert v. Wren*, 7 Cranch (U. S.) 370. In this case Chief Justice Marshall said: "According to the practice which prevails generally in *England*, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in *England* in favor of this jurisdiction, one of which is that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice." See also *Powell v. Monson*, etc., *Mfg. Co.*, 3 Mason (U. S.) 347; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281; *Ferry v. Burnell*, 14 Fed. Rep. 807; *In re Null*, 2 Fed. Rep. 71; *In re Ransom*, 17 Fed. Rep. 331; *Peirce v. O'Brien*, 29 Fed. Rep. 402; *Schley v. Pullman Palace Car Co.*, 25 Fed. Rep. 890; *Bottomly v. Spencer*, 36 Fed. Rep. 732; *Marshall v. Whitney*, 43 Fed. Rep. 343; *Richards v. Bellingham Bay Land Co.*, 47 Fed. Rep. 854; *Grafflin v. Nevada Phosphate Co.*, 35 Fed. Rep. 474.

3. *Alabama*.—*Beavers v. Smith*, 11 Ala. 20; *Johnson v. Elliott*, 12 Ala. 112; *Potter v. Barclay*, 15 Ala. 439;

Not Confined to Direct Proceedings.—The jurisdiction is not confined to the assignment of dower in direct proceedings for that purpose, but the widow may obtain this relief in other proceedings in equity, under the familiar principle that where a court of equity has obtained jurisdiction over some portion of a controversy it may award complete relief to all the parties before it, although some of the parties might obtain the same relief at law. Thus

Fry v. Merchant's Ins. Co., 15 Ala. 810; *Shelton v. Carrol*, 16 Ala. 148; *Edmondson v. Montague*, 14 Ala. 370; *Francis v. Garrard*, 18 Ala. 794; *Thrasher v. Pinckard*, 23 Ala. 616; *Owen v. Slatter*, 26 Ala. 547; *Slatter v. Meek*, 35 Ala. 528; *Brooks v. Woods*, 40 Ala. 538; *Boyd v. Hunter*, 44 Ala. 705; *Morgan v. Henderson*, 102 Ala. 245; *Wood v. Morgan*, 56 Ala. 397; *Sheppard v. Sheppard*, 87 Ala. 560; *Gillespie v. Somerville*, 3 Stew. & P. (Ala.) 447.

Arkansas.—*Ex p. Crittenden*, 10 Ark. 333; *Crittenden v. Woodruff*, 11 Ark. 82; *Menifee v. Menifee*, 8 Ark. 37; *Hewitt v. Cox*, 55 Ark. 225; *Hilliard v. Hilliard*, 50 Ark. 34.

Delaware.—*Farrow v. Farrow*, 1 Del. Ch. 457; *Ridgeway v. Newbold*, 1 Harr. (Del.) 385; *Layton v. Butler*, 4 Harr. (Del.) 507.

Florida.—*Chaires v. Shepard*, 7 Fla. 77; *Milton v. Milton*, 14 Fla. 369; *Henderson v. Chaires*, 35 Fla. 423.

Illinois.—*Blain v. Harrison*, 11 Ill. 384; *Turney v. Smith*, 14 Ill. 242; *Osborne v. Horine*, 17 Ill. 92; *Hart v. Burch*, 130 Ill. 426; *Coburn v. Herington*, 114 Ill. 104; *Burns v. Miller*, 110 Ill. 242; *Heisen v. Heisen*, 145 Ill. 658; *Simpson v. Ham*, 78 Ill. 203.

Indiana.—*Malin v. Coult*, 4 Ind. 535; *Wells v. Sprague*, 10 Ind. 305; *Strong v. Clem*, 12 Ind. 37.

Iowa.—*McCraney v. McCraney*, 5 Iowa 232; *Gano v. Gilruth*, 4 Greene (Iowa) 453; *Phares v. Walters*, 6 Iowa 106; *Thomas v. Thomas*, 73 Iowa 657; *Starry v. Starry*, 21 Iowa 254.

Kentucky.—*Kendall v. Honey*, 5 T. B. Mon. (Ky.) 282; *Jones v. Todd*, 2 J. J. Marsh. (Ky.) 359; *Stevens v. Smith*, 4 J. J. Marsh. (Ky.) 64; *Robertson v. M'Daniel*, 5 J. J. Marsh. (Ky.) 11; *Marshall v. Anderson*, 1 B. Mon. (Ky.) 198; *Gray v. Sparrow*, 3 B. Mon. (Ky.) 110; *McElroy v. Wathen*, 3 B. Mon. (Ky.) 135; *Gaston v. Bates*, 4 B. Mon. (Ky.) 366; *Lawson v. Morton*, 6 Dana (Ky.) 471; *Wall v. Hill*, 7 Dana (Ky.) 173.

Maine.—*Freeman v. Freeman*, 39 Me. 426; *Smith v. Eustis*, 7 Me. 41; *Wing v. Ayer*, 53 Me. 465; *Lovejoy v. Vose*, 73 Me. 46; *Simonton v. Gray*, 34 Me. 50.

Maryland.—*Maccubbin v. Cromwell*, 2 Har. & G. (Md.) 443; *Wells v. Beall*, 2 Gill & J. (Md.) 468; *Steiger v. Hillen*, 5 Gill & J. (Md.) 133; *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; *Scott v. Crawford*, 11 Gill & J. (Md.) 365; *Darnall v. Hill*, 12 Gill & J. (Md.) 388; *Kiddall v. Trimble*, 1 Md. Ch. 143; *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Chase's Case*, 1 Bland (Md.) 206; *Naill v. Maurer*, 25 Md. 532; *Grove v. Todd*, 45 Md. 252; *Mitchell v. Farrish*, 69 Md. 235.

Michigan.—*Brown v. Bronson*, 35 Mich. 415.

Mississippi.—*Turner v. Morris*, 27 Miss. 733.

Missouri.—*Rankin v. Oliphant*, 9 Mo. 239; *Roberts v. Walker*, 101 Mo. 597; *Rannels v. Washington University*, 96 Mo. 226; *Young v. Thrasher*, 115 Mo. 222.

North Carolina.—*Campbell v. Murphy*, 2 Jones Eq. (N. Car.) 357; *Whithead v. Clinch*, 1 Murph. (N. Car.) 128; *Pollard v. Slaughter*, 92 N. Car. 81; *Efland v. Efland*, 96 N. Car. 488; *Parton v. Allison*, 109 N. Car. 674.

Ohio.—*Todd v. Beatty*, *Wright (Ohio)* 460; *Allen v. McCoy*, 8 Ohio (pt. 2) 418; *Finch v. Finch*, 10 Ohio St. 501; *Larrowe v. Beam*, 10 Ohio 498; *Boltz v. Stoltz*, 41 Ohio St. 540.

Rhode Island.—*Kenyon v. Kenyon*, 17 R. I. 539; *Maxon v. Gray*, 14 R. I. 641.

Vermont.—*Danforth v. Smith*, 23 Vt. 247.

Virginia.—*Grayson v. Moncure*, 1 Leigh (Va.) 449; *Tod v. Baylor*, 4 Leigh (Va.) 498; *Blair v. Thompson*, 11 Gratt. (Va.) 441; *Boyden v. Lancaster*, 2 Patt. & H. (Va.) 198; *Blunt v. Gee*, 5 Call (Va.) 481.

West Virginia.—*Morgan v. Blatchley*, 33 W. Va. 155.

the widow cannot recover dower in partition proceedings,¹ unless it be in a suit in equity, where such relief may be necessary to a complete adjudication of the rights of all the parties before the court.² In some states where a wife, obtaining divorce on account of the fault or aggression of her husband, is entitled to dower in his lands as if he were dead, it is held that she cannot obtain an assignment of dower in the divorce suit, but must recover her dower in the usual proceedings.³ A court of equity may assign dower in suits to set aside fraudulent conveyances made by the husband to defeat dower,⁴ or to cancel releases of dower obtained from the wife by fraud.⁵ Where the wife has joined with her husband in a conveyance to defraud creditors, she may recover dower in suit to have such conveyance set aside.⁶

Injunctions.—It seems that an injunction will be granted in suits for dower as in other cases.⁷ But an injunction will not be granted against a widow to restrain her from prosecuting numerous suits against the owners of various tracts of land which formerly constituted one body of land.⁸ In this proceeding the dower

1. *Coles v. Coles*, 15 Johns. (N. Y.) 319; *Matter of Sipperly*, 44 Barb. (N. Y.) 370; *Tanner v. Niles*, 1 Barb. (N. Y.) 560; *Brown v. Adams*, 2 Whart. (Pa.) 188.

2. *Thomas v. Thomas*, 73 Iowa 657; *Johnson v. Johnson*, 1 Munf. (Va.) 549; *Bush v. Bush*, 5 Del. Ch. 144. See *contra*, *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407.

Illinois.—Section 22 of c. 106, "Partition" (Starr & C. Stat.), provides that "if dower has not been allotted to the person entitled thereto, or the homestead set off, in case any party to the suit is entitled to an estate of homestead in the premises, or any part thereof, such dower may be allotted and such homestead set off by the commissioners; and if the court shall so direct, the premises so allotted or set off may be partitioned among the claimants, subject thereto." *Fleming v. Vennum*, 45 Ill. 374; *Priddy v. Griffith*, 150 Ill. 560; *Hartwell v. De Vault*, 159 Ill. 325; *Tink v. Walker*, 148 Ill. 234.

3. *Smith v. Smith*, 13 Mass. 231; *Holmes v. Holmes*, 54 Minn. 352.

4. *Rockwell v. Rockwell*, 81 Mich. 493; *Brooks v. McMeekin*, 37 S. Car. 285; *Flowers v. Flowers*, 89 Ga. 632; *Petty v. Petty*, 4 B. Mon. (Ky.) 215; *Davis v. Davis*, 5 Mo. 183; *Tate v. Tate*, 1 Dev. & B. Eq. (N. Car.) 22; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Holmes v. Holmes*, 3 Paige (N. Y.) 363; *Lake v. Nolan*, 81 Mich. 112; *London v. London*, 1 Humph. (Tenn.) 1.

See petitions in *Bear v. Stahl*, 61 Mich. 203; *Rockwell v. Rockwell*, 81 Mich. 493.

5. *Smart v. Waterhose*, 10 Yerg. (Tenn.) 94; *Miller v. Stepper*, 32 Mich. 194.

6. *Summers v. Babb*, 13 Ill. 483; *Robinson v. Bates*, 3 Met. (Mass.) 40; *Woodworth v. Paige*, 5 Ohio St. 71; *Belford v. Crane*, 16 N. J. Eq. 265; *Malloney v. Horan*, 49 N. Y. 111; *Dugan v. Massey*, 6 Bush (Ky.) 81; *Richardson v. Wyman*, 62 Me. 280; *Wyman v. Fox*, 59 Me. 100; *Bohannon v. Combs*, 97 Mo. 446.

7. In a suit in equity by an heir against the widow and other heirs, the defendants will not be enjoined from collecting the rents or from instituting proceedings at law for dower, where it is not alleged that such rents will be irretrievably lost by reason of the insolvency of those receiving them, or that the rents are jeopardized. *Knigh-ton v. Young*, 22 Md. 359; *Kenan v. Johnson*, 48 Ga. 28.

Where the widow is denied an injunction against a tenant in possession under a lease for years, because she had an adequate remedy at law by terminating the lease for nonpayment of rent, the court will not retain the cause to admeasure dower. *Shores v. Shores*, 34 Mo. App. 208.

8. The widow has a right to proceed at law against each owner separately, and, after establishing her right to dower, may join all the parties in a

may be assigned, or the decree may direct a sale of the property and award dower in the surplus.¹ After foreclosure her remedy is by an action to redeem.²

Other Proceedings.—Dower may also be assigned in an action for an accounting;³ to declare a trust in real estate;⁴ to foreclose a mechanic's lien;⁵ in a proceeding by an administrator or executor to sell real estate.⁶

2. Parties—*a.* **PLAINTIFFS.**—The Widow is generally the plaintiff in a suit for dower,⁷ but where she has sold or assigned her right of dower, before admeasurement, her assignee may maintain the action.⁸

Heir or Owner of Land.—In cases where a court of equity has jurisdiction, an heir,⁹ or the owner, of real estate¹⁰ in which a widow

suit in equity, where all their rights may be adjusted and dower admeasured. *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438.

An Action at Law for Dower will not be enjoined because the widow is in possession of the estate and is committing waste. *Kenan v. Johnson*, 48 Ga. 28.

1. *Mantz v. Buchanan*, 1 Md. Ch. 202; *Holden v. Dunn*, 144 Ill. 413; *New York L. Ins. Co. v. Mayer*, 14 Daly (N. Y.) 318; *Mandel v. McClave*, 46 Ohio St. 407.

2. *Gibson v. Crehore*, 3 Pick. (Mass.) 475; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Eldridge v. Eldridge*, 14 N. J. Eq. 195.

3. *Gano v. Gilruth*, 4 Greene (Iowa) 453.

4. *Hawley v. James*, 5 Paige (N. Y.) 318.

In *Stewart v. Chadwick*, 8 Iowa 463, the court refused to admeasure dower in such proceeding. "The widow of W. has no estate, as such, for which she can sue at present, as in this case. The right descends upon the heirs at law, and when they have recovered, she makes her claim of dower upon them."

5. *McClure v. Fairfield*, 153 Pa. St. 411.

6. *In re Rawlings*, 81 Iowa 701.

7. Where the Widow Is an Infant she may maintain the action for dower as in other cases where an infant is plaintiff. *Phelan v. Phelan, Draper* (U. C.) 386.

Where the Widow Marries during a suit for dower it is not error to make her husband a complainant, but he is not a necessary party. *Portier v. Barclay*, 15 Ala. 439.

If the widow has married, the second husband may join with her in the bill

as a plaintiff. *Turner v. Morris*, 27 Miss. 733.

8. *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152; *Parton v. Allison*, 111 N. Car. 429; *Strong v. Clem*, 12 Ind. 37; *Maccubbin v. Cromwell*, 2 Har. & G. (Md.) 443; *Mutual L. Ins. Co. v. Shipman*, 119 N. Y. 324; *Todd v. Beatty*, Wright (Ohio) 460; *Morgan v. Blatchley*, 33 W. Va. 155; *Dobberstein v. Murphy* (Minn. 1896), 66 N. W. Rep. 204; *Brown v. Meredith*, 2 Keen 527. See *contra*, *Strong v. Bragg*, 7 Blackf. (Ind.) 62, citing 4 Kent's Com. 61; *Jacoway v. McGarragh*, 21 Ark. 347.

"Before the assignment of her dower, a widow is not seized of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. She can, however, make such a contract concerning it as equity can and will, under proper circumstances, enforce." *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152.

Action by Heirs.—A widow is not a proper party plaintiff in an action by the heirs to have lands in the name of a third person declared to be in trust for the husband's estate. She must await the termination of the suit and institute a separate proceeding for dower in case the heirs refuse to assign it to her. *Stewart v. Chadwick*, 8 Iowa 463.

The Widow and the Heirs may Join as plaintiffs in an action to have a conveyance set aside because the husband was an imbecile and incompetent. *Gray v. Sparrow*, 3 B. Mon. (Ky.) 110.

9. *Roberts v. Walker*, 101 Mo. 597; *Young v. Young*, 7 Mackey (D. C.) 243; *Allsmiller v. Freutchenicht*, 86 Ky. 198.

10. The husband's grantee may resort

has or claims to have a right of dower, may maintain a suit to quiet title or to ascertain and admeasure dower.

The Creditors of the Widow may obtain an assignment of dower by a decree in equity. In such case the action for admeasurement of dower is generally brought by a receiver appointed by the court.¹

b. DEFENDANTS—All Adverse Parties.—In a suit in equity not only the tenant of the freehold, but all other persons having a claim or interest in the property adverse to the widow, may be made parties defendant, as the object of the proceeding is not merely to obtain a division and possession of the land, but to adjudicate the rights of all persons having adverse interests.²

to equity to have dower assigned to a widow in possession of the property. See dictum in *Shelton v. Carrol*, 16 Ala. 148.

In *Thrasher v. Pinckard*, 23 Ala. 616, the purchaser of real estate, on a contract for "good and lawful titles," was sued in an action at law for the balance of purchase price. The vendor had died leaving heirs having an interest in the balance of the purchase price, and his widow claimed dower in the real estate. The purchaser brought a suit against the heirs and the widow, to enjoin the proceedings at law, to have the dower claim settled and, if allowed, that the same be allowed in a gross sum of money and that the amount be deducted from the unpaid purchase-money. It was alleged in the bill that valuable improvements had been erected on the premises, of such character that the probate court could not do justice by assigning the dower by metes and bounds. It was held that the bill stated a good cause of action and gave a court of equity jurisdiction.

1. In cases where the right of dower is subject to execution the decree of a court of equity usually declares that such right shall be admeasured and sold by a receiver. *McMahon v. Gray*, 150 Mass. 289; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Davison v. Whitteley*, 1 MacArthur (D. C.) 163; *Boltz v. Stolz*, 41 Ohio St. 540. See decree in the latter case.

This remedy is denied in *Maxon v. Gray*, 14 R. I. 641, on the ground that courts of equity had no jurisdiction in that state, either by statute or general jurisdiction.

2. *Badgley v. Bruce*, 4 Paige (N. Y.) 98; *Hewitt v. Cox*, 55 Ark. 225.

Married Woman.—Where the prop-

erty is owned by a married woman her husband is a necessary party defendant. *Morse v. Thorsell*, 78 Ill. 600.

Where the Widow Assigns her dower before it has been admeasured to her, she is a necessary party defendant in an action by the assignee for dower. *Parton v. Allison*, 111 N. Car. 429.

The Administrator of the Deceased husband is not entitled to become a party to a suit for assignment of dower, as the title vested in the heirs, and the administrator has no interest in the land. *Campbell v. Murphy*, 2 Jones Eq. (N. Car.) 357; *Kenyon v. Kenyon*, 17 R. I. 539.

Legal Title Held in Trust.—Where the legal title is held by A for himself, and also in trust for B, both are necessary parties defendant where both are in joint possession of the property. *Rand v. Walker*, 117 U. S. 340.

The Assignee of a Mortgage on the premises is not a necessary party where no relief is sought against him. *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349.

New Jersey.—The case of *Drost v. Hall*, 52 N. J. Eq. 68, is opposed to the above rule. A demurrer was sustained to a bill in equity because it was merely alleged that defendants had or claimed to have some interest in the land, without defining such interest, as that of owner, incumbrancer, tenant for years, or other interest. "The bill," it was said, "wholly fails to show that the defendants have such an estate in the land in which dower is claimed as invests them with the power to assign dower or makes it their duty to do so. For this reason, I think, the demurrer must be sustained with costs."

Trustees who, by the terms of the

Where the Land has been Sold in Separate Tracts the widow may proceed against the owner of one tract. In such case the purchasers of other tracts are not necessary parties.¹ Or she may proceed against the owners of all the tracts aliened by her husband,² and in such case all the parties having or claiming an interest in each tract must be made defendants.³

Tenant under Lease.—The tenant who entered into possession under a lease from some party other than the widow is a proper party defendant.⁴

will, are to hold the estate for the use of the wife during her life, and on her death to convey to the testator's children, are necessary parties, as they have a title adverse to the widow's right of dower. *Droste v. Hall* (N. J. Eq. 1894), 29 Atl. Rep. 437.

Creditors of the wife are not necessary or proper parties, as they can levy on the property after admeasurement. *Ramsour v. Ramsour*, 63 N. Car. 231.

A creditor of the deceased husband may be permitted to intervene after decree and object to the admeasurement of dower as excessive. *Ex p. Moore*, 64 N. Car. 90.

1. *Coburn v. Herrington*, 114 Ill. 104; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Droste v. Hall* (N. J. Eq. 1894), 29 Atl. Rep. 437.

Where lands have been sold in parcels at a judicial sale and the widow and heirs sue for partition and dower in one parcel, the purchasers of other parcels at the sale are not necessary parties. *Hart v. Burch*, 130 Ill. 426.

Although the statute requires the application for dower in the probate court to include all the lands which lie in the county, a court of equity will entertain a bill for dower in a portion of the property in the county, if the property is improved or so situated that dower cannot be assigned by metes and bounds as in other cases. *Owen v. Slatter*, 26 Ala. 547.

In *Allen v. McCoy*, 8 Ohio (pt. 2) 463, the land had been conveyed to numerous parties and platted into town lots. The wife brought her bill in chancery against the owner of one lot. The statute provided that the widow might file her petition against "the heir or other person having the next immediate estate of inheritance," and empowered the court to "render such decree in the premises as shall appear just and consistent with the rights of all the parties interested therein," and that dower might be assigned in one of sev-

eral tracts "if the same can be done without prejudice to the rights of any person claiming title to, or holding a lien on, such lands." It was held that the action could be maintained against the owner of one lot. *Approved in Coburn v. Herrington*, 114 Ill. 104.

2. *Marshall v. Anderson*, 1 B. Mon. (Ky.) 198. See *contra*, under statute, *Barney v. Frowner*, 9 Ala. 901. A bill is not multifarious because the wife seeks dower in separate tracts of land aliened by the husband during coverture, without her relinquishment. The plaintiff may elect to proceed against each separately or all together. *Boyden v. Lancaster*, 2 Patt. & H. (Va.) 198.

In New Jersey the rule is that only parties interested in one tract can be joined as defendants. Where the defendants were purchasers of separate tracts the court said: "To join all of these parties in one bill which prays relief that must be three distinct assignments of dower in the three separate pieces of property, is to unite several distinct and independent demands against different defendants in the same bill, and such joinder renders the bill multifarious." *Droste v. Hall* (N. J. Eq. 1894), 29 Atl. Rep. 437.

3. Where it is apparent from the bill and exhibits that necessary parties have not been joined, the court will, on its own motion, remand the cause, although the objection was not properly raised. *Morgan v. Blatchley*, 33 W. Va. 155.

4. *McIntosh v. Wood*, 15 Grant's Ch. (U. C.) 92.

In *Badgley v. Bruce*, 4 Paige (N. Y.) 98, the land had been sold on execution to S., who conveyed to B., who leased the land to H. for a term of years. The court, in sustaining a bill against B. and H. for dower, said: "Previous to the Revised Statutes, the remedy at law for dower was by a writ of dower *unde nihil habet*. But as this was a species of real action, it could only be sustained against the

Parties Who have Had Title in the lands but have conveyed all their interest to the present owners, are not necessary parties defendant.¹

3. Bill or Petition—Facts Essential to Right.—The bill or petition for dower should allege all the facts essential to the establishment of the right of dower, as the marriage of demandant to the deceased, the seizin of the husband during coverture of a certain estate and his alienation during his lifetime or seizin at the time of his death, the possession of the lands by the defendants under certain titles or claims of title, and their refusal on demand to assign dower.²

Remedy at Law.—The bill for dower usually contained sufficient allegations to show some impediment preventing an adequate remedy at law, or other facts which would give the court jurisdiction.³ In modern practice such allegations will not be necessary,

owner of the freehold. It would not have lain against the defendant H., who was merely a tenant for years. The widow applied to the tenant in possession, and he refused to assign her dower, because he was not the owner of the land; and the tenant of the freehold refused to give her the assignment to which she was entitled, because he had a covenant of warranty from some one else. Under such circumstances, I think she was right in applying to the equity court for relief, so that she might obtain the actual possession of her dower right in the premises, notwithstanding the existence of the term for years."

New Jersey.—This is denied in New Jersey, where it is held that the defendants must have such an estate in land as invests them with the power to assign dower. *Drost v. Hall*, 52 N. J. Eq. 68.

1. Where the husband sold the property in his lifetime it is not necessary to make his heirs defendants. *Boyd v. Lancaster*, 2 Patt. & H. (Va.) 198.

In *Blair v. Thompson*, 11 Gratt. (Va.) 441, the wife brought a suit in equity against all the parties who had acquired title from her husband, and also all the parties through whom the title had been conveyed by several intermediate conveyances, which were set out in the bill. The defendants joined issue among themselves as their several liabilities to each other. It was held that as such issues did arise from the plaintiff's pleading and proof, the court would grant no decree concern-

ing their liabilities; that, in action for dower, the present owners of the land are the only necessary defendants.

2. The essential facts to be alleged in a bill have been stated as follows: "Although the bill is not as particular in its statement of the husband's title and of its transmission to the defendants as it might have been, * * * yet it alleges distinctly the relation of husband and wife, the death of the husband, his seizin and alienation during coverture, and the possession of the land, with claim of title by the defendants. These allegations certainly show the substantial requisites for the establishment of the right. And although it be admitted that they may all be true, and yet that other facts may exist which show that there is no right of dower, we apprehend that, as the allegations of the bill are sufficient, *prima facie*, to support the title, it was not necessary for the complainant in the first instance, to negative all or any facts by which it might possibly be avoided." *Wall v. Hill*, 7 Dana (Ky.) 173.

3. *Moor v. Black*, Cas. temp. Talb. 126; *Pulteney v. Warren*, 6 Ves. Jr. 89; *Strickland v. Strickland*, 6 Beav. 81.

"In point of practice, the writer believes that bills for dower uniformly allege impediments to recovery at law, either real or supposititious, in order to attract the jurisdiction." *Park on Dower* 327.

It is not clear from the reports that any impediment at law was alleged in the following cases: *Mundy v. Mundy*, 2 Ves. Jr. 122, 4 Bro. C. C. 295; *Curtis*

as courts of equity have original jurisdiction, or, in some states, concurrent jurisdiction, and in many states the courts have jurisdiction both in law and in equity.

Widowhood.—It should be alleged that the demandant was the wife of the deceased.¹

Seizin and Title.—The bill should show that the husband of the demandant was seized during coverture in such an estate as would entitle her to dower,² but it need not show that the husband was invested with a legal title where dower is in equitable estates.³

A Demand for assignment of dower should be alleged.⁴

4. Answer.—The answer must conform to the rules of chancery practice.⁵

Legal or Equitable Defenses.—Where the widow is seeking equitable relief, in addition to the assignment of dower, any defense, legal or equitable, may be set up in the answer.⁶ But in the early

v. Curtis, 2 Bro. C. C. 620; *Wild v. Wells*, 1 Dick. 3.

An Allegation of Fraud and Undue Influence must aver sufficient facts showing that the grantor's will was overcome, or the bill will not be sufficient. See *Jackson v. Rowell*, 87 Ala. 685.

1. Where it was alleged in the petition that the appellant "was not the wife of M. at the time of his death, having been divorced from him several years before," it will not be presumed that the divorce was merely from bed and board, as such presumption would be in favor of the pleader. *McKean v. Brown*, 83 Ky. 208.

2. *Wing v. Ayer*, 53 Me. 465; *Freeman v. Freeman*, 39 Me. 426.

3. A bill in equity is demurrable, when, instead of alleging that the complainant's husband or some one to his use was, at some time during the marriage, seized of an estate of inheritance in the land out of which dower is claimed, it merely alleges that the husband "had the use and enjoyment of the same (properly described) and occupied the same as his homestead." *Kenyon v. Kenyon*, 17 R. I. 539.

The bill should allege that the husband was seized in fee; but in the absence of a demurrer an allegation that "he was possessed of the land in his own right and by bond" is sufficient. *Gaston v. Bates*, 4 B. Mon. (Ky.) 366.

4. *Darnall v. Hill*, 12 Gill & J. (Md.) 388; *Wells v. Sprague*, 10 Ind. 305.

5. In *Finch v. Finch*, 10 Ohio St. 501, the defendants denied "that the petitioner, F., is entitled to dower in

the premises described in her petition, or in any part thereof." The court held that this amounted to "a kind of a general issue—a form of pleading wholly inadmissible under the code or in chancery, and will not be further considered."

Where facts are alleged in a bill that show that the action is not barred by the statute of limitations, in anticipation of such defense, a plea setting up such defense in bar must deny the avoiding facts alleged in the bill, and must be accompanied by an answer denying or avoiding such facts. *Henderson v. Chaires*, 35 Fla. 423.

6. *Cauley v. Lawson*, 5 Jones Eq. (N. Car.) 132; *Murphy v. Avery*, 1 Dev. & B. (N. Car.) 25; *Murphy v. Murphy*, 12 Ohio St. 407.

Where the husband had an equitable estate in land as vendee under a bond for a deed, but had transferred the bond before acquiring a legal title, a subsequent grantee of the legal title is not estopped to deny the seizin of the husband. *Edmondson v. Montague*, 14 Ala. 370.

Release.—The defense that the widow released her right of dower to a stranger is a valid defense in equity. *Grant v. Jackson, etc., Co.*, 5 Del. Ch. 404.

Assignment.—The fact that the widow has assigned her right of dower, before admeasurement, to one of the heirs for a valuable consideration, is a complete bar to her suit in equity for dower, although such assignment is void at law. *Wilkinson v. Brandon*, 92 Ala. 530; *Dobberstein v. Murphy*, 44 Minn. 526.

cases it was held no equitable relief was sought; the claim for dower was considered a legal right, and governed by the same rules as in an action at law, and only legal defenses could be set up in the answer.¹

Bona Fide Purchaser.—It is not a sufficient defense, in a suit in equity for dower, that the owner purchased the lands for a valuable consideration and without notice of the wife's claim for dower or without notice of the marriage.²

Several Defenses.—A defendant may set up several defenses to the suit for dower, but such defenses must be consistent.³

5. Trial—Chancery Practice.—The suit for dower is tried by the methods usually pursued by courts of equity. A reference may be granted,⁴ and in some cases the issues may be submitted to a jury.⁵

Where Right to Dower Raised by Answer.—In some of the early cases it was the practice in the chancery court to refuse to decree dower where the right to dower was brought in issue by the answer.⁶ But this practice was not followed by our

1. 2 Scribner on Dower 164; Mayburry v. Brien, 15 Pet. (U. S.) 21; Blain v. Harrison, 11 Ill. 384; Gano v. Gilruth, 4 Greene (Iowa) 453; Phares v. Walters, 6 Iowa 106; Tod v. Baylor, 4 Leigh (Va.) 498.

2. Snelgrove v. Snelgrove, 4 Desaus. (S. Car.) 274; Campbell v. Murphy, 2 Jones Eq. (N. Car.) 357; Blain v. Harrison, 11 Ill. 384; Rankin v. Oliphant, 9 Mo. 239; Larowe v. Beam, 10 Ohio 498; Ridgeway v. Newbold, 1 Harr. (Del.) 385; Gano v. Gilruth, 4 Greene (Iowa) 453; Owen v. Slatter, 26 Ala. 547; Mitchell v. Farrish, 69 Md. 235.

3. See answer in Scanlan v. Scanlan, 134 Ill. 630.

Where Inconsistent Defenses Are Set Up in the answer and no exception is taken before trial, the decree will not be vacated if some of the consistent defenses are found to be true. Scanlan v. Scanlan, 134 Ill. 640.

4. Barnes v. Carson, 59 Ala. 188.

In Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, the chancellor found the widow entitled to dower, and referred the case to a master to ascertain and report the rents and profits of the estate from the death of the husband to the date of the report, and also to ascertain the amount due on a mortgage admitted to be prior to the right of dower.

5. In London v. London, 1 Humph. (Tenn.) 1, the chancellor submitted the issues to a jury, who found for the complainant and assessed her damages. On appeal, the court said: "It is obvi-

ous that it was unnecessary, perhaps improper, to have submitted the matter of account to the jury; at all events, their finding does not exclude the court from calculating and ascertaining for itself the true amount of compensation to be decreed to the widow for the detention of her dower. No doubt is entertained by us that in cases of dower in chancery, where the marriage or the seizin is denied, or where adultery and elopement are imputed, or where the tenant in possession does not claim under the husband or the heir, but adversely, that in some of these cases an issue should be submitted to a jury, * * * but the facts being found, or the right established in these cases in favor of the complainant, the court should give complete relief by assigning the dower and taking all proper accounts between the parties."

6. "Formerly, the court would not assist a widow in the assignment of her dower, out of the husband's estate, if there was any doubt as to her legal right. Where the title to dower was disputed, it referred her claim to the decision of a court of law, either by directing an issue or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower as she might be advised. Now, however, it is presumed that the court will itself determine the legal right." 2 Daniell Ch. Pl. & Pr. 1165. See also D'Arcy v. Blake, 2 Sch. &

courts,¹ for the court, having assumed jurisdiction, proceeded to try the issues whether an equitable or legal estate was claimed, and regardless of the defense interposed.²

6. Decree—Right to and Admeasurement of Dower.—In proceedings in equity several orders or decrees are granted; the first finding that the widow is entitled to dower, appointing commissioners to admeasure it.³ This decree, although final as to the right to dower, is merely interlocutory as to the admeasurement.⁴

Final Decree.—On the return of the report of the commissioners, a final decree is rendered confirming the report and awarding the property to the widow.⁵

Where the Commissioners Report an Allotment of part of the estate and find that the remainder cannot be divided, a further decree may be rendered directing a sale of the remainder.⁶

Decree Appointing Commissioners.—The interlocutory decree, finding that the widow is entitled to dower, usually appoints three or

Lef. 387; *Mundy v. Mundy*, 2 Ves. Jr. 128.

In *Curtis v. Curtis*, 2 Bro. C. C. 620, the defendant answered, denying the marriage and the seizin of the husband. The lord chancellor ordered the bill retained with liberty to bring an action at law. In the action at law the marriage was denied, as before, and the Court of Common Pleas ordered the issue as to marriage to be tried before a bishop, who found for the marriage. Dower was allowed by the Court of Common Pleas, but before it was assigned both parties had died, and the executrix of the widow was allowed a decree against the executor of the heir.

1. In the following cases this practice is referred to, but not followed: *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438; *Badgley v. Bruce*, 4 Paige (N. Y.) 98; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Scott v. Crawford*, 11 Gill & J. (Md.) 365; *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; *Wells v. Beall*, 2 Gill & J. (Md.) 468.

2. This practice is not followed where the court has both the original and concurrent jurisdiction of courts of chancery, or where the writ of dower is abolished and dower can be recovered in both the probate courts and courts of general jurisdiction. *London v. London*, 1 Humph. (Tenn.) 1.

3. *Barnes v. Carson*, 59 Ala. 188; *Meggot v. Meggot*, Dick. 794; *Goodenough v. Goodenough*, Dick. 795;

Miller v. Stepper, 32 Mich. 194; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 483; *Robinson v. Govers*, 138 N. Y. 425, 67 Hun (N. Y.) 317, 65 Hun (N. Y.) 562; *Everson v. McMullen*, 113 N. Y. 293.

4. A decree that demandant is entitled to dower as claimed, and appointing commissioners to lay off the dower, ascertain the rents and profits, and report to the next term of court, to which the cause is continued, is not a final decree, as it is still within the power of the court, and may be set aside at a subsequent term. *Ex p. Crittenden*, 10 Ark. 333. See also *Robinson v. Govers*, 138 N. Y. 425.

In *Brown v. Bronson*, 35 Mich. 415, the first decree is held to be a final decree. "It settled the title of complainant, and the further proceedings were in furtherance and partly in execution of the original decree. * * * Although there is usually but one final decree in a single cause, yet it is possible, and in some cases necessary, to have more than one."

Where an order is made overruling exceptions to the commissioners' report and confirming the report, such order is not final where damages remain to be assessed. The case is not disposed of until such damages are assessed and a decree entered accordingly. *Rannels v. Washington University*, 96 Mo. 226.

5. *Barnes v. Carson*, 59 Ala. 188; *Ex p. Crittenden*, 10 Ark. 333.

6. See proceedings in *Burns v. Miller*, 110 Ill. 242.

more commissioners¹ or a jury² to estimate the value of the estate and the rents and profits. The number and qualification of the commissioners are usually fixed by the statute. The commissioners, while exercising judicial powers as to the value and situation of the allotment, are nevertheless bound by the instructions incorporated in the decree.³ The decree usually directs the land to be set off by metes and bounds as the sheriff would assign it at common law,⁴ or the decree will follow the directions of the statute, if any.⁵

Sum in Lieu of Dower.—But in cases where the rules of the law court are inapplicable, or the property is indivisible or is an equitable estate arising from the sale of lands in which the wife had a right of dower, courts of equity may allow a gross sum or a sum in annual payments in lieu of dower.⁶ In such cases the appointment of commissioners is unnecessary, as the pleadings and decree show that the property is not divisible by metes and bounds.⁷

The Decree should Contain Specific Directions to the master or commissioners as to the method of estimating the rents and profits, and

1. *Barnes v. Carson*, 59 Ala. 188; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Lucas v. Calcraft*, 1 Bro. C. C. 134, 2 Dick. 594; *Huddleston v. Huddleston*, 1 Ch. Rep. 38; *Worgan v. Ryder*, 1 Ves. & B. 20; *Wild v. Wells*, 1 Dick. 3; *Young v. Young*, 7 Mackey (D. C.) 243.

2. *Young v. Thrasher*, 115 Mo. 222.

3. *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Gibson v. Marshall*, 5 Rich. Eq. (S. Car.) 254.

The Commissioners need Not Consult the Wishes of the Demandant nor fix her allotment so that it shall abut upon a highway. It is sufficient if they make a fair division according to quantity and quality. *Moore v. Dick*, 134 Ill. 43.

4. *Tod v. Baylor*, 4 Leigh (Va.) 498; *Gibson v. Marshall*, 5 Rich. Eq. (S. Car.) 254.

5. Where the law requires an admeasurement by metes and bounds, or a sum of money in lieu thereof, when, in the opinion of a majority of the commissioners, the estate cannot be divided without manifest disadvantage, an instruction to assess the value of the estate and to allow one-third of such value to the widow as dower, is erroneous. *Jefferies v. Allen*, 33 S. Car. 268.

6. The manner in which dower shall be assigned is regulated by statute in most of the states. A common provision is that, where the estate of which a widow is dowable is entire, and no division by metes and bounds can be

made without injury thereto, dower shall be assigned in a special manner, as of a third part of the rents and profits. In cases where a division cannot be made, the widow, in most states, is given the right by statute to elect whether the dower shall be in a gross sum or in instalments. For assignment in gross sum, or in share of the rents and profits, see article DOWER, in Am. and Eng. Encyc. of Law.

7. In *Heisen v. Heisen*, 145 Ill. 658, the court found that the lot was occupied by a residence, and "that the same cannot be divided without damage to the whole, and without great injury to said premises," and assigned dower out of the rent. Section 39 of title Dower (Ill. Stat.) provided that, "when the estate out of which dower is to be assigned consists of a mill or other tenement which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided without great injury thereto, the dower may be assigned of the rents, issues and profits thereof, to be had and received by the person entitled thereto as tenant in common with the owner of the estate, or a jury may be impaneled to inquire of the yearly value of the dower therein, who shall assess the same accordingly, and the court shall thereupon enter a decree," etc. It was held that under such finding the court of equity could assess the rents and profits without the assistance of a jury or commissioners.

as to the admeasurement of dower under the circumstances of the case.¹

7. Report of Commissioners.—The report of the commissioners should describe the lands allotted to the widow with certainty, as by stating the metes and bounds of the real estate.² The report should show that the commissioners took the oath required by the statute³

8. Confirmation of Report—Reassignment.—Where the assignment is inadequate or improper the report of the master or commissioners may be set aside and a reassignment ordered.⁴ If the assignment has been confirmed and a decree entered the proceedings to obtain a reassignment may be by original bill⁵ or a bill in review.⁶

9. Writ of Possession.—On approval of the report of the commissioners a final decree may be entered upon which the court may issue a writ of possession.⁷

10. Costs.—The costs may be taxed against either party at the discretion of the court, and are generally regulated by the conduct of the parties. The widow is not allowed costs where the proceedings are not contested or delayed by defendants.⁸ But where

1. See forms of decrees in *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; *Ex p. Crittenden*, 10 Ark. 372.

2. See return of sheriff in proceedings at law. *Allsmiller v. Freutchenicht*, 86 Ky. 198.

Where the records show that deceased owned lands in a certain section 1, and the commissioners assigned lands in section 2 adjoining, and the decree confirming the report described the lands in section 1, it will be presumed that the decree is correct. *Burns v. Miller*, 110 Ill. 242.

3. *Durham v. Mulkey*, 59 Ill. 91.

4. See *supra*, IV. *Proceedings at Law*.

5. *Mantz v. Buchanan*, 1 Md. Ch. 206; *Thomas v. Wood*, 1 Md. Ch. 299.

6. In *Young v. Young*, 7 Mackey (D. C.) 243, the widow was assigned the homestead as being equal to one-third in value of all the estate. At the sale of the remainder of the property it brought a much greater price than that fixed by the appraisement. Immediately after the sale, the widow filed a petition for a reassignment of dower and for the assignment to her of the homestead and such additional part of the proceeds of the sale as would equal with the homestead a third part of the value of the entire estate. This application was held to be

in the nature of a bill to modify the decree and not a bill of review.

Where after an assignment of dower the heirs lost a large portion of the estate in proceedings instituted against the ancestor, the heirs may maintain a suit in equity for a reassignment of dower, and a readjustment of the personalty and final accounts of the executor. *Singleton v. Singleton*, 5 Dana (Ky.) 87.

Where Money has been Assigned by a court of equity in lieu of dower and accepted by the widow, a court of equity will not grant an order for reassignment merely because of the appreciation of property several years afterwards. *Donoghue v. Chicago*, 57 Ill. 235.

7. Where the statute directs that the court shall forthwith cause the widow to have possession, by writ directed to the sheriff for that purpose, the decree may provide that the writ issue forthwith. *Agnew v. Fults*, 119 Ill. 296.

8. *Beavers v. Smith*, 11 Ala. 20; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258; *Hazen v. Thurber*, 4 Johns. Ch. (N. Y.) 604; *Grove v. Todd*, 45 Md. 252.

In *Lucas v. Calcraft*, 1 Ves. & B. 20, note, it was said: "Where a widow comes into this court for the single purpose of having dower assigned her, costs do not follow the

the defendants refused to assign dower or have delayed the proceeding by feigned issues, the widow is allowed costs.¹

VIII. SUMMARY STATUTORY PROCEEDINGS — 1. Jurisdiction — a. WHAT COURTS HAVE JURISDICTION.—In those states where summary proceedings for admeasurement of dower have been established by statute, jurisdiction has been given, with very few exceptions, to whatever courts in the state exercised probate jurisdiction. A review of all the statutes would be unprofitable. A few special cases are collected in the note.²

suit. I have been furnished with several precedents, but not one in which costs have been given on the single point. In bills for dower separate questions of title often arise, which may be conducted vexatiously and so as to be the subject of costs, but costs are not to be given, as of course, with respect to setting out dower only."

1. *Worgan v. Ryder*, 1 Ves. & B. 20; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Russell v. Austin*, 1 Paige (N. Y.) 192; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482.

In a Friendly Contest between the widow and her children who are minor heirs, where she acted in good faith and assisted the executor in the conveyance of the estate, and the decision is for the benefit of all parties interested in the distribution of the fund, the widow will be allowed her costs and a reasonable attorney's fee. *Burnet v. Burnet*, 46 N. J. Eq. 144.

2. **Alabama.**—In *Barney v. Frowner*, 9 Ala. 901, it was held that the Orphans' Court, which is the court having probate jurisdiction in that state, had no jurisdiction of proceedings for admeasurement of dower, but that such jurisdiction was possessed by the County Court, having common-law jurisdiction.

Arkansas.—Section 2606, Mansf. Dig., is not inconsistent with any provision of the Constitution of 1874, and confers on the probate court a limited jurisdiction in the allotment of dower, concurrent with the Circuit Court in chancery. The jurisdiction of chancery over the subject is more extensive than that possessed by the inferior court; but when an estate is in course of administration, and it is desired only to allot dower, without adjusting any question of title or damage, the probate court has the power to act on the petition of the widow. *Hilliard v. Hilliard*, 50 Ark. 34.

Florida.—The Circuit Court organized under the Constitution of 1868, and given jurisdiction "in all cases of law in which the demand or value of the property involved exceeds one hundred dollars," has concurrent jurisdiction with the County Court to assign dower in accordance with the summary remedy provided by the statute of 1828. *Henderson v. Chaires*, 25 Fla. 26.

Iowa.—Under the Code of 1851, the statute providing that dower should be set apart by the executor "under the direction of the court," it was held that the County Court was intended, as it was the only court clothed with power to direct the executor in the discharge of his duty. *Shawhan v. Loffer*, 24 Iowa 224.

Massachusetts.—In *Sheafe v. O'Neil*, 9 Mass. 9 (1812), it is stated that there is no statute expressly giving the judges of probate jurisdiction to assign dower, but there being indirect references in the statutes seeming to contemplate such jurisdiction, it has long been exercised, and has become settled.

North Carolina.—Proceedings for admeasurement of dower in this state are classed as special proceedings with respect to which the clerk of the superior court has jurisdictional functions. *Tate v. Powe*, 64 N. Car. 644.

Such proceedings, when brought in the superior court, out of term time, are proceeded with by the clerk at once, the court acting through him and his action being a part of his duties as clerk of the court. If issues of fact are not raised, and there is no appeal from his decision on questions of law, he carries the proceedings to a conclusion. If issues of fact are raised he transfers the case to the civil issue docket for trial at the ensuing term of court. Either party may appeal at once to the judge from his decision of a question of law, and the question of fact or of law having been settled, the

b. WHETHER JURISDICTION EXCLUSIVE OR CONCURRENT.—The jurisdiction conferred upon probate courts by constitutional or statutory provisions is not exclusive, and does not deprive courts of equity of their concurrent jurisdiction.¹

The Object of Such Provisions was to provide a summary remedy in ordinary cases in lieu of the cumbersome proceedings at law. It was not intended to impair the jurisdiction in equity, but to provide a cumulative remedy.²

In *Pennsylvania* the Orphans' Court has exclusive jurisdiction of the assignment of a statutory dower allowed in cases where the husband died seized and left no will, and in all other cases such court has no jurisdiction.³

clerk, as clerk of the court, takes notice of it, and it becomes his duty to move forward upon such decision of the court or findings of the jury in the further disposition of the proceedings, unless, in his further action, he should decide questions of law which are excepted to by one of the parties, in which case a further appeal may be taken to the judge as before. *Brittain v. Mull*, 91 N. Car. 498.

Tennessee.—*Seem*, that the County Court has jurisdiction to admeasure dower, *Rhea v. Meridith*, 6 Lea (Tenn.) 605.

1. *Thomas v. Thomas*, 73 Iowa 657; *Starry v. Starry*, 21 Iowa 254; *Rice v. Nelson*, 27 Iowa 148; *Hilliard v. Hilliard*, 50 Ark. 34; *Wood v. Morgan*, 56 Ala. 397; *Sheppard v. Sheppard*, 87 Ala. 561.

In *Campbell v. Murphy*, 2 Jones Eq. (N. Car.) 357, the jurisdiction of courts of equity was first questioned, and the court held that a court of equity had concurrent jurisdiction. "Although our statute gives to the widow a more direct and summary remedy than the writ of dower at common law, there is no reason to suppose that there was an intention to take away the jurisdiction which courts of equity had assumed over the subject. On the contrary, the intention was to give a cumulative remedy, so that the widow has an election to proceed in either mode."

2. In *Arkansas* the constitutional provision giving the probate courts jurisdiction over dower in summary proceedings does not give the probate court exclusive jurisdiction. "The jurisdiction was conferred upon the probate court as a matter of convenience, and with a view to despatch, but of course to be exercised alone in such

cases as were plain and simple in their character, and in which that court could afford full and complete relief. The remedy given by the constitution is clearly cumulative, and was never designed to impair or in any manner affect the ancient jurisdiction of the courts of chancery." *Menifee v. Menifee*, 8 Ark. 38.

Where jurisdiction is conferred by statute upon another court, over subject matters of which the chancery court has jurisdiction, the equity jurisdiction remains unimpaired, unless forbidden by such statute. *Owen v. Slatter*, 26 Ala. 551.

3. *Bradford v. Kent*, 43 Pa. St. 474; *Thomas v. Simpson*, 3 Pa. St. 60; *Bratton v. Mitchell*, 7 Watts (Pa.) 113; *Tatham v. Ramey*, 82 Pa. St. 130; *Taylor v. Birmingham*, 29 Pa. St. 306; *Gourley v. Kinley*, 66 Pa. St. 270; *McMichael v. Skilton*, 13 Pa. St. 215; *Vensel's Appeal*, 77 Pa. St. 71.

Where the Husband Left a Will, and the widow does not elect to take under the will, she may recover dower in the common-law courts, but not in the Orphans' Court. *Bradford v. Kent*, 43 Pa. St. 474; *Shaffer v. Shaffer*, 50 Pa. St. 394.

Intestate a Tenant in Common.—The Orphans' Court has no jurisdiction where the intestate was a tenant in common at his death. *Romig's Appeal*, 8 Watts (Pa.) 415; *Evans v. Evans*, 9 Pa. St. 190; *Brown v. Adams*, 2 Whart. (Pa.) 188; *In re Eell's Estate*, 6 Pa. St. 457.

Where Lands are Held by a Person in Adverse Possession, the remedy is by an action for dower in the common-law courts. *Evans v. Evans*, 29 Pa. St. 277; *Galbraith v. Green*, 13 S. & R. (Pa.) 85.

The Probate Courts of Connecticut have exclusive jurisdiction of the assignment of dower.¹

c. NATURE AND EXTENT OF JURISDICTION—(1) Where the Applicant's Right to Dower is Disputed.—Concerning a dispute as to the applicant's right to dower, there are three distinct doctrines in the different states, and the cases accordingly fall into three general groups.

Ouster of Jurisdiction—First. Where a denial of the applicant's right to dower ousts the court of jurisdiction.²

1. If dower was not assigned in all the property of deceased a reassignment may be obtained in the probate court, but not in other courts. The jurisdiction of the probate court is not exhausted by a partial assignment of dower. *Way v. Way*, 42 Conn. 52.

2. **Kentucky.**—In this state the County Court early had jurisdiction to summarily allot dower to the widow only when there was no dispute as to her right to such an allotment. The statute prescribed no mode of trying questions of right, nor gave jurisdiction to pronounce any judgment on such questions. See, *semble*, *Stevens v. Stevens*, 3 Dana (Ky.) 371; *Rintch v. Cunningham*, 4 Bibb (Ky.) 462.

The court was, therefore, without jurisdiction when the heirs denied the legality of the applicant's marriage, *Garris v. Garris*, 7 B. Mon. (Ky.) 461; *Williams v. Williams*, 1 J. J. Marsh. (Ky.) 105; or asserted that she abandoned the deceased during her marriage with him, *Murphey v. Murphey*, 7 B. Mon. (Ky.) 232; *Garris v. Garris*, 7 B. Mon. (Ky.) 461. And in *Taylor v. Lusk*, 7 J. J. Marsh. (Ky.) 636, it was doubted if the County Court had jurisdiction to assign dower in slaves when the personal representative of the deceased refused his assent, and it was intimated that in such case the applicant's remedy was in chancery. It was held in the same case, however, that the fact that the widow's right to dower in slaves was contingent, being subject to the payment of the debts of the estate, did not, the personal representative consenting, deprive the court of jurisdiction.

Maine.—Where one, claiming under the heirs, appeared and denied the widow's right to dower, on the ground that dower had already been assigned to her, and contended that the fact that part of the lands so assigned had been taken from her by paramount title did

not, under the circumstances of the case, entitle her to a reassignment, it was held that the probate court was deprived of jurisdiction. *French v. Crosby*, 23 Me. 276.

Where the statute provided that "the judge of probate * * * may assign dower to the widow, in lands of which the husband died seized, * * * where her right of dower is not disputed by the heirs or devisees," it was held that the heirs or devisees or persons claiming under them could alone dispute the widow's right so as to deprive the court of jurisdiction. Persons claiming title to the lands other than through the heirs or devisees were without such authority. *Barton v. Hinds*, 46 Me. 121.

But in *Bent v. Weeks*, 44 Me. 45, the question as to whether the widow was lawfully married to the deceased seems to have been regarded as adjudicated by the judgment of the probate court.

Michigan.—In *King v. Merritt*, 67 Mich. 194, the assignment of dower by proceedings in the probate court was collaterally attacked, and the record of the probate court failed to show that an application was made. It was held that the proceedings were void. It is said in the opinion that the probate court is without jurisdiction to take cognizance of the matter until an application is filed stating jurisdictional facts, among which, under the Michigan statute, it must be alleged that the widow's "right of dower is not disputed by the heirs or devisees, and that she, or some other person interested in the land, wishes it set apart."

Nebraska.—The statute limits the jurisdiction of the County Court to cases where the widow's "right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them." Construing the statute, it has been held that in

Jurisdiction to Make Assignment and to Determine Right.—Second. Where the court has unlimited jurisdiction to make the assignment, and also jurisdiction, more or less complete, to determine the widow's right to dower. The states which fall under this head group themselves according to the extent of the jurisdiction exercised by the court of probate, in determining the widow's right to dower. Its authority may be practically unlimited, determining in the one proceeding all contests which may arise, and entitling the widow, by the judgment rendered, to possession of the premises assigned;¹ or it may be limited to a determination of

order to oust the court of jurisdiction, the right of the applicant to dower must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim. *Guthman v. Guthman*, 18 Neb. 98.

The court is not deprived of jurisdiction because the application fails to state that the widow's right to dower is not disputed, although such an allegation is proper. To oust the court of jurisdiction, the parties contesting the widow's claim must affirmatively dispute her right. *Serry v. Curry*, 26 Neb. 353. But see *contra*, as to this, *King v. Merritt*, 67 Mich. 194.

1. **Alabama.**—In *Barney v. Frowner*, 9 Ala. 906, it is said, in the opinion by Ormond, J.: "Our statute contemplates a contestation of the widow's right of dower, and provides the necessary means for ascertaining it. For this purpose, the heir, and the tenant of the freehold, are to be notified of the application, and may contest the right, and finally, if decided in favor of the widow, the statute directs the sheriff to put her in possession. This is not a mere legal investiture of the title, leaving her to obtain the possession by suit, if not voluntarily yielded, but a possession in fact as well as in law." See also, to the same effect, *Green v. Green*, 7 Port. (Ala.) 19.

In the exercise of its summary jurisdiction, the court of probate has no equity jurisdiction, however, but must proceed according to the rules of law; so that if the demandant has a legal right to dower, it is the duty of the court to allot it, irrespective of the considerations which are purely of equitable cognizance. It has, therefore, no jurisdiction to go into an inquiry whether the lands in which dower is claimed were purchased by the deceased with money obtained by him

from a woman with whom, after a voluntary separation between him and demandant, he had contracted a supposed marriage, and with whom, as his lawful wife, he lived until his death. *Martin v. Martin*, 22 Ala. 86. But see *contra*, as to this last, *Farrow v. Farrow*, 1 Del. Ch. 457.

Delaware.—The Orphans' Court has complete jurisdiction to assign dower, and in the exercise of such jurisdiction may determine questions, whether legal or equitable, involved in a contest of the widow's right. *Farrow v. Farrow*, 1 Del. Ch. 457.

North Carolina.—In this state summary proceedings for assignment of dower, being classed as "special proceedings" under the statute, are before the clerk of the Superior Court. When questions of fact are raised they are transferred by him to the civil issue docket to be tried by said court in term time. An immediate appeal lies from his decision of a question of law to the judge of the court; and issues, whether of fact or law, having been determined in the manner above pointed out, it is the duty of the clerk to proceed as if such issues had not been raised but had been conceded, as determined, in the first place. *Brittain v. Mull*, 91 N. Car. 498.

Rhode Island.—The statute giving jurisdiction to assign dower to courts of probate contains no limitations upon the extent of the jurisdiction, and it is held that courts of probate have the same power to set off dower as courts of common law, and may, to the same extent, determine questions involving the widow's right. *Eddy v. Moulton*, 13 R. I. 105; *Gardner v. Gardner*, 10 R. I. 211.

But the court has no jurisdiction to entertain equitable defenses, and cannot consider an antenuptial contract which, whether sufficient or not in

the applicant's right to dower generally in the estate of the deceased, in a contest between the applicant and the personal representatives, leaving to be determined by an action of ejectment, if need be, her right to dower in any particular tract of land in the possession of one claiming adversely;¹ or it may be

equity, is not a legal bar. *Gardner v. Gardner*, 10 R. I. 211.

South Carolina.—The statute giving the probate court jurisdiction does not limit it to cases where the widow's right to dower is undisputed. The court has power to determine issues of fact and law, involving such right, and thus may inquire if the widow has made a valid release of dower. The objection that issues of fact are raised by the evidence, which should be determined by a jury, and that the statute does not authorize a jury in the probate court, is not sufficient to deprive the court of jurisdiction, as the statute provides a method by which an appeal may be taken and a jury trial had. *Stewart v. Blease*, 4 S. Car. 37. See also *Tibbetts v. Langley Mfg. Co.*, 12 S. Car. 465.

1. **Florida.**—In this state the only persons required to be notified of an application for assignment of dower are the personal representatives of the deceased husband; and they, with the applicant, are the only proper parties to the proceeding. It is held that such questions, concerning the widow's right to dower, as may be properly raised by such personal representatives, may be determined in the summary proceedings. Thus the personal representatives may defend upon the ground of the desertion and adultery of the applicant, and the court has jurisdiction to determine such an issue. It is intimated, in accordance with the cases in *Mississippi*, the statute of which state is similar to that of Florida, that questions as to the right of the applicant to have dower set out of any particular piece of land are not within the jurisdiction of the court, they not being questions in which the personal representatives have any concern or any right to represent those who have. *Henderson v. Chaires*, 25 Fla. 26.

The statutes of *Florida*, *Mississippi*, and *Alabama* are practically the same; but it will be seen that the latter state has construed its statute differently from the other two.

Mississippi.—The constitution provides that the probate court shall have jurisdiction in "all matters of the allotment of dower." In *James v. Rowan*, 6 Smed. & M. (Miss.) 401, it is said, in the opinion by Clayton, J.: "From the nature of the probate court it is wholly unfit to decide upon the title to land, where there is a conflict of claims. * * * If there be proof of marriage, of seizin of the husband during the coverture, of nonalienation on the part of the wife, and death of the husband, she is, against the representatives of the husband, entitled to dower. Those representatives are the only proper parties to the proceeding. The rights of others are wholly unaffected, and the decree in no manner operates upon them. If there are adversary rights, they may be set up in opposition to the decree, or rather in avoidance of it. Those who have such rights may put the widow to her ejectment, or other appropriate remedy, and in such proceeding the respective claims will be considered, in a great degree, as if no decree of the probate court had been pronounced. To explain, the decree will establish that she is the widow having right to dower out of the estate of the decedent; but whether the particular estate which is claimed adversely to the husband is subject to such right, is a question not determined by that court, except so far as the representatives of the husband are concerned, who are the only proper parties before the probate court." See also *Ware v. Washington*, 6 Smed. & M. (Miss.) 737; *Holloman v. Holloman*, 5 Smed. & M. (Miss.) 559; *Pickens v. Wilson*, 13 Smed. & M. (Miss.) 691; *Farmers, etc., Bank v. Tappan*, 5 Smed. & M. (Miss.) 112.

Where the lands are in possession of one who claims under a judicial sale in the lifetime of the husband, the probate court has no jurisdiction over such person, and cannot, as against him, determine the widow's right to dower in the land, although he appears and answers in the case. Such adverse holding does not deprive the court of

regulated by specifically enumerating in the statute, what facts must be proved in the probate court before the widow shall be entitled to an assignment of dower. Under such a statute, the determination of the court upon such questions, and also its determination of the boundaries of the dower assigned, when unappealed from, becomes binding on all parties to the proceeding; but all questions not specifically enumerated in the statute are left to be adjudicated in another court, having competent jurisdiction, and the parties will not be bound by any attempted determination of such questions by the probate court.¹

Assignment Irrespective of Right.—Third. Where the court has no jurisdiction to determine the widow's right to dower, but has full jurisdiction to make the assignment, irrespective as to whether such right is contested or not. Where this doctrine prevails, it is the duty of the court having the summary jurisdiction, to assign dower in accordance with the application, assuming that the widow has a right to be endowed of the lands therein described.²

power to make the assignment, however. *Bisland v. Hewett*, 11 Smed. & M. (Miss.) 164; *Jiggitts v. Bennett*, 31 Miss. 610.

In *Randolph v. Doss*, 3 How. (Miss.) 205, a contest between the applicant for dower and an adverse claimant of the land was determined. It was said in the opinion that the powers of the court are not restricted by the relation of the parties to the suit and that "it is totally immaterial whether the contest for dower be between the widow and heir, or the widow and strangers;" but the doctrine of the case, although not expressly overruled, must be regarded as modified by later cases cited above.

1. *Hall v. Pierson*, 63 Conn. 332; *Hewitt's Appeal*, 53 Conn. 24; *Selleck v. Selleck*, cited in *Andrews v. Andrews*, 8 Conn. 86, note (a). Apparently not in exact accord with the above cases is *Carter's Appeal*, 59 Conn. 576, where it was held that a court of probate, though it has not general equity jurisdiction, must enforce an election when the question arises in settlement of an estate. See this case explained in *Hall v. Pierson*, 63 Conn. 332. In this last case an extended and careful review of the *Connecticut* cases is made for the purpose of determining the exact limitations on the jurisdiction of the probate court. The following rule is announced: "The order and decree of a court of probate, having jurisdiction of the settlement of an estate, assigning dower, unappealed

from, is final and conclusive of the statutory right of the applicant to such assignment, and designates the lands in which the dower exists as against such estate. That is its conclusive extent."

2. In *Hyde v. Hyde*, 4 Wend. (N. Y.) 630, it is said, in the opinion by Marcy, J.: "The only question presented by this appeal is, whether the postnuptial provision made by the husband for his wife was intended to be in lieu of dower. This, as I understand the law, was not a question to be settled by the surrogate, and consequently not to be raised and determined on this appeal. The proceedings before the surrogate assume that the widow is entitled to dower out of the lands in question. She does not get possession by the agency of the admeasurers; but if what is assigned to her by them is not quietly yielded up, she must resort to her action. Those who oppose her claim have not their rights compromised by the proceedings before the surrogate. In defense to her action they can show, and that is the proper time for doing it, that she has no right to be endowed of the lands which she seeks to recover. The review here of the proceedings of the surrogate looks only to the regularity and fairness of what has been done by him and the admeasurers, on the assumption that the widow has a right to dower. We have nothing to do now with the question whether she is barred of this right by the provision

Any contest over such right must be determined in another court and by a separate action. If, after dower has been assigned, the widow is put to her action of ejectment, and is successful, the assignment has fixed the boundaries of her dower. This, and only this, has become *res judicata* by the assignment proceedings.¹

(2) *Where the Husband did Not Die Seized.*—It is usual for the jurisdiction of the Probate Court to be limited to cases where the husband died seized of the land out of which application is made for assignment of dower. Sometimes this is by express provision of statute;² but it has frequently been so held, even in the absence of such a provision, the Probate Court not being well adapted to the determination of contests likely to arise where the land is held by one claiming adversely to the husband.³

made for her by her husband in 1820." See also *Matter of Watkins*, 9 Johns. N. Y. 245; *Fritts' Case*, 32 N. J. Eq. 293; *Barton v. Hinds*, 46 Me. 124.

In *Parks v. Hardey*, 4 Bradf. (N. Y.) 15, it is said: "In the present case, it is insisted by the party claiming to be owner of the premises that the widow's husband was seized only of an undivided half of the land, and that admeasurement should be made in accordance with that fact. My answer is that it must depend upon the widow's option whether she shall have admeasurement of the whole or the half of the premises. That is a question of title, and must be tried elsewhere. If she insists upon admeasurement of dower in the entire lot, in the expectation of establishing her husband's seizin in the whole, she is entitled to the admeasurement accordingly."

Where surplus moneys on foreclosure were paid into the Surrogate's Court, and the widow applied for an appointment of her dower right therein, it was held that the Surrogate Court had no equitable jurisdiction to allow as a counterclaim, sums due from her to the estate. *Taylor v. Bentley*, 3 Redf. (N. Y.) 34.

1. *Wood v. Seely*, 32 N. Y. 105; *Jackson v. Randall*, 5 Cow. (N. Y.) 168; *Jackson v. Waltermire*, 5 Cow. (N. Y.) 299; *Jackson v. Dewitt*, 6 Cow. (N. Y.) 316; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287; *Rutherford v. Graham*, 4 Hun (N. Y.) 796. And see cases cited in preceding note.

It follows that after assignment the widow should sue for the specific portion assigned to her, and not for an undivided third of the premises. *Ward v. Kilts*, 12 Wend. (N. Y.) 137;

Borst v. Griffin, 9 Wend. (N. Y.) 307.

2. *French v. Crosby*, 23 Me. 276; *Deforests' Appeal*, 1 Root (Conn.) 50.

Under a statute confining the jurisdiction of the Probate Court to cases where the husband died seized and possessed, it was held that an assignment of dower made by that court, out of lands of which the husband did not die seized, was void, and could be collaterally attacked. *Fisk v. Eastman*, 5 N. H. 240. See also *Raynham v. Wilmarth*, 13 Met. (Mass.) 414.

3. In *Sheafe v. O'Neil*, 9 Mass. 9, it is said by Sewall, J.: "But in contested cases, and especially where the intestate was not, at his death, the tenant of the fee, where his heirs have no interest or concern in the assignment of dower, and where strangers, not presumed to be cognizant of the proceedings in the probate court, have the whole interest and property, subject to the claim of dower; where the probate court is incompetent to any other purpose of partition, a jurisdiction to assign dower would be as inexpedient as it is unnecessary." See also *Rintch v. Cunningham*, 4 Bibb (Ky.) 462; *Stevens v. Stevens*, 3 Dana (Ky.) 371; *Nance v. Hooper*, 11 Ala. 552; *Thrasher v. Pinckard*, 23 Ala. 616; *Barney v. Frowner*, 9 Ala. 901.

Mississippi.—A contrary doctrine prevails in Mississippi, where the Probate Court is held to have jurisdiction to make the assignment, although the land is in the possession of one who, at the time of the husband's death, held adversely to him. The court has no jurisdiction over such adverse holder, however, and no authority to deliver possession to the widow after

Mortgaged Lands.—In those states where a mortgage of real estate is held to pass the title to the mortgagee, the Probate Court will have no jurisdiction to assign dower, out of mortgaged lands, to the widow of the deceased mortgagor, as he did not die seized of such lands.¹

Husband Seized and Possessed.—The jurisdiction of the Probate Court in some states is limited to cases where the husband died "seized and possessed."²

(3) *Where the Land has been Alienated by the Heirs.*—The probate court will not lose jurisdiction because, before the application for admeasurement is made, the land has been alienated by the heirs.³

(4) *Where Assignment cannot be Made by Metes and Bounds.*—When, because of improvements placed on the land, or for any other reasons, an assignment by metes and bounds would be inequitable, and a sum of money should be awarded in lieu of dower, the court of probate has been held to have no jurisdiction, it not being well fitted to adjust the rights between the parties.⁴

the assignment is made. *Bisland v. Hewett*, 11 Smed. & M. (Miss.) 164; *Jiggitts v. Bennett*, 31 Miss. 610; *Jiggitts v. Jiggitts*, 40 Miss. 718.

1. *Sheafe v. O'Neil*, 9 Mass. 9; *Raynham v. Wilmarth*, 13 Met. (Mass.) 414; *Pinkham v. Gear*, 3 N. H. 163.

But compare these cases with *Henry's Case*, 4 Cush. (Mass.) 257, where it was held that if the mortgagor died in possession of the mortgaged land, there was sufficient seizin to sustain the jurisdiction of the Probate Court. See also *Draper v. Baker*, 12 Cush. (Mass.) 288.

2. *Henderson v. Chaires*, 25 Fla. 26.

In Pennsylvania common-law dower has been abolished in lands of which the husband died seized and possessed, and in lieu thereof the widow is given a distributive share. The widow's remedy, in common with the heirs, is an action of partition. The Orphans' Court, formerly, had exclusive jurisdiction. *McMasters v. Carothers*, 1 Pa. St. 324; *Thomas v. Simpson*, 3 Pa. St. 60; *Galbraith v. Green*, 13 S. & R. (Pa.) 93; *Bradford v. Kent*, 43 Pa. St. 474.

3. *Weaver v. Sturtevant*, 12 R. I. 537. No reasonable ground for questioning the jurisdiction of the court because the land had been conveyed by the heirs is apparent. The statute giving jurisdiction to the court of probate is very broad, and does not even require seizin in the husband at the time of his death.

4. In such case the proper forum is a court of equity. *Thrasher v. Pinckard*, 23 Ala. 616; *Barney v. Frowner*, 9 Ala. 901; *Tygh v. Dolan*, 95 Ala. 269; *Wood v. Morgan*, 56 Ala. 397; *Beavers v. Smith*, 11 Ala. 20.

The admitted fact that "the dwelling house on said land, with the ground covered by its yards, is worth three-fourths of the value of the entire property," does not show that dower cannot be assigned by metes and bounds, and, alone, will not oust the Probate Court of jurisdiction. *Humes v. Scruggs*, 64 Ala. 40.

Land Charged with Trust.—When it appears that the lands, in which an allotment of dower is sought, are chargeable with a trust in favor of the husband's children by a former marriage, on account of moneys belonging to their mother's statutory estate, which were invested or used by him in the purchase of the lands, an assignment by metes and bounds would be unjust, and the court should decline jurisdiction, leaving the parties to their remedies in equity; but the mere assertion of such a claim by the heirs, without any evidence to support it, does not require the court to dismiss the petition. *Sheppard v. Sheppard*, 87 Ala. 560.

Dower out of Surplus Money on Foreclosure.—But in *Taylor v. Bentley*, 3 Redf. (N. Y.) 34, the surrogate assumed jurisdiction to assign a portion, in lieu of dower, out of surplus moneys on foreclosure of a mortgage.

(5) *Where Applicant's Right Is Equitable; and Herein of Equitable Defenses.*—The statutory proceeding is a summary method for the simple admeasurement of dower, and no other relief than that specially authorized by the statute can be granted. Should the powers of a court of equity be required to completely adjust the rights and interests of parties in such a case, resort must be had to such a court.¹

Husband Equitable Owner.—Where the husband was not the holder of the legal title, but was the equitable owner of the lands, it has been held that the summary jurisdiction cannot be invoked.²

Widow's Assignee.—Likewise, it has been held that there was no summary jurisdiction to assign dower in favor of one to whom the widow had assigned her right, such right being personal to the widow and operating as an equitable assignment only.³

Equitable Defenses.—The usual rule is that equitable defenses will not be considered in summary proceedings for assignment of dower, even though the court has more or less jurisdiction to determine the widow's right to dower; if her right is good at law, her dower will be assigned, and contest concerning equitable bars to her right will be left for future determination in a court having jurisdiction.⁴ The doctrine is not universally

1. *Milton v. Milton*, 14 Fla. 369; *Godwin v. King*, 31 Fla. 525.

Homestead.—But the mere fact that a portion of the property in which dower is asked to be assigned to the widow was the homestead of the deceased husband in his lifetime, does not of itself necessitate a resort to the court of equity. *Godwin v. King*, 31 Fla. 525.

2. In *North Carolina*, as elsewhere explained, special proceedings are brought before the clerk of the superior court. Assignment of dower is usually such a proceeding. But if any equitable element is involved, which, under former practice, would have been cognizable in a court of equity, the superior court in term has jurisdiction, and the application for dower becomes a civil action. Thus, where an action was brought by a widow, alleging that the legal title to certain land was in the defendants, but that they held in trust for her deceased husband, and asking that they be declared trustees and that her dower be assigned in the land, it was held that the superior court in term, and not the clerk, had jurisdiction. *Efland v. Efland*, 96 N. Car. 488.

The authority of the County Court, possessing the summary jurisdiction to assign dower out of lands of which

the deceased husband was possessed only of the equitable title, was raised in *Robinson v. Miller*, 1 B. Mon. (Ky.) 88, 2 B. Mon. (Ky.) 284, but the court found it unnecessary to decide the question, disposing of the case on other grounds. But in *Hawkins v. Page*, 4 T. B. Mon. (Ky.) 136, it was held that an assignment of dower by the County Court, out of lands whereof the husband was possessed only of an equitable title, was void and open to collateral attack.

3. *Parton v. Allison*, 109 N. Car. 674.

4. Thus the defense that the widow is barred of her dower by reason of an oral antenuptial settlement or agreement for jointure, the existence of such an agreement being denied by the widow, will not be considered; but the party seeking to avail himself of such a bar will be left to his recourse to equity for relief. *Fritt's Case*, 32 N. J. Eq. 293. And see *Gardner v. Gardner*, 10 R. I. 211. But see *contra*, *Carter's Appeal*, 59 Conn. 576. This last case is explained in *Hall v. Pierson*, 63 Conn. 332.

And where a woman sought to intervene in the proceedings, claiming that for many years she had lived with the deceased, believing that she was legally married to him, and that the

accepted, however, and the court of probate is sometimes held to have equitable jurisdiction.¹

(6) *Power to Award Damages and Mesne Profits.*—It has been held that the Probate Court has no power to award damages² or mesne profits to the widow.³

land out of which his widow was seeking dower had been purchased in his name with her money, it was held that the court of probate was without jurisdiction to determine her rights, but that dower would be assigned, and she would be left to her remedy in equity. *Martin v. Martin*, 22 Ala. 86.

In *Sheppard v. Sheppard*, 87 Ala. 560, in which there was an equitable contest rendering an assignment by metes and bounds unjust, it was held that the court of probate should decline jurisdiction.

In *Hewitt's Appeal*, 53 Conn. 24, the purchaser of the land under guardian's sale attempted to contest the widow's right to dower on the ground of equitable estoppel, she having represented to him, before he made the purchase and paid his money, that she claimed no dower in the property and that he would get a title free from such claims. Park, C. J., says, in the opinion: "But the appellees insist that the probate court can try and determine the equitable title of Mrs. Hewitt to dower, as it exists between her and third parties, and should do so before the court assigns her dower, on the ground that such courts administer equity in some cases, and that this is one of the cases where it has this power. But the equity which a court of probate can administer must grow out of, and be inseparably connected with, the matter the court is acting upon. The court was called upon to assign and set out dower to Mrs. Hewitt. It is admitted that she had the statutory requisites. Setting out dower does not affect in the least her title to dower in the lands designated. If she has done things which in equity estop her from claiming dower, the equity does not grow out of, nor is it connected with, the matter that the court has in hand, the mere designating of the lands in which she is to hold her dower. It grew out of a purchase of the dower lands after her dower had attached. The case of *Selleck v. Selleck*, which appears in a note to *Andrews v. Andrews*, 8 Conn. 86, is decisive of this question."

Likewise, the question as to whether

the applicant, after being divorced from the deceased, entered into a contract with him by which her dower was barred, is not within the jurisdiction of the Probate Court to determine. *Hall v. Pierson*, 63 Conn. 332.

In *New York* the surrogate has no jurisdiction to allow, as an equitable counterclaim, sums of money due from the widow to her husband's estate, in an application by the widow for an appointment of her dower right in surplus moneys remaining after satisfying the lien of the mortgage by foreclosure sale. *Taylor v. Bentley*, 3 Redf. (N. Y.) 34.

1. In *Delaware* the Orphans' Court is given complete jurisdiction over dower, and may determine equitable as well as legal questions. *Farrow v. Farrow*, 1 Del. Ch. 457.

2. *Smith v. Smith*, 13 Ala. 329.

3. "The probate court has no jurisdiction to award to the widow damages for mesne profits; the chancery court alone is competent to grant that relief, and she may institute proceedings in that court after her dower has been assigned by the probate court." *Slatter v. Meek*, 35 Ala. 528. And see *Waters v. Williams*, 38 Ala. 680.

In *Henderson v. Chaires*, 25 Fla. 39, it is said, in the opinion by Maxwell, J.: "As to the allotment of personalty by the second report, there is serious objection. Part of the allotment is of money and lint cotton received by the executors for rent of lands since the death of the testator; another part of money received by them from proceeds of sale of personal property, and of the appraised value of other personalty. These are proper allowances. * * * But the statute under which this proceeding was brought does not contemplate any such allowances. It was intended as a summary mode for the allotment of dower in property, and property in kind, of which the husband died seized and possessed. As to personalty, it provides that the commissioners appointed to allot dower shall 'allot and set off to the widow her portion of the personal estate of which her husband died possessed.'

d. PENDENCY OF PROCEEDINGS IN ANOTHER COURT.—Pendency of partition proceedings in another court, in which proceedings the widow is a party, has been held not to oust the Probate Court of jurisdiction to assign dower. If, in the race of diligence, she can procure the admeasurement of her dower before the partition proceedings are ripe for a decree of sale, she is legally entitled to the fruits of such diligence.¹

Object of Proceedings the Same.—But where the object of the pending and of the proposed action is the same, namely, to assign dower, and where, for that purpose, the Probate Court has concurrent jurisdiction with other courts, the court where the action is first brought will obtain exclusive jurisdiction of the case.²

e. WHERE LANDS LIE IN TWO OR MORE COUNTIES.—In the absence of a statute directing otherwise, the Probate Court has no jurisdiction to assign dower in any county other than where it is situated.³

But in Order to Avoid Multiplicity of Suits it is sometimes provided that proceedings having been instituted in one county, all the dower to which the widow is entitled must be assigned in the single proceeding.⁴

McClellan's Dig. 476-477. Construing the statute strictly, as the law requires in dealing with statutes providing summary remedies, the commissioners had no authority to make allotment of anything except of property of which the husband died possessed. This is not what was done; and in the absence of that flexibility allowed in equity, not even the doing under the statute of what was proper in itself, and should be done in a proper proceeding, can be sustained."

1. "Her proceedings under the petition for the admeasurement of dower being regular, her title to dower undisputed, her right to consummate those proceedings undoubted, and the effect of such consummation in the highest degree important to her legal interests, I think they should have been permitted to pass forward in the ordinary way towards their conclusion, without interruption on account of other proceedings having been first commenced, to which she was made a party, and having in view mainly a different object." Hogeboom, J., in *Matter of Siperly*, 44 Barb. (N. Y.) 370. And see in accord, *Matter of Hughes*, 3 Redf. (N. Y.) 18.

In *Rex v. Rex*, 3 S. & R. (Pa.) 533, Tilghman, C. J., says, in the opinion: "It is objected that the Orphans' Court ought not to have proceeded, because an action of partition was depending

in a court of common law. I am very clear that the pendency of an action of partition was no objection to the Orphans' Court proceeding. The proceedings in the two courts are essentially different. The Act of Assembly expressly provides for partition in these cases, and it shall not be in the power of either party to defeat the act, by recurring to a writ of partition at common law. It would, in fact, be to repeal the act, so far as respects partition." In explanation of the above it should be said that the action of partition in the Orphans' Court in *Pennsylvania*, is the statutory remedy provided for the benefit of the widow and heirs in the settlement of estates, and is the proper remedy for the widow to pursue to have her distributive share of land set out which the statute allows her in lieu of dower.

2. *Hilliard v. Hilliard*, 50 Ark. 34. And as regards assigning homestead, see *Tygh v. Dolan*, 95 Ala. 269.

3. *Crabtree v. Crabtree*, 5 Ark. 638. The question was raised in *Adams v. Barron*, 13 Ala. 205, where a single tract of land lay in two counties, but the court found it unnecessary to decide it.

4. Proceedings for the assignment of dower, instituted and determined in the county of the deceased husband's last residence, were held to be a bar to subsequent proceedings for the same purpose in another county to affect

f. **CONSENT TO JURISDICTION.**—It is a well-established principle, not confined to proceedings for assignment of dower, that if the court has no jurisdiction of the subject-matter, consent of the parties will confer no jurisdiction. Where the parties have done no more, therefore, than to agree that the court may decide the controversy between them, neither will be bound by the judgment.¹

g. **WHO MAY OBJECT TO JURISDICTION.**—Although the court is without jurisdiction to make the assignment, a person on whose application the court acted cannot be heard to afterwards object that the court was without authority.²

2. Parties—*a.* PLAINTIFFS.—The summary proceeding for the admeasurement of dower can only be maintained by the persons authorized by the statutes, such as the widow and heirs.³

Assignee or Other Person Interested.—As a rule it cannot be maintained by a party to whom the widow has assigned her dower,⁴ or by other persons interested in having the right to dower determined and admeasured.

b. **DEFENDANTS—Heirs.**—As this proceeding is merely for the ascertainment and admeasurement of dower, and not a proceeding to determine the rights of all persons interested in the real estate, the heirs are the only necessary parties defendant.⁵

The Executor or Administrator of the husband's estate is not a proper party defendant, as he has no interest or title in the real estate.⁶

lands therein located, although the assignment in the first proceedings was made on the basis of the lands located in the one county alone. *Askew v. Bynum*, 81 N. Car. 350.

1. *Holloman v. Holloman*, 5 Smed. & M. (Miss.) 559; *James v. Rowan*, 6 Smed. & M. (Miss.) 393.

Assignment Acquiesced in.—If, however, the court not only assigns the dower, but the assignment is acquiesced in by the parties after it is made, and is acted upon by them, then such assignment will become binding, for it is lawful for the tenant of the freehold to himself assign dower without recourse to the court, and if the assignment made by the court is ratified by him and assented to by the widow, it is immaterial that the court acted without jurisdiction. *Robinson v. Miller*, 1 B. Mon. (Ky.) 88, 2 B. Mon. (Ky.) 284; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50; *Pinkham v. Gear*, 3 N. H. 163; *Draper v. Baker*, 12 Cush. (Mass.) 288.

2. *Adams v. Barron*, 13 Ala. 205.

3. *Jackson v. Aspell*, 20 Johns. (N. Y.) 411. In some states the statutes authorize the proceeding to be com-

menced by the widow or any heirs or other persons interested in the estate, or in the lands of decedent.

4. The assignee of the widow must apply to a court of equity for the admeasurement of dower. *Parton v. Allison*, 109 N. Car. 674; *Jackson v. Aspell*, 20 Johns. (N. Y.) 411.

5. *James v. Rowan*, 6 Smed. & M. (Miss.) 393; *Holloman v. Holloman*, 5 Smed. & M. (Miss.) 559; *Pickens v. Wilson*, 13 Smed. & M. (Miss.) 691; *Lowery v. Lowery*, 64 N. Car. 110.

6. *Chapman v. Schroeder*, 10 Ga. 321; *Campbell's Case*, 2 Dougl. (Mich.) 141.

In *Alabama* it was held that the executor might resist a claim to dower in the personal estate and was therefore a necessary party. *Green v. Green*, 7 Port. (Ala.) 19; *Barney v. Frowner*, 9 Ala. 901.

In some states the personal representative of the deceased husband is a necessary party, and the statute requires notice to be served upon such person. *Henderson v. Chaires*, 25 Fla. 26; *Rogers v. Hoskins*, 14 Ga. 166; *Langford v. Langford*, 82 Ga. 202.

Other Persons.—Persons claiming adverse possession¹ or paramount title,² or creditors of the deceased husband,³ are not necessary parties, as their rights cannot be determined by the proceedings. In some states, however, the owner of the land, whether an alienee of the husband or a purchaser at an administrator's sale, or a person claiming a paramount title or an estate in the lands, is a necessary party.⁴

3. Application—Generally.—The application for dower in the summary proceedings must state facts sufficient to give the court jurisdiction, and to entitle the party to the relief provided by the statute.⁵

Necessary Averments.—The marriage or the relationship of the applicant to deceased;⁶ the seizin of deceased of a dowerable estate,

1. Where a party sets up adverse possession of the land to defeat dower, the Probate Court does not lose jurisdiction, but must retain the cause and admeasure dower. The widow may then maintain ejectment or a suit in equity. *Bisland v. Hewett*, 11 Smed. & M. (Miss.) 164.

2. *Holloman v. Holloman*, 5 Smed. & M. (Miss.) 559; *James v. Rowan*, 6 Smed. & M. (Miss.) 393; *Farmers, etc., Bank v. Tappan*, 5 Smed. & M. (Miss.) 112. But see, *contra*, *Hill v. Bowers*, 4 Heisk. (Tenn.) 272.

In *Hemmenway v. Corey*, 16 Vt. 223, it is said to be wholly immaterial to the adverse claimant, whether dower is assigned or not, or how much dower is assigned. His remedy cannot be obtained in that action. See also *Woodward v. Spear*, 10 Vt. 420.

3. *Barton v. Hinds*, 46 Me. 121.

In *Welfare v. Welfare*, 108 N. Car. 272, creditors were allowed to intervene before the confirmation of the report of the commissioners.

Where the Estate Is Insolvent and the widow is also guardian of the heirs, the creditors of the deceased husband may be allowed to intervene if they desire. *Ex p. Avery*, 64 N. Car. 113.

4. *Green v. Green*, 7 Port. (Ala.) 19; *Forrester v. Forrester*, 38 Ala. 119; *Chapman v. Schroeder*, 10 Ga. 321; *Ward v. Kilts*, 12 Wend. (N. Y.) 137; *Stewart v. Smith*, 39 Barb. (N. Y.) 167.

In *North Carolina* the statute requires that "the heirs, devisees, and other persons in possession of or claiming estates in the lands shall be parties to such proceedings." Under such statute the alienee of the husband is entitled to intervene. *Carney v. Whitehurst*, 64 N. Car. 426.

5. See application in *Serry v. Curry*, 26 Neb. 353.

A petition for assignment of homestead and dower states but one cause of action, and all the facts constituting such cause of action should be stated in one count. *Bryan v. Rhoades*, 96 Mo. 485.

Under a statute permitting the application to be filed after the expiration of forty days after the death of the husband, a petition is sufficient if it appears from the facts alleged that the petition was filed after the expiration of forty days, although such fact was not expressly alleged. *Jackson v. Waltermire*, 7 Cow. (N. Y.) 353.

In *King v. Merritt*, 67 Mich. 194, the following facts are suggested as being necessary to give the court jurisdiction, viz.: "Residence of the widow; that she is a widow; that the estate in which she asks to be endowed is that of her deceased husband, and of which he died seized; and, under our statute, she ought further to state that her right to dower is not disputed by the heirs or devisees, and that she, or some other person interested in the land, wishes it set apart."

Failure to Deny Dispute.—The failure to allege that the right to dower is not "disputed by heirs or devisees" will not deprive the court of jurisdiction. *Serry v. Curry*, 26 Neb. 363.

Security for Costs.—Section 2396 of the *Alabama Code*, requiring security for costs to be given by nonresident plaintiffs, does not apply to an application for dower filed in the probate court by a nonresident widow. *Forrester v. Forrester*, 35 Ala. 594.

6. An averment that the demandant

during coverture,¹ of certain described lands within the county;² the names of the heirs,³ personal representatives,⁴ tenants of the freehold, or persons in possession,⁵ are all necessary averments. It should also be alleged that deceased left no will, or that he left a will, and that the demandant elects to recover dower.⁶

4. Notice of Application—*a*. NECESSITY OF NOTICE.—It has been held that an assignment of dower under the summary proceedings provided by statute is a proceeding *in rem*, operating as general notice, and that such an assignment is valid without the interested parties having had actual notice.⁷ The great weight

is the widow of deceased is objectionable. *Martin v. Martin*, 22 Ala. 86.

1. *McGee v. McGee*, 4 Ired. (N. Car.) 105; *Littleton v. Littleton*, 1 Dev. & B. (N. Car.) 327; *Norwood v. Marrow*, 4 Dev. & B. (N. Car.) 442.

2. *Craig v. Barker*, 4 Dana (Ky.) 600; *Martin v. Martin*, 22 Ala. 86.

The Application must Describe All the Lands, as an allotment of land not described in the application is void. *Falls v. Wright*, 55 Ark. 562.

Personal Property.—In some cases the application should include a description of the personal property to be set apart under the statute. *Caillaret v. Bernard*, 7 Smed. & M. (Miss.) 316.

3. *Earle v. Juzan*, 7 Ala. 474; *Martin v. Martin*, 22 Ala. 86.

4. *Martin v. Martin*, 22 Ala. 86; *Green v. Green*, 7 Port. (Ala.) 19.

5. *Martin v. Martin*, 22 Ala. 86.

6. If it appear that deceased left a will, the petition is demurrable unless the election to take dower is alleged. *McLeod v. McDonnell*, 6 Ala. 236.

7. *Stevens v. Stevens*, 3 Dana (Ky.) 371. In this case the court said: "It is a general rule of the common law, because it is a principle of justice, that no one should be affected by a judicial proceeding, unless during its pendency he shall have had notice of it. And it must be admitted that in allotting dower the county courts act judicially; because, otherwise, their orders in such cases would not be subject to revision by this court, and the many nullifications of such orders by our predecessors would have been extrajudicial.

"But the statute giving jurisdiction to the county courts, and prescribing the course of proceeding, neither requires nor seems to have contemplated express or formal notice of an application for the appointment of commissioners for assigning dower. It has

conferred jurisdiction in that class of cases only in which the husband died seized of the legal title, and in which there is no dispute as to the right of his surviving wife to an allotment of dower; and it has neither prescribed any mode of trying, by pleading or by jury, questions of right, or of fact, nor given jurisdiction to pronounce any judgment on questions of law, or of fact.

"Moreover, an assignment of dower is a proceeding *in rem*; the allotment is made upon the land, and that is actual notice to the terre-tenant, and may be constructive notice to all others who have title to it. When, by the death of the husband, the wife's initiate right to dower becomes consummate, the only object of an assignment is to give her a right of entry, and define the boundary of her possession; an allotment vests her with no new right to the land. And not only the heir, but an abator, disseizor, or intruder, may make a good assignment of dower. In allotting dower, all that commissioners, under the authority of a county court, have to do is to ascertain by a process almost exclusively mechanical and approximating to mathematical, one-third of the land, and define it by a designated boundary. They are selected for their intelligence and probity, and are required to act under the sanction of an oath, and the court must revise and approve their report.

"These considerations tend to show that there is no great necessity for actual notice, and that it is not required by law; and practice and authority corroborate this deduction. Formal notice has been but seldom, if ever, given of applications for appointing commissioners to allot dower; and not only has no assignment by a county court been set aside by this court, for

of authority is the other way, however, and an assignment made without notice to the parties interested will be set aside as irregular, and often will be declared void and may be collaterally attacked.¹

want of such notice, but in *Rintch v. Cunningham*, 4 Bibb (Ky.) 463, it was said that actual notice in such cases was not required.

"If, when the application is made by the widow, express notice to the heir is necessary, by a parity of reasoning it could be shown that such notice to the widow would be equally necessary on the application of the heir. But the heir may assign dower by his own voluntary act, and it is his duty to do so; and therefore it would seem that notice of an application by him, for an allotment by others, selected by the county court, and sworn to act faithfully and impartially, should not be required. Besides, the jurisdiction of the county courts is, in such cases, special; their records must show every fact required by the statute; and therefore there can be but little, if any, danger of irremediable injustice." See also *Rintch v. Cunningham*, 4 Bibb (Ky.) 462.

The former case was *reversed*, however, because of defects in the report of the commissioners who made the assignment of dower. The rule subsequent to the above cases seems to have been changed by statute in *Kentucky*. See *Holderman v. Holderman*, 5 B. Mon. (Ky.) 384.

In Pennsylvania, in partition proceedings, the usual practice of the Orphans' Court formerly was that an inquest would be granted on the petition of the widow or any one of the heirs as a matter of course, and without notice to the other parties interested. On appeal to the Supreme Court, the practice was disapproved as wrong in principle, but sustained as to hold otherwise would disturb many titles. *Rex v. Rex*, 3 S. & R. (Pa.) 533; *Horam's Estate*, 59 Pa. St. 152; *Vensel's Appeal*, 77 Pa. St. 71.

1. In the following cases the judgment was *reversed* because no notice was served upon the parties interested: *Green v. Green*, 7 Port. (Ala.) 19; *Matter of Cooper*, 15 Johns. (N. Y.) 533; *Rathbun v. Miller*, 6 Johns. (N. Y.) 281; *Holderman v. Holderman*, 5 B. Mon. (Ky.) 384.

In the following cases the assign-

ment without notice was said to be void: *Farmers, etc., Bank v. Tappan*, 5 Smed. & M. (Miss.) 128; *Peake v. Redd*, 14 Mo. 79.

In *Rayner v. Capehart*, 2 Hawks (N. Car.) 375, the facts were as follows: Lands were allotted to the widow as dower without previous notice having been given to the heir at law, who was an infant. The widow remained in possession of the land for seven years, when the defendant obtained possession, and the widow brought an action of ejectment against him. He attempted to defend upon the ground that an assignment without notice to the infant was void, and that the widow was therefore not entitled to possession of the land. The court held that however erroneous the assignment might have been as against the infant heir, yet the court which made the assignment had jurisdiction of the case, and as against a mere stranger the assignment was valid.

Collateral Attack.—In *Mississippi* the statute provides that where the widow is executrix or administratrix of the estate of her deceased husband, she shall give notice of her application for assignment of dower by advertisement in the newspaper published nearest her residence. Where dower was assigned to the widow without such advertisement having been made, it was held that the assignment was open to collateral attack on the part of persons claiming to be distributees of the estate. *Muirhead v. Muirhead*, 23 Miss. 97.

Where no notice of the application for assignment of dower was served upon the tenant, but he was given notice of the time when the commissioners would make the assignment, it was held that although the proceedings were erroneous, yet the assignment was not void, and the tenant, failing to appeal from the decree of the Probate Court accepting the report, was bound. The court says in the opinion: "Notice is so essentially necessary that, without it, such proceedings are uniformly held to be void, except in cases where the statute has provided specific means of relief. So far as this principle been carried, that such proceedings have

6. SUFFICIENCY OF NOTICE.—No general rule can be formulated as to what will constitute a sufficient notice of an application for assignment of dower. The subject is usually one of statutory enactment, varying greatly in the different states. The remedy commonly provided by statute being summary in its character, some courts have regarded those provisions concerning notice as of special importance and have said that they must be strictly complied with.¹

In Writing.—In accordance with this supposed importance, even in the absence of a statute directing the kind of notice which must be served, it has been held that the notice must be in writing.²

frequently been adjudged void for want of notice, even where none was expressly directed by statute. *Ex p. Robinson*, 1 D. Chip. (Vt.) 357; *Chase v. Hathaway*, 14 Mass. 222. But though this proviso does not strictly belong to that class of statutory enactments which are merely directory, yet we consider that a failure to comply with it has not rendered these proceedings void. The committee were required by their warrant to give the defendant notice, which they did. This was a notice expressly enjoined by the 84th section, and the defendant acted at his peril in disregarding it. By that notice he became so far a party to the proceedings that he had a right to attend the committee while making the division and an opportunity to contest their report. He also had a right, under the 7th section of the act, to appeal from the probate decree accepting the report. It is true he had lost the benefit of the previous notice which the proviso requires, and for that cause might doubtless have procured the whole proceedings vacated on appeal. But having neglected to avail himself of these rights, he ought now to be bound by the decree. He should be considered as having waived all advantage from this defect. Justice and convenience seem to demand this result. It is far better that he should submit to some possible injustice in the division than be allowed in this collateral manner to avoid it." *Corliss v. Corliss*, 8 Vt. 389.

Where Heirs Were Infants.—But in a case where the heirs were infants, and the only notice which the records of the Probate Court showed was that such heirs were present when the commissioners made the assignment, it was held that the proceedings were void,

and open to collateral attack. *King v. Merritt*, 67 Mich. 212.

Tenant without Notice but Subsequently in Court.—Where the tenant had no notice of the application for assignment of dower, but the record showed that before the assignment was approved he was properly in court, it was held that having failed to appeal from the order approving the assignment, he was bound thereby, and that the court at a subsequent term, on motion of the tenant, had no authority to vacate the order approving the assignment. *Peake v. Redd*, 14 Mo. 83.

Presumption of Notice.—Where an order for publication was made by the Probate Court on the filing of a petition for dower, it will be presumed, in the absence of any evidence to the contrary, that the publication was made. *Randolph v. Doss*, 3 How. (Miss.) 205.

1. In *Alabama* the statute provided that in case the widow was the executrix or administratrix of her deceased husband's estate, notice of her application for allotment of dower must be given by advertisement in a newspaper published four successive times. The suit was instituted by the widow. The petition did not show whether a personal representative of the estate had been appointed or not, and there was no record of any advertisement. It was held that the remedy being a summary one, provided for by statute, there must be strict conformity to its requirements, and such conformity not being shown, the proceedings would be set aside. *Barney v. Frowner*, 9 Ala. 901.

2. **Notice in Writing.**—It was shown that four days before the application of the widow to the surrogate for the appointment of commissioners to assign her dower, a verbal notice was given to the parties interested in the

In Name of Applicant.—The notice must be in the name of the applicant, or at least must show that it is given in her behalf.¹

Notice to Several.—Where several persons are required to be notified, it is proper to join them all in the notice.²

Substitution among Commissioners—Further Notice.—Although commissioners were appointed on sufficient notice in the first place, it will be error to subsequently make any substitutions among them without further notice having been given.³ But where the tenant, although duly notified, made no appearance, and the substitution was made the same day that the commissioners were appointed, it was held unnecessary to serve a second notice.⁴

Collateral Attack.—Although a notice be defective, or the service thereof imperfect, if, in a collateral proceeding, it appears that there was a notice, and the court before whom it was returnable has determined in favor of the sufficiency thereof, that determination is binding, and the judgment can be attacked only in a direct proceeding to reverse or modify it.⁵

land, of the time when the application would be made. None of the parties appeared before the surrogate on that day, and without further notice commissioners were appointed. The court held that this was error, saying: "On general principle, the notice ought to be in writing, and the want of it is a fatal objection to these proceedings." *Matter of Cooper*, 15 Johns. (N.Y.) 533.

1. Notice in Name of Widow.—A notice directed to "S. R. and J. A., executors upon the estate of H. D. H. deceased," informed said executors of the time when an application would be made for the appointment of commissioners to assign dower. The notice was signed "W. & H., petitioner's attorneys." The name of the petitioner nowhere appeared in the notice. It was held that "a notice in the name of nobody is no notice." *Rogers v. Hoskins*, 14 Ga. 166.

2. Joining Executors in Notice.—Thus where the statute directs that notice shall be served upon the executors or administrators of the deceased husband's estate, and there were two executors, it was held proper to join them in the notice. *Rogers v. Hoskins*, 14 Ga. 166.

3. Substitution of Commissioner without Notice.—The statute of *Kentucky* authorized the appointment of commissioners, upon the application of the widow and heirs, or either of them, provided reasonable notice of the intended application be given to every

other person or persons interested in the partition. Notice was duly given, and four commissioners were appointed. Five months later, without further notice, the court made an order substituting two other persons in the place of two of the commissioners previously appointed. The appellate court held that this was error, and that failure of the plaintiff in error to appear, at the time set, and oppose the confirmation of the report, did not preclude him from appealing, within the statutory time, from the order confirming it. *Holderman v. Holderman*, 5 B. Mon. (Ky.) 384.

4. The tenant of the freehold, having been duly notified, failed to appear, and the surrogate appointed three commissioners, as provided by statute. Soon after, and the same day that the commissioners were appointed, the surrogate, learning that one of the commissioners was too ill to serve, appointed another in his place without further notice having been given to the tenant. It was held, on appeal, that the whole might be regarded as one continued proceeding, and that it was not necessary to repeat the notice which had previously been served. The court expressed a doubt if the rule would not have been otherwise had the tenant appeared in the first place and gone away without being informed that anything further was to be done. *White v. Story*, 2 Hill (N. Y.) 543.

5. Collateral Attack.—The notice, in

c. WHO SHOULD BE SERVED WITH NOTICE.—It is usual for the statutes to specify with more or less certainty what persons are necessary to be served with notice of the application for appointment of commissioners. Where the question is in any way left in doubt, its solution will largely depend upon the extent of the court's jurisdiction to try questions involving the widow's right to dower in the land out of which she desires to have her dower set off. As has been seen, this jurisdiction, if it exists at all, is usually very limited. In general, all persons ought to be notified who, considering the scope of the court's jurisdiction, will or may be adversely affected by the proceedings.

Personal Representatives.—In some of the states the personal representative of the husband alone is required to be served with notice.¹ And in others he is a necessary party to the proceedings.²

a proceeding before the County Court for the admeasurement of dower, was not directed to the heirs by name, but "to all interested in the estate of," etc., and it did not appear from the record, but was shown by parol testimony, that the notice was served upon the heirs. In a collateral proceeding to defeat the title of a purchaser, acquired at a sale under the proceedings, it was held that these defects were of no avail. *Shawhan v. Loffer*, 24 Iowa 217.

The statutes of *Nebraska* provide that notice of the application "shall be given to such heirs, devisees, or other persons, in such manner as the judge of probate shall direct." The probate judge failed to make any order directing how the notice should be served. The return of service was by affidavit made by the petitioner, stating that she served the notice by reading the same to the older children and explaining the matter to the younger. There was also an acceptance of service by her as guardian of the minor children. In an action of ejectment brought by these heirs against alienees of the widow, for possession of the land assigned to her, under the proceedings, as her dower, the court said: "We do not approve of the mode of service in this case, and in a direct proceeding to contest the judgment it would be held insufficient; but it is not subject to collateral attack." *Serry v. Curry*, 26 Neb. 353.

So, also, when the return on a petition, served upon the defendants in dower proceedings, was irregular, being in the name of a deputy sheriff, instead of in the name of the sheriff by the deputy, but the record of the court

recited "that the defendants have been served with process and copies of the petition," it was held that the judgment was not subject to collateral attack. *Brickhouse v. Sutton*, 99 N. Car. 103.

1. *Henderson v. Chaires*, 25 Fla. 32.

2. *Barney v. Frowner*, 9 Ala. 901; *Green v. Green*, 7 Port. (Ala.) 19; *Rogers v. Hoskins*, 14 Ga. 166; *Langford v. Langford*, 82 Ga. 202.

In those states where this is true, it is sometimes said that the administrator or executor represents the interests of the creditors and heirs in the proceeding, and for that reason should be notified. *Langford v. Langford*, 82 Ga. 202.

Representative's Interest in Land.—In most of the states the personal representative has a contingent interest in the land by reason of his right to sell the same in the event that the personalty is insufficient to pay the debts of the estate. It was held, however, in *Campbell's Case*, 2 Dougl. (Mich.) 141, that this was not a sufficient reason why the personal representative should be notified, the court saying: "Other provisions of our statutes, it is true, authorize the sale, by the administrator, of a part or all of the real estate of the deceased, for the payment of debts; but these provisions, it is believed, do not affect the widow's right of dower, until a sale for such purpose is actually made."

Where It Is the Duty of the Commissioners to Set off a Portion of the Personal Estate to the widow, the executor or administrator, being directly interested, should, of course, have notice. *Green v. Green*, 7 Port. (Ala.) 27.

Temporary Administrator.—It has been held that a service of notice on the temporary administrator was not such a service as was contemplated by the statute.¹

Where the Widow Seeks Dower out of Land Alienated by the husband in his lifetime, the personal representative of the estate, having no interest in such land, need not be notified.²

Heirs.—In some of the states it is necessary to notify the heirs.³

Tenant of the Freehold.—Where the land does not belong to the heirs, either because it was conveyed by the husband in his lifetime, or because it has since been sold by the heirs, or by reason of a sale in administration proceedings, in many of the states it is necessary to notify the person who is the owner of the land at the time the application is made.⁴ And where such is the case the statute is not complied with by serving a notice merely on the tenant in possession.⁵

5. Answer.—The answer in summary proceedings may set up any legal or equitable defense.⁶ Where the answer raises an issue as to title the county or probate court will lose jurisdiction under the provisions of some of the statutes.⁷ It is the duty of a guardian of the minor heirs to file an answer in the summary proceedings as in other cases.⁸

6. Order Appointing Commissioners.—The order appointing commissioners, in the summary proceedings, adjudges that the widow

Where there Is More than One Personal Representative of the estate, a notice should be served on each. *Rogers v. Hoskins*, 14 Ga. 166.

1. The statute provided that "the applicant [for dower] shall give written notice to the representative of such estate, * * * of such intended application for such assignment of dower." The decision was put upon the ground that the permanent administrator represented the creditors and heirs in the proceeding, and that when he was duly served with notice such heirs and creditors were bound by the proceedings taken, and that the statute did not vest the temporary administrator with authority to so represent the creditors and heirs, his authority, so far as real estate was concerned, extending no further than to preserve and protect it. *Langford v. Langford*, 82 Ga. 202.

2. The statute in *Georgia* provides that the person applying for dower shall give to *all persons in interest* twenty days' notice of the intended application. Although in general it is held in that state that the personal representative must be notified, yet, in a case where the application was for dower out of lands in possession of the

husband's alienee, a demurrer to the plea that the personal representatives of the estate of the deceased husband had not been notified was sustained. *Chapman v. Schroeder*, 10 Ga. 321.

3. *Green v. Green*, 7 Port. (Ala.) 16.

Where the statute provides that the court shall have jurisdiction only when the "right to dower is not disputed by the heirs or devisees, or any person claiming under them," it would seem that such persons ought to have notice in order that they may appear and dispute the right, and thus deprive the court of jurisdiction. *Campbell's Case*, 2 Dougl. (Mich.) 141.

4. *Green v. Green*, 7 Port. (Ala.) 19; *Forrester v. Forrester*, 38 Ala. 119; *Chapman v. Schroeder*, 10 Ga. 321. So provided by statute in *New York*. *Ward v. Kilts*, 12 Wend. (N. Y.) 137; *Stewart v. Smith*, 39 Barb. (N. Y.) 167.

5. *Ward v. Kilts*, 12 Wend. (N. Y.) 137; *Stewart v. Smith*, 39 Barb. (N. Y.) 167.

6. *Efland v. Efland*, 96 N. Car. 488; *Tate v. Powe*, 64 N. Car. 644.

7. See jurisdiction in summary proceedings.

8. *Rutherford v. Richardson*, 1 Sneed (Tenn.) 609.

is entitled to dower, and appoints commissioners to admeasure dower.¹

7. Notice by Commissioners of the Time of Assignment.—Due notice having been served of the application for appointment of commissioners, it is not usually held necessary to serve a further notice of the time when the commissioners will proceed to make the assignment.²

8. Report of Commissioners.—The report of the commissioners should show that they were qualified and took the oath required by the statute,³ and should describe the property allotted to the widow by metes and bounds or by other certain description.⁴

9. Notice of Motion to Confirm Commissioners' Report.—If the order appointing the commissioners specifies the time when they shall make their report, it will operate as an adjournment, and parties having had notice of the application for the appointment of the commissioners will not be entitled to further notice of the motion to confirm their report.⁵ When the order, however, does not state the time when the report shall be made, it is certainly the better practice, and it would seem, on principle, to be necessary, to serve notice of the motion to confirm the report.⁶

1. *Stiner v. Cawthorn*, 4 Dev. & B. (N. Car.) 501; *Rutherford v. Richardson*, 1 Sneed (Tenn.) 609; *Holderman v. Holderman*, 5 B. Mon. (Ky.) 384. See decree in *Brickhouse v. Sutton*, 99 N. Car. 103.

2. *Beaty v. Hearst*, 1 McMull. (S. Car.) 31. *Semble*, Matter of *Watkins*, 9 Johns. (N. Y.) 246. But see *contra*, in partition proceedings, *Doubleday v. Newton*, 9 How. Pr. (Washington County Ct.) 71.

3. *Williams v. Morgan*, 1 Litt. (Ky.) 167; *Christopher v. Christopher*, 92 Tenn. 408; *Hawkins v. Craig*, 6 T. B. Mon. (Ky.) 254.

Where Commissioners are Appointed by Consent, an exception that the report does not show that they were freeholders and in no wise related to the parties in interest will not be sustained. *Christopher v. Christopher*, 92 Tenn. 408.

Where a Second Commission is Appointed, the former commission is superseded and its return is void. *Crocker v. Fox*, 1 Root (Conn.) 227; *Smith v. Maxwell*, 3 Litt. (Ky.) 471.

All the Commissioners should Sign the report, but the report of three out of five may be confirmed. *Burnham v. Porter*, 24 N. H. 570.

4. It is sufficient to designate the land by the numbers of the tracts as designated by the United States

survey. *Adams v. Barron*, 13 Ala. 205.

The Sheriff is not required to attest the report of the commissioners. *Brickhouse v. Sutton*, 99 N. Car. 103.

5. *White v. Story*, 2 Hill (N. Y.) 543. The objection of want of notice was commented on in the opinion as follows: "It is said that notice should have been given of the application for confirming the report of the commissioners. The appellant had all the notice which the statute requires, and all that was necessary for the preservation of his rights. The surrogate, in his order appointing the commissioners, specified the time when they should make their report. This was in the nature of an adjournment; and when a party is once brought properly into court he must take notice at his peril of a regular adjournment or continuance of the proceedings to another day. There can be little doubt that the appellant knew when the report was to be made; but if he did not, it was because he was voluntarily absent when the petition was presented and the commissioners appointed."

6. In *Henderson v. Chaires*, 25 Fla. 37, the court said: "It is shown by the record that notice of applications to confirm the reports was given to the attorney of defendants—the first, one day, and the second, five days

10. Confirmation of Report.—When the commissioners have made an assignment of dower and filed a report of the property so assigned, the court may proceed to confirm the report if no cause is shown to the contrary.¹

Objections to the report may be sustained by affidavits and contradicted by counter affidavits.²

Contradiction or Explanation of Report.—The commissioners may contradict or explain their return by their affidavits.³

beforehand. But if that had not been done we are not prepared to say that any notice was necessary, though it would be better practice to give it. The proceeding was a statutory one which, says the statute, 'shall be in a summary way,' the only notice required being ten days' notice to the executors or administrators previous to the hearing."

It was held in *Adams v. Barron*, 13 Ala. 205, that no notice was necessary. The court said: "The statute under which the plaintiffs made their application does not require that they shall have notice of the time when the report of the commissioners will be acted on by the court. It declares, 'the proceedings upon such petition for dower shall be in a summary way, and the court shall, at their first term, when such petition is filed, proceed to hear and determine as to them shall seem just and right, provided the petitioners give notice,' etc. If plaintiffs in error were injured by the confirmation of a report of the commissioners under which they are placed in possession of the land, they should have moved in the Orphans' Court to set aside the confirmation."

The doctrine of the above case would not seem to commend itself. An order of confirmation, like a judgment, ought to follow, not precede, a contest. If a party has a right to object to the commissioners' report, he should be given an opportunity to be heard before the report is confirmed. The order of confirmation might be made on the last day of the term, in which case, by the common law, the court would have no power, at a subsequent term, to vacate the order. The contesting party would thus never have a chance to be heard, and would be driven to his appeal without his objection to the report ever having been presented to the trial judge.

1. *Tongue v. Gist*, 1 Nott & M. (S.

Car.) 110. See proceedings in *White v. Story*, 2 Hill (N. Y.) 543; *Fuller v. Rust*, 153 Mass. 46; *Welfare v. Welfare*, 108 N. Car. 272; *In re Garrison*, 15 N. J. Eq. 393; *Serry v. Curry*, 26 Neb. 353; *Fitzhugh v. Foote*, 3 Call (Va.) 13.

The Executor or Heirs, being necessary parties, may object to the return of the commissioners. *Atwell v. Holliman*, 39 Ga. 670; *Laney v. Stewart*, 35 Ga. 251.

The Proper Time to Object to the manner and extent of the assignment of dower in land is when the report of the commissioners is filed. *Chapman v. Schroeder*, 10 Ga. 321.

Where the Statute Requires the Report to be Recorded if accepted by the court, no formal order of confirmation is required if the report is duly recorded. *Serry v. Curry*, 26 Neb. 362.

2. *Beaty v. Hearst*, 1 McMull. (S. Car.) 31. Either affidavits or oral testimony may be introduced. *Stewart v. Blease*, 5 S. Car. 433.

3. "Affidavits of jurors are not allowed in impeachment of their verdicts. On the other hand, arbitrators are constantly heard touching their awards. We have looked into the reasons given by Lord Mansfield * * * for the exclusion of the affidavits of jurors; and however weighty they may have been in his day in England, or may be now, in the case of jurors, who sit in secret, must be unanimous, and are by law, to a considerable extent, and for solid reasons, an independent, irresponsible body, we think they are not such as apply with sufficient force to commissioners for assignment of dower, to cause their testimony to be excluded." *McCormick v. Taylor*, 5 Ind. 436. See *contra*, *Farr v. Farr*, 21 Ark. 573.

Such affidavit is not competent in a collateral attack of the commissioners' return. *Graham v. Dunigan*, 2 Bosw. (N. Y.) 516.

11. Vacating Report—Reassignment.—The report will be set aside and a reassignment ordered if the commissioners have assigned to the widow a greater or less amount than she is entitled to,¹ or if the division is unjust and inequitable among the heirs.²

The Court is Not Bound by the Report in all cases where it is free from fraud, and was not based on erroneous principles, but may set aside the admeasurement wherever it is unjust from any cause.³

Causes for Setting Aside Report.—It is sufficient cause for setting aside a report, that the report was not made at the next term;⁴ that the commissioners who acted were not appointed;⁵ that all the commissioners did not sign the report;⁶ that they assigned the property in fee;⁷ that they allotted one-third of an estate in which the husband had but an undivided one-half interest.⁸

12. Appeal.—The order of the probate or other court, confirming the report of the commissioners, may be reviewed by appeal.⁹

1. *Welfare v. Welfare*, 108 N. Car. 272; *Stiner v. Cawthorn*, 4 Dev. & B. (N. Car.) 505; *Eagles v. Eagles*, 2 Hayw. (N. Car.) 181; *Hawkins v. Hall*, 2 Bay (S. Car.) 449; *Heyward v. Cuthbert*, 3 Brev. (S. Car.) 482; *Lesesne v. Russell*, 1 Bay (S. Car.) 459.

An Excessive Allotment may be cured by filing a release of the excess. *Douglas v. McDill*, 1 Spears (S. Car.) 139.

2. *In re Garrison*, 15 N. J. Eq. 393. In this case it was urged that the court had no power to set aside an assignment if it was fair as to the widow, although it might consist of all the property belonging to one heir. It was held the court had the power to protect the interests of all the parties.

Where Two Sets of Commissioners have Filed Reports containing different allotments, a reassignment will not be ordered, but the court will set aside the report of the commission acting without authority. *Smith v. Maxwell*, 3 Litt. (Ky.) 471.

3. *Irwin v. Brooks*, 19 S. Car. 96.

Petition for Reassignment.—A petition for reassignment of dower cannot be maintained to set aside the summary proceedings in the County Court. The remedy is by writ of error or petition in equity. *Bowers v. Bowers*, 8 Ired. (N. Car.) 247.

4. *Osborn v. Rogers*, 19 N. J. Eq. 429.

5. *Osborn v. Rogers*, 19 N. J. Eq. 429.

6. See *Irwin v. Brooks*, 19 S. Car. 96; *Williamson v. McLeod*, 64 Ga. 761; *Burnham v. Porter*, 24 N. H. 570.

A report may be confirmed, although

a minority report, if filed by some of the commissioners. *Stewart v. Blease*, 5 S. Car. 433.

7. *Wilhelm v. Wilhelm*, 4 Md. Ch. 330.

8. *Osborn v. Rogers*, 19 N. J. Eq. 429.

9. *Sherard v. Sherard*, 33 Ala. 488; *Stiner v. Cawthorn*, 4 Dev. & B. (N. Car.) 501.

The summary proceeding is in the nature of "an equity proceeding, and, in such cases, depositions and exhibits, or documentary evidence, actually read upon the hearing of the cause, are parts of the record, and no bill of exceptions is necessary to bring them up to this court, but such depositions or documentary evidence as were rejected on the hearing can only be made part of the record by bill of exceptions." *Hill v. Bowers*, 4 Heisk. (Tenn.) 272.

In *Parish v. Ellis*, 16 Pet. (U. S.) 451, a summary proceeding for allotment of dower is held to be an action at law, and not reviewable on appeal.

Trial de Novo.—On appeal from the Probate Court to the Circuit Court the cause is tried *de novo*, and such judgment rendered as the Probate Court ought to have given. The Circuit Court should not remand the cause. *Crabtree v. Crabtree*, 5 Ark. 638.

Where the statute provides for a transcript of the proceedings, the parties cannot introduce affidavits not included in the transcript. *White v. Story*, 2 Hill (N. Y.) 543.

Where the proceedings in the Orphans' Court were radically defective, on appeal to the higher court the widow will be allowed her election to

But the appeal cannot be taken by a person not a proper party to the summary proceedings.¹

When No Appeal.—An appeal will not lie from a decree in favor of the right of dower and ordering an assignment by commissioners,² or an order confirming the report of the commissioners and retaining the cause for assessment of damages,³ as such are interlocutory, and do not make a final disposition of the cause.

dismiss or to amend and proceed in the latter court. *Osborn v. Rogers*, 19 N. J. Eq. 429.

Notice of Appeal.—Under a statute requiring a notice in writing to be given within thirty days after the filing of the report of the admeasurers, but not specifying the parties to be served, it is sufficient to serve the notice on one of a firm of attorneys who appeared before the Surrogate Court. But such notice should have been sent to a nonresident respondent by mail, or served upon his tenant, or his attorney in fact, if he had one. *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

1. *Barton v. Hinds*, 46 Me. 121; *Hermenway v. Corey*, 16 Vt. 225.

A Writ of Error in this proceeding cannot be sued out by a stranger to the record. The remedy of a party interested, but not a party to the suit, is by certiorari. *Earle v. Juzan*, 7 Ala. 474.

2. *Rutherford v. Richardson*, 1 Sneed (Tenn.) 609; *Holderman v. Holderman*, 5 B. Mon. (Ky.) 384.

Where court has rendered a judgment for dower, and the jury has made an allotment, to which exceptions are taken, the appeal does not disturb the judgment that the widow recover dower, but carries up the report of the jury. *Stiner v. Cawthorn*, 4 Dev. & B. (N. Car.) 501.

3. *Rannels v. Washington University*, 96 Mo. 226.

DRAINAGE.

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I. SCOPE OF THE ARTICLE.—In many of the states there are statutory provisions, more or less elaborate, for the drainage and reclamation of swamp, marshy, or overflowed lands, and the assessment of benefits therefor. This article treats only of proceedings under those statutes, and the subject of municipal drainage by means of sewers is relegated to another title.¹

II. DISTINGUISHING FEATURES OF THE VARIOUS SYSTEMS.—In some of the states drains or ditches are constructed through the agency of corporations organized under general laws. In others the proceedings are instituted before the township or county authorities. In still others the work is conducted from beginning to end under the direction and control of an established court of general jurisdiction. And in *Indiana* it seems that either of the foregoing methods may be used at the option of the parties interested, although the last mentioned system is the one most generally resorted to.

1. See article LOCAL IMPROVEMENTS.

III. TESTING LEGAL EXISTENCE OF DRAINAGE DISTRICT—Collateral Attack.—A drainage district is a public corporation,¹ and the validity of its corporate existence cannot be collaterally attacked.² Thus it cannot be questioned by a landowner in an action against him to recover an assessment,³ nor in a suit to enjoin the collection of an assessment⁴ or the construction of drains;⁵ and the order of a board establishing the district, not being a judicial act, cannot be reviewed upon certiorari.⁶

Quo Warranto.—The authorities concur that the sole method of testing the legal existence of the corporation is by an information in the nature of a *quo warranto* on behalf of the state.⁷

1. Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51; People v. La Rue, 67 Cal. 526; Dean v. Davis, 51 Cal. 407; People v. Reclamation Dist. No. 108, 53 Cal. 346; People v. Williams, 56 Cal. 647; Hoke v. Perdue, 62 Cal. 545; Smith v. People, 140 Ill. 355; Elmore v. Drainage Com'rs, 135 Ill. 269; McGillis v. Willis, 39 Ill. App. 311.

Municipal Corporation.—In Havana Tp. Drainage Dist. No. 1 v. Kelsey, 120 Ill. 482, a drainage district was held to be a municipal corporation within the meaning of a statute regulating appeals.

2. Hoke v. Perdue, 62 Cal. 545; Osborn v. People, 103 Ill. 224; Evans v. Lewis, 121 Ill. 478; People v. Jones, 137 Ill. 35; Allman v. Lumsden, 55 Ill. App. 21.

3. Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51; Reclamation Dist. No. 124 v. Gray, 95 Cal. 601; People v. Hagar, 52 Cal. 171.

On an Application for Judgment for delinquent assessments under the Illinois statute the regularity of the organization of the district cannot be questioned. Tucker v. People, 156 Ill. 108; People v. Jones, 137 Ill. 35. See also Osborn v. People, 103 Ill. 224.

4. Dean v. Davis, 51 Cal. 407; Evans v. Lewis, 121 Ill. 478; Morrell v. Union Drainage Dist. No. 1, 118 Ill. 139.

5. Hoke v. Perdue, 62 Cal. 545.

6. Williams v. Sacramento County, 65 Cal. 160; Lees v. Drainage Com'rs, 125 Ill. 47. Compare Hagar v. Yolo County, 47 Cal. 222.

Extension of Boundaries.—In Mason, etc., Special Drainage Dist. v. Griffin, 134 Ill. 330, where the commissioners of a district, in proceedings for enlarging its boundaries, disregarded

certain jurisdictional requirements of the statute, it was contended that the only remedy was by an information in the nature of a *quo warranto*; but the court held that the corporation having exceeded its jurisdiction could be proceeded against by *quo warranto*, by *scire facias*, or by the common-law writ of certiorari indifferently, as the one or the other might afford a proper and sufficient remedy.

"All of these several writs," said the court, "are direct remedies afforded by the law, and in respect to neither of them can it be said that it is a collateral attack upon the legal existence or organization of the corporation." And in distinguishing Lees v. Drainage Com'rs, 125 Ill. 47, the court continued: "There the corporate existence itself of a *quasi* municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto* and *de jure*."

See Evans v. Lewis, 121 Ill. 478, where it was held that the legality of an extension of boundaries could not be questioned on a collateral attack, such as a bill in chancery to enjoin the collection of an assessment, the court incidentally declaring that the proper remedy was by *quo warranto*.

7. Dean v. Davis, 51 Cal. 407; Lees v. Drainage Com'rs, 125 Ill. 47; Samuels v. Drainage Com'rs, 125 Ill. 536; Evans v. Lewis, 121 Ill. 478; Keigwin v. Hamilton Tp., 115 Ill. 347; Blake v. People, 109 Ill. 504; Osborn v. People, 103 Ill. 224. See also People v. Williams, 56 Cal. 647; Chapman v. Drainage Com'rs of Dist. No. 3, 28 Ill. App. 17.

Information in the nature of *quo*
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IV. PETITION.—The statutes usually provide that the first step in the proceedings shall be the filing of a petition with the court or other designated authority, signed by a certain proportion of the owners of lands to be affected by the proposed work.¹ A petition conforming to the statutory requirements is the essential foundation of jurisdiction to proceed.² But where that is

warranto was the remedy resorted to in *People v. Scott*, 132 Ill. 427; *People v. O'Hair*, 128 Ill. 20; *Klinger v. People*, 130 Ill. 509; *Smith v. People*, 140 Ill. 355; *Drainage Dist. No. 3 v. People*, 147 Ill. 404.

Joinder of Improper Matters.—The information should not combine matters which are properly remediable by the writ with mere private grievances of the relator, for which the law furnishes him a proper remedy by a private action either at law or in chancery. *People v. Cooper*, 139 Ill. 461.

Sufficiency of Allegations.—In an information against drainage commissioners for the purpose of testing the existence of the district, it is sufficient to allege generally that the defendants are in possession of their offices without lawful authority. *People v. Cooper*, 139 Ill. 461.

Surplusage.—Where a count contains a sufficient general allegation, and proceeds, by way of more minute specification, to state various official acts which merely constitute an abuse and not a usurpation of official authority and are not relied upon as an independent ground for prosecuting the writ, this specification will, on demurrer, be wholly disregarded. *People v. Cooper*, 139 Ill. 461.

Admissions by Demurrer.—A demurrer to an information alleging that the defendants were elected by unqualified votes does not admit the allegation, since it is not well pleaded, inasmuch as the invalidity of the election was matter to be set up by the prosecution in a replication, and was not essential to the information. *People v. Cooper*, 139 Ill. 461.

Sustaining Demurrer when Harmless Error.—It is not prejudicial error to sustain a demurrer to some of the counts in the information, when the remaining counts are sufficient to enable the prosecution to obtain all the relief to which it could in any event be entitled. *People v. Cooper*, 139 Ill. 461.

Abated on Demurrer.—The writ may

be abated on demurrer when the pleadings disclose a state of facts that would have warranted the refusal of leave to file it in the first instance. *People v. Wild Cat Special Drainage Dist.*, 31 Ill. App. 219.

Jurisdiction of Appeal from Judgment.

—In *Illinois* an information in the nature of a *quo warranto* against commissioners of highways assuming to act as drainage commissioners on the ground that the district has not been legally organized, involves a franchise, and an appeal from the judgment of the trial court must be taken directly to the Supreme Court and not to the appellate court. *People v. O'Hair*, 128 Ill. 20. See also *People v. Cooper*, 139 Ill. 461.

1. See California Political Code, § 3446; Rev. Stat. Illinois (Hurd. 1893), c. 42, § 2; Burns Annot. Indiana Stat., § 5623; Rev. Code Iowa 1888, § 1208; Gen. Stat. Minnesota 1894, § 7747; New York Laws 1869, c. 888, §§ 1, 2; Annotated Stat. Wisconsin 1889, § 1359; *Muskego v. Drainage Com'rs*, 78 Wis. 40.

2. *Richman v. Muscatine County*, 70 Iowa 627, and *Shepard v. Johnson County*, 72 Iowa 258, in both of which cases the petition lacked the requisite number of signatures; *Hall v. Slaybaugh*, 69 Mich. 484; *Darst v. Griffin*, 31 Neb. 668; *Dakota County v. Cheney*, 22 Neb. 437; *Frost v. Leatherman*, 55 Mich. 33, where the assessment was declared void because the residence of the petitioners was not such as the statute required; *Kroop v. Forman*, 31 Mich. 144, where the application was not in writing and the proceedings were quashed on certiorari.

Description of Proposed Drain, etc.

The statutes almost uniformly require that the course of the proposed drain shall be described, and usually require also a description of the lands to be traversed. See, for decisions on the sufficiency of petitions in those particulars, *Clark v. Teller*, 50 Mich. 618; *Coomes v. Burt*, 22 Pick. Mass. 422;

sufficient¹ the subsequent steps, if not in accordance with the statute, become irregularities more or less important according to the extent of the injury resulting therefrom.² In *Indiana* the statute prescribes what the petition shall contain,³ and when it is filed in the Circuit Court the day set for the docketing of the petition is to be fixed and noted thereon.⁴

V. NOTICE AND HEARING.—Upon the filing of the petition notice is given to parties interested, and an opportunity to be heard upon the questions to be decided.⁵

Notice is Jurisdictional,⁶ and if it be not given in strict compliance with the statute, subsequent proceedings are void as to those who do not waive notice or are not otherwise stopped from objecting.⁷

In re Drainage along Pequest River, 39 N. J. L. 197.

1. Statutes sometimes provide that a judgment or order confirming an assessment shall be conclusive as to the regularity of the prior proceedings. Under such a statute in *Illinois* it was held that after confirmation the sufficiency of the petition could not be questioned except on appeal or error to reverse the judgment. *Riebling v. People*, 145 Ill. 120.

2. *Hall v. Slaybaugh*, 69 Mich. 484.

3. As to the Sufficiency of a petition under the statute, see *Rogers v. Venis*, 137 Ind. 221; *Sample v. Carroll*, 132 Ind. 496; *Watkins v. Pickering*, 92 Ind. 332; *Metty v. Marsh*, 124 Ind. 18; *Troyer v. Dyar*, 102 Ind. 396; *Carr v. State*, 103 Ind. 548; *Wright v. Wilson*, 95 Ind. 408; *Heick v. Voight*, 110 Ind. 279; *Collins v. Rupe*, 109 Ind. 340; *Deisner v. Simpson*, 72 Ind. 435.

4. *Burns Annot. Indiana Stat.*, § 5624.

When Filing Presumed Regular.—Judgment entered upon a petition for drainage is conclusive that the petition was duly filed. *Updegraff v. Palmer*, 107 Ind. 181, where the court said: "It is clear that the objection would be unavailing coming so late as it did, even if the record did not show a filing as the statute requires."

A Failure to Indorse on the petition a date on which it will be docketed is a mere irregularity which does not affect the rights of a remonstrant and will be disregarded. *Rogers v. Venis*, 137 Ind. 221. See also *Smith v. Smith*, 97 Ind. 273.

Admitting New Parties.—After the filing of the petition new parties may be admitted and allowed to defend

although their title is not of record. *Bell v. Cox*, 122 Ind. 153, holding that the rights of parties so admitted are substantially the same as those of the original parties.

Dismissal of Petition.—As to the right of a petitioner to dismiss his petition, and at what stage it must be exercised, see *Crume v. Wilson*, 104 Ind. 583.

5. See *Rev. Stat. Illinois* (Hurd. 1893), c. 42, §§ 3, 5; *Burns Annot. Indiana Stat.*, § 5624; *Rev. Code Iowa* 1888, §§ 1208, 1218, 1219; *Gen. Stat. Minnesota* 1894, §§ 7748, 7792; *New York Laws* 1869, c. 888, §§ 1, 2; *People v. Henion*, 64 Hun (N. Y.) 471; *Matter of Beehler's Petition* (Supreme Ct.), 3 N. Y. St. Rep. 486; *Annotated Stat. Wisconsin* 1889, § 1360.

6. *Curran v. Sibley County*, 47 Minn. 313; *Bixby v. Goss*, 54 Mich. 551; *Tireman v. Ruthruff*, 40 Mich. 175; *Mason, etc., Special Drainage Dist. v. Griffin*, 134 Ill. 330.

7. *Wright v. Rowley*, 44 Mich. 557; *Daniels v. Smith*, 38 Mich. 660; *Bullock v. Taylor*, 39 Mich. 141; *Taylor v. Burnap*, 39 Mich. 739; *Strachan v. Brown*, 39 Mich. 168; *Lane v. Burnap*, 39 Mich. 736; *Van Buskirk v. Harrod*, 48 Mich. 258; *Reinig v. Munson*, 46 Mich. 138; *Lampson v. Ingham County*, 45 Mich. 150; *Willcheck v. Edwards*, 42 Mich. 105; *Whiteford Tp. v. Phinney*, 53 Mich. 132; *Bixby v. Goss*, 54 Mich. 551; *Milton v. Wacker*, 40 Mich. 229; *Campau v. Charbeneau* (Mich. 1895), 63 N. W. Rep. 435; *Burnett v. Scully*, 56 Mich. 374; *Purdy v. Martin*, 31 Mich. 455; *Livermore v. Burnap*, 38 Mich. 350; *Cook v. Covert*, 71 Mich. 249; *Baltimore, etc., R. Co. v. Wagner*, 43 Ohio St. 75. See also *In re Drainage along*

In *Indiana* notice as provided by statute must be given to the owner or occupant of the land described in the petition.¹ The notice must follow and not precede the filing of the petition.² If it appears to the court that legal notice has been given, the

Pequest River, 39 N. J. L. 197; *In re Application for Drainage, etc.*, 35 N. J. L. 497.

Notice of Adjournment.—Persons who have been duly cited to appear are not entitled to notice of a lawful adjournment of the board or court. *Kinnie v. Bare*, 80 Mich. 345.

1. Burns Annot. Stat., § 5624.

Defective Notice.—Whether proper notice has been given or not is a jurisdictional question, and where there is some notice and the Circuit Court acts under it the proceedings will stand as against collateral attack. *McMullen v. State*, 105 Ind. 334; *Young v. Wells*, 97 Ind. 410; *Jackson v. State*, 104 Ind. 516; *Montgomery v. Wasem*, 116 Ind. 343; *Prezinger v. Harness*, 114 Ind. 491; *Peters v. Griffie*, 108 Ind. 121; *Johnson v. State*, 116 Ind. 374; *Otis v. De Boer*, 116 Ind. 531. See also *Carr v. State*, 103 Ind. 548; *Albertson v. State*, 95 Ind. 370; *McCollum v. Uhl*, 128 Ind. 304; *Sunier v. Miller*, 105 Ind. 393; *Kleyla v. Haskett*, 112 Ind. 515.

Where No Notice Whatever is given the proceedings are void on collateral attack. *Scudder v. Jones*, 134 Ind. 547; *Brosemer v. Kelsey*, 106 Ind. 504. See also *Sunier v. Miller*, 105 Ind. 393; *Prezinger v. Harness*, 114 Ind. 491.

Estoppel.—A petitioner for a drain is estopped in an action against him for an assessment from alleging that he had no notice of the presentation of the petition. *Heckett v. State*, 113 Ind. 532.

Proof of Notice.—The statute formerly required that proof of posting notice of the filing of the petition could be made only by affidavit, see *Scott v. Brackett*, 89 Ind. 413; but the present law requires that it shall be made to appear to the court that notice has been given, and does not prescribe the manner of proof. In *Meranda v. Spurlin*, 100 Ind. 385, the court said there was no reason why the proof might not be by oral testimony. To the same point, see *Carr v. Boone*, 108 Ind. 241.

Waiver by Appearance and Remonstrance.—Appearing and remonstrating without objecting to the sufficiency of notice of the proceeding is a waiver of objection. *Updegraff v. Palmer*,

107 Ind. 181; *Ford v. Ford*, 110 Ind. 89. See also article APPEARANCES, vol. 2, p. 644. On the same principle, see *Gilbert v. Hall*, 115 Ind. 549; *Carr v. Boone*, 108 Ind. 241.

But want of notice is not waived by entering a special appearance and moving to dismiss the proceedings on that ground. *Carr v. Boone*, 108 Ind. 241. See also article APPEARANCES, vol. 2, p. 620 *et seq.*

Second Notice.—Where the notice is not sufficient the court may order a second notice provided there is no unreasonable delay and no prejudice to substantial rights. *Carr v. Boone*, 108 Ind. 241.

Failure to Notify Another Party.—A party who has due notice cannot take advantage of the failure to notify some other landowner, unless it appears that such failure will prevent the construction of the ditch. *Grimes v. Coe*, 102 Ind. 406; *Jones v. Cardwell*, 98 Ind. 331; *Carr v. Boone*, 108 Ind. 241. Compare *Wright v. Wilson*, 95 Ind. 408.

2. *McMullen v. State*, 105 Ind. 334; *Sites v. Miller*, 120 Ind. 19, holding that where the notice is that the petition *will* be filed at the next term of court it is not sufficient, and the proceedings may be dismissed upon the motion of one who has not submitted to the jurisdiction of the court.

But it seems that the requirement is not jurisdictional, and where the petition was filed the day after notice was given it was held to be an irregularity which would not avail to defeat an action to collect an assessment. *Deegan v. State*, 108 Ind. 155.

Nunc pro Tunc Entry.—In a proper case a *nunc pro tunc* entry may be made showing that notice was given according to law. *Meranda v. Spurlin*, 100 Ind. 380, where the entry was based upon the affidavits on file and the court's notes—"proof of notice filed; cause ordered docketed." In the same case it was held that a party having appeared to a motion for a *nunc pro tunc* entry cannot afterwards object that the notice of such motion was not served upon others against whom benefits were assessed.

court orders the petition to be placed on the docket, and if no objections are filed and the petition is deemed sufficient an order is made referring the same to the drainage commissioners.¹

VI. ASSESSMENT OF BENEFITS.—Assessments of benefits are made according to the actual benefit to the tract assessed. The assessment list should describe each tract² and specify the amount assessed against it, and in some instances the statutes require the name of the owner to be stated if known.³

VII. REPORT OF COMMISSIONERS.—The *Indiana* statute provides that the drainage commissioners shall proceed to inspect the lands, etc., and make report to the court at a time prescribed by the court.⁴ The report must be filed at the time fixed,⁵ unless

1. Burns Annot. Stat., § 4274.

Naming Commissioners Unnecessary.—It is not necessary to name the commissioners in the order of reference. *McMullen v. State*, 105 Ind. 334, holding that the resignation of one or more of them after a petition had been referred to them by name, and the appointment of a successor or successors, will not affect the proceeding. It is too late to object to a reference after the commissioners have made their report and the drain has been established in accordance therewith. *Updegraff v. Palmer*, 107 Ind. 181.

2. See, for sufficient descriptions, *Smith v. State*, 8 Ind. App. 661; *Sample v. Carroll*, 132 Ind. 496.

Abbreviations.—A description of land by well-understood abbreviations is not void for uncertainty. *Frazer v. State*, 106 Ind. 471; *Jordan Ditching, etc., Assoc. v. Wagoner*, 33 Ind. 50.

Void Descriptions.—In the following cases the description of the land was held to be void for uncertainty: *Ross v. State*, 119 Ind. 90; *Zigler v. Menges*, 121 Ind. 99.

Misdescription Corrected in Action to Enforce.—It was held in *Luzadder v. State*, 131 Ind. 598, that where a complaint to enforce an assessment clearly shows the land intended to be benefited and shows that a radical defect in the description of the land in the assessment was caused by mistake of the commissioner, the court has power to reform the description and enforce the assessment against the land intended.

3. See *Kepler v. Wright*, 136 Ind. 77, holding that the statute did not require the names to be stated with absolute accuracy.

4. *Horner's Indiana Stat.*, § 4274,

provides that the commissioners shall make personal inspection of the lands described in the petition, and consider the practicability of the proposed drainage, whether it will improve the public health, and whether the expense will be less than the benefits. If they find either of these inquiries in the negative they shall so report, and the petition shall be dismissed; but if they find otherwise they shall proceed to lay out the work, estimate the costs, assess the benefits, and make report to the court as directed under oath. The same section provides that in the order of reference the court shall fix a time and place for the meeting of the commissioners and a time when they shall report.

Negative Report.—Where the commissioners make a negative report, it is not necessary for them to verify it, and it need not contain a statement of the estimated cost of the work and the benefits or injuries to each tract. *Bleemel v. Shattuck*, 133 Ind. 498.

5. Failure to Report in Time.—One whose lands may be affected by the proposed drain may have the petition dismissed, where the drainage commissioners fail to report at the time fixed, without an order extending the time, *Claybaugh v. Baltimore, etc., R. Co.*, 108 Ind. 262; *Munson v. Blake*, 101 Ind. 78; but after a party has remonstrated or asked leave to remonstrate, it is too late for him to move to dismiss. *Blake v. Quivey*, 113 Ind. 124. See also *Bohr v. Neunenschwander*, 120 Ind. 449, to the point that the failure of the commissioners to report at the time designated does not *ipso facto* discontinue the proceedings.

And the failure to report in time,

the time has been extended by an order of court,¹ which may be obtained upon the motion of any of the parties interested.² A report in substantial compliance with the statutory requirements is sufficient.³

Where the commissioners locate the drain, it will be presumed that they passed upon preliminary questions, and their decision thereon need not be embodied in their report,⁴ nor is it necessary that they should state when or where they met.⁵ The court may allow the commissioners to correct a clerical error in their report.⁶

VIII. REMONSTRANCE.—In *Indiana* the statutes provide with considerable minuteness for the filing of remonstrances against the petition for drainage before it has been acted upon,⁷ and for

although available on appeal, is an irregularity which cannot be taken advantage of on collateral attack. *McMullen v. State*, 105 Ind. 334.

The Failure of the Clerk to deliver to the commissioners, as provided by statute, a copy of the petition and order fixing the time at which they would report, does not vitiate the report. *Bohr v. Neuenschwander*, 120 Ind. 449.

1. *Blake v. Quivey*, 113 Ind. 124. That the court may in its discretion extend the time, see *Lipes v. Hand*, 104 Ind. 503; *Higbee v. Peed*, 98 Ind. 420.

But the order extending the time "should be made before or on the day first fixed for the filing of the report, so as to apprise those interested in the proceeding, either as petitioners or prospective remonstrants, of the time as changed when the report will be made." *Munson v. Blake*, 101 Ind. 84.

2. *Bohr v. Neuenschwander*, 120 Ind. 449.

3. *Meranda v. Spurlin*, 100 Ind. 380. See also *Roberts v. Gierss*, 101 Ind. 408.

Trifling Discrepancy.—Where the report states in positive terms that the estimated cost will be less than the estimated benefits, it is sufficient although in a tabulated statement attached to the report it is shown that the estimated benefits and the estimated expenses are exactly equal. "The proceedings are not to fail simply because of a trifling inconsistency." *Grimes v. Coe*, 102 Ind. 406.

4. *Anderson v. Baker*, 98 Ind. 587; *Meranda v. Spurlin*, 100 Ind. 380.

5. *Smith v. Smith*, 97 Ind. 273.

6. *Rogers v. Venis*, 137 Ind. 221.

After Expiration of Term.—Such cor-

rection may be made after the close of the term of the Circuit Court at which an order has been made establishing a drain, but before the commissioner to whom the work has been referred has completed the ditch and made his final report. *Steele v. Hanna*, 117 Ind. 333.

Proceedings on Contested Report.—The report is not competent evidence to prove the utility of the drain, etc. *Bohr v. Neuenschwander*, 120 Ind. 449.

As to trial by the court instead of by jury, see *Lipes v. Hand*, 104 Ind. 503; *Baltimore, etc., R. Co. v. Ketting*, 122 Ind. 5.

As to how far the provisions of the civil code are applicable, see *Dukes v. Working*, 93 Ind. 501, and cases cited; *Crume v. Wilson*, 104 Ind. 586; *Zumbro v. Parnin*, 141 Ind. 430.

As to judgment for costs upon a finding and judgment against remonstrants, see *Perkins v. Hayward*, 132 Ind. 95.

Reference for reassessment where the original assessment proves insufficient, see *Rogers v. Voorhees*, 124 Ind. 469.

Sufficiency of special finding by the court, see *Perkins v. Hayward*, 124 Ind. 445.

7. After the docketing of the petition in court, "any person named in such petition as the owner of land shall have ten days, exclusive of Sunday and the day of docketing such action, after such docketing, to file with said court any demurrer, remonstrance, or objection he may have to the form of said petition, or as to why said drainage commissioners, or either of them, on account of their interest in said work or kinship to any person whose lands are affected thereby, should not act in

remonstrances against the report of the drainage commissioners.¹

the matter. After said ten days shall have elapsed the court shall consider such remonstrance, demurrer, or objection, if any, and, if it finds said petition defective, shall dismiss the same at the cost of the petitioner or petitioners, unless the same be amended within a time fixed by the court; *provided* that if at this stage of the proceeding two-thirds in number of the landowners named as such in such petition, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioners. * * * All objections to the petition or the acting of any drainage commissioner not made within said ten days shall be deemed waived." Horner's Ind. Stat., § 4274.

Remonstrance for Mere Irregularity.—A failure to indorse on the petition a date on which it will be docketed is a mere irregularity which does not constitute a ground for remonstrance. Rogers v. Venis, 137 Ind. 221.

Remonstrance by Two-thirds.—A township not named in the petition, but which is subject to assessment therefor, is a "landowner" within the meaning of the provision for a dismissal upon the remonstrance of two-thirds of the landowners. Zumbro v. Parnin, 141 Ind. 430.

After the report of the commissioners it is too late for two-thirds of the landowners to have a dismissal upon their remonstrance, even though the two-thirds consists of new parties brought in by the commissioners' report. Yancey v. Thompson, 130 Ind. 585.

"It is quite clear that nonresident landowners cannot be computed in determining the number necessary to secure the dismissal of a petition. The statute expressly designates the class of landowners whose remonstrance shall prevail against the petition, and the express mention of one thing implies exclusion of all others." Bell v. Cox, 122 Ind. 153.

1. Horner's Indiana Stat., § 4275, provides that, upon the making of the report to the court, ten days, exclusive of the day of filing such report and Sundays, shall be allowed to any owner of lands affected by the work

proposed, and reported benefited or damaged, to remonstrate against the report, and the remonstrance shall be verified by the owner of the land, or by some person on his or her behalf. The statute then specifies ten grounds for remonstrances, and prescribes what course the proceedings shall take if the remonstrance be sustained or dismissed on any or all of the grounds enumerated.

Who may Remonstrate.—One not named in the petition, but who has been admitted as a party before remonstrance is made, has a right to remonstrate. Zumbro v. Parnin, 141 Ind. 430.

A property owner whose land will be injured by the construction of a ditch has a right to remonstrate, although no damages are assessed in his favor and no benefits are assessed against his land. He comes within the description of "any owner of lands affected by the work proposed." Reasoner v. Creek, 101 Ind. 482.

Verification.—If the remonstrance is verified by one or more of the remonstrants, but not by all of them, such verification will be regarded as made by all, and if after the remonstrance is filed those who verified it withdraw therefrom, such act will not operate as a withdrawal of the verification, but this will remain unaffected thereby. Munson v. Blake, 101 Ind. 78.

Time for Filing.—The remonstrance must not only be filed in the clerk's office, but presented to the court within the ten days prescribed by the statute, where such presentation is not prevented by the adjournment of court or other circumstances beyond the remonstrant's control. Gilbert v. Hall, 115 Ind. 549.

A paper which lacks an essential statutory element of a remonstrance cannot be amended into a statutory remonstrance after the expiration of ten days. Morgan Civil Tp. v. Hunt, 104 Ind. 591.

The provision of the statute requiring a remonstrance to be filed within ten days does not apply to cases where all the owner's land which will be affected is not described in the petition, but such cases are governed by the proviso which leaves the entire case open until the notice there specified has been given, and it is error to admit a re-

Stricti Juris.—The right to remonstrate, being a statutory right, must be exercised in strict compliance with the statute.¹

Confined to Ground Stated.—Remonstrants must be confined to the grounds of objection stated in their remonstrance,² and the court may require a remonstrance to be made more specific.³ Objections that are not specifically made at the proper time will not be entertained at a later stage of the case, if they do not go to the jurisdiction.⁴

Irrelevant Matters.—Matters set up in a remonstrance, that are not statutory causes therefor, may be stricken out.⁵

Withdrawal of a Joint Remonstrant.—One or more of several remonstrants may withdraw, but such action will not impair the right of the others to proceed as if the withdrawal had not occurred.⁶

monstrance as to land not described and strike it out as to land described. "The law requires that one trial shall settle the entire controversy and that one remonstrance shall present the entire issue." *Goodwine v. Leak*, 114 Ind. 499.

Sickness No Excuse.—One who was prevented by sickness from filing a remonstrance within the statutory time is not entitled to relief, as the provision of the code whereby the court may, in its discretion, allow a party to file his pleadings after the time limited therefor is not applicable. *Hays v. Tippy*, 91 Ind. 102.

Remonstrance Constitutes Appearance.—"Filing a remonstrance, like filing an answer or other pleading in a case, constitutes an appearance in the case, and so far as the remonstrant is concerned is a waiver of all questions pertaining to the jurisdiction of the court over his person." *Ford v. Ford*, 110 Ind. 91, *citing* *Sunier v. Miller*, 105 Ind. 393; *Green v. Elliott*, 86 Ind. 53; *Schmied v. Keeney*, 72 Ind. 309; *Neff v. Reed*, 98 Ind. 341; *Slaute v. Hollowell*, 90 Ind. 286; and *distinguishing* *Scott v. Brackett*, 89 Ind. 413.

Burden of Proof.—Where a landowner remonstrates on the ground that his land is assessed for too much, the burden of proof on that issue rests upon him, and consequently he may be required to first introduce evidence on the issue. *Rogers v. Venis*, 137 Ind. 221.

1. *Gilbert v. Hall*, 115 Ind. 552; *Morgan Civil Tp. v. Hunt*, 104 Ind. 590.

2. *Updegraff v. Palmer*, 107 Ind. 181; *Higbee v. Peed*, 98 Ind. 420; *Meranda v. Spurlin*, 100 Ind. 380.

Statement of Grounds.—A report of

commissioners need not state when or where they met, and a remonstrance that they "did not meet at the time and place," fixed by the court is too indefinite. *Smith v. Smith*, 97 Ind. 273.

A remonstrance against a report of the commissioners must state the particulars in which the report is not according to law. It is not sufficient to use the general terms of the statute that the report is not "according to law." *Higbee v. Peed*, 98 Ind. 420; *Meranda v. Spurlin*, 100 Ind. 380; *Hudson v. Bunch*, 116 Ind. 63.

A remonstrance upon the ground that the report of the commissioners does not state with sufficient certainty the method of drainage, is too indefinite. *Meranda v. Spurlin*, 100 Ind. 380. See also *Sample v. Carroll*, 132 Ind. 496.

3. It is not error to require a cause of remonstrance to be made more specific, so as to state the lands, compared with the assessments against which the remonstrant's lands are assessed too much. *Higbee v. Peed*, 98 Ind. 420.

4. *Perkins v. Hayward*, 132 Ind. 95. As, for instance, in a motion for new trial, *Goodwine v. Leak*, 127 Ind. 569; or on appeal to the Circuit Court from the final order or judgment of the board of county commissioners establishing a drain under *Horner's Ind. Stat.*, § 4285 *et seq.* *Metty v. Marsh*, 124 Ind. 18. See also *Lipes v. Hand*, 104 Ind. 503; *Chandler v. Beal*, 132 Ind. 596.

5. *Rogers v. Venis*, 137 Ind. 221; *Smith v. Smith*, 97 Ind. 273; *Higbee v. Peed*, 98 Ind. 420; *Anderson v. Baker*, 98 Ind. 587.

6. *Munson v. Blake*, 101 Ind. 78.

Costs.—A remonstrant may be taxed with the costs of litigating those grounds of remonstrance on which he fails.¹

IX. REVIEW OF PROCEEDINGS—1. By Appeal.—Although there is no constitutional right to an appeal from assessments in drainage proceedings,² in most of the states the statutes provide for appeals from the determination of the drainage commissioners or other authorities before whom the proceedings were instituted, and the statutes often specify the questions that may alone be litigated on the trial on appeal.³

1. Rogers v. Venis, 137 Ind. 221.

Nunc pro Tunc Entry.—In *Perkins v. Hayward, 132 Ind. 95*, construing the statutory provision that the remonstrant "shall pay the costs," etc., the court held that a finding and judgment against remonstrants establishing a ditch necessarily involves a judgment for costs, and the failure of the clerk to enter, as a part of the judgment, a judgment for costs, is a mere omission which may properly be corrected by a *nunc pro tunc* entry upon proper notice to remonstrants; and that such notice is waived by appearing and making a counter motion for a modification of the judgment for costs in their favor.

Effect of Withdrawal of Remonstrant.—

Where one of several remonstrants withdraws, he escapes all liability for costs thereafter created in consequence of the remonstrance. *Munson v. Blake, 101 Ind. 78.*

Remonstrant's Success on Appeal.—In proceedings under the Act of March 9, 1875, where a landowner remonstrated on the ground that he would sustain damage, and the issue was found against him before the board of commissioners and in his favor on appeal, he was held entitled to costs upon such issue. *Watkins v. Pickering, 92 Ind. 332.*

2. Yeomans v. Riddle, 84 Iowa 147; State v. Blake, 35 N. J. L. 208.

3. In California it was held, in *Bixler's Appeal, 59 Cal. 550*, that the Supreme Court had no jurisdiction of an appeal from a judgment of the Superior Court upon an appeal from an order of the board of supervisors in a swamp land proceeding.

Illinois.—As to the character of the trial on appeal and the presumption in favor of the correctness of the assessment, see *Briggs v. Union Drainage Dist. No. 1, 140 Ill. 53; Mascall v. Drainage Dist., 122 Ill. 620; Gilker-*

son v. Scott, 76 Ill. 509; Illinois Cent. R. Co. v. East Lake Fork Drainage Dist., 129 Ill. 417; Drainage Com'rs v. Hudson, 109 Ill. 659.

As to the right of trial by jury on appeal to the County Court, see *Mascall v. Drainage Dist., 122 Ill. 620.*

As to the effect of the appeal as a supersedeas, see *Turley v. People, 116 Ill. 433.*

An appeal lies to the Supreme Court from the judgment of the County Court in a proceeding to confirm an assessment. *Havana Tp. Drainage Dist. No. 1 v. Kelsey, 120 Ill. 482.*

In Indiana the statute provides for appeals to the Circuit Court from the doings of county commissioners in proceedings to establish drains. For various matters relating to the proceedings on such appeals, see *Bonfoy v. Goar, 140 Ind. 292; Meranda v. Spurlin, 100 Ind. 380; Denton v. Thompson, 136 Ind. 446; Zigler v. Menges, 121 Ind. 99; Morgan Civil Tp. v. Hunt, 104 Ind. 590; Hardy v. McKinney, 107 Ind. 364; Neff v. Reed, 98 Ind. 341; Meehan v. Wiles, 93 Ind. 52; Anderson v. Caldwell, 91 Ind. 451; Drebert v. Trier, 106 Ind. 510; Donaldson v. Lawson, 126 Ind. 169; Ross v. Davis, 97 Ind. 79; Budd v. Reidelbach, 128 Ind. 145; Mills v. Hardy, 128 Ind. 311; Schneck v. Cobb, 107 Ind. 439; Sunier v. Miller, 105 Ind. 393; Goff v. McGee, 128 Ind. 394; Bachelor v. Cole, 132 Ind. 143.*

Appeals to the Supreme Court, see *Denton v. Thompson, 136 Ind. 446; Racer v. Wingate, 138 Ind. 114; Bleemel v. Shattuck, 133 Ind. 498; Williams v. Stevenson, 103 Ind. 243; Dukes v. Working, 93 Ind. 501; Lipes v. Hand, 104 Ind. 503; Munson v. Blake, 101 Ind. 78; Chandler v. Beal, 132 Ind. 596; Sample v. Carroll, 132 Ind. 496; Higbee v. Peed, 98 Ind. 420; Ford v. Ford, 110 Ind. 89; Metty v. Marsh, 124 Ind. 18; Wright v. Wilson,*

2. By Certiorari.—In General.—In many jurisdictions the proceedings of public officers or boards in establishing drains are reviewable by the common-law writ of certiorari.¹ Its use seems to be confined to cases where the defect in the proceedings is jurisdictional, or where there has been a failure to comply with the essential requirements of the statute.²

95 Ind. 408; Indianapolis, etc., Gravel Road Co. v. Christian, 93 Ind. 360; Sites v. Miller, 120 Ind. 19; Bass v. Elliott, 105 Ind. 517; Bowman v. Ely, 135 Ind. 494; Carr v. Boone, 108 Ind. 241; White v. McGrew, 129 Ind. 83.

Iowa.—As to what classes of persons alone have the right to appeal under the statute, see Lambert v. Mills County, 58 Iowa 666.

Michigan.—As to the jurisdiction of the Supreme Court in chancery on appeal, see Clark v. Teller, 50 Mich. 618.

Minnesota.—As to the sufficiency of the notice of appeal and of the appeal bond, see Anderson v. Meeker County, 46 Minn. 237.

A judgment of the District Court upon appeal, affirming the order of commissioners in drainage proceedings, is not defective because the lands affected are not described therein, where they are sufficiently described in other parts of the record. Dowlan v. Sibley County, 36 Minn. 430.

New York.—Appeals should be taken to the County Court, Matter of Beehler's Petition (Supreme Ct.), 3 N. Y. St. Rep. 486; and thence to the general term of the Supreme Court, Matter of Ryers, 72 N. Y. 1; Burk v. Ayers, 19 Hun (N. Y.) 17; and thence to the court of appeals on questions of law, Matter of Swan's Petition, 97 N. Y. 492.

As to what questions may be reviewed on appeal, see People v. Jefferson County Ct., 55 N. Y. 604; Matter of Draining Swamp Lands, 5 Hun (N. Y.) 116; Matter of New York Cent., etc., R. Co. (Supreme Ct.), 8 N. Y. Supp. 247.

Ohio.—The Probate Court on appeal has power to set aside the verdict of the jury in a proper case and impanel a new jury. Trimble v. Koch, 26 Ohio St. 434. See also Allyn v. Depew, 28 Ohio St. 619.

The statute contemplates that upon trial in the Probate Court the jury may base their verdict upon an actual view of the premises by them. Williams v. Lockoman, 46 Ohio St. 416.

Wisconsin.—All assessments by commissioners are subject to review by the court with a trial by jury. Bryant v. Robbins, 70 Wis. 258. See also State v. Stewart, 74 Wis. 620.

1. For the propriety of the remedy by certiorari in general, see the article CERTIORARI, vol. 5, p. 1; and for a discussion of the office of the writ in connection with its use for the purpose of reviewing drainage proceedings, see Mason, etc., Special Drainage Dist. v. Griffin, 134 Ill. 330.

Not a Substitute for Quo Warranto.—Certiorari cannot be used to test the legal existence of a drainage district. See *supra*, III. *Testing Legal Existence of Drainage District.*

Cases where the Writ was Used which are not cited in the following note are Seibert v. Lovell (Iowa, 1894), 61 N. W. Rep. 197; State v. Lord, 26 N. J. L. 140; State v. Clinton Tp., 39 N. J. L. 656; Craig v. Mackey, 48 N. J. L. 363; People v. Nearing, 27 N. Y. 306.

2. "We are not inclined to reverse such proceedings except for very substantial faults," said the court in Dunning v. Essex Tp., 44 Mich. 518.

Proceedings Quashed.—The proceedings were quashed on certiorari in the following cases: Shaw v. Johnson County, 72 Iowa 763; Shepard v. Johnson County, 72 Iowa 258; Richman v. Muscatine County, 70 Iowa 627; Stout v. Chosen Freeholders, 25 N. J. L. 202; State v. Curtis, 86 Wis. 140; State v. Findley, 67 Wis. 86.

In Michigan certiorari to review proceedings in establishing a drain is expressly allowed and regulated by 3 Howell's Annot. Stat., § 1740, *e. 4*. Proceedings were quashed in Wright v. Rowley, 44 Mich. 557; Kinnie v. Bare, 68 Mich. 625; Robertson v. Baxter, 57 Mich. 127; Corey v. Probate Judge, 56 Mich. 524; Bennett v. Olney, 29 Mich. 734; Lane v. Burnap, 39 Mich. 736; Bench v. Otis, 25 Mich. 29; Taylor v. Burnap, 39 Mich. 739; Strachan v. Brown, 39 Mich. 168; Bullock v. Taylor, 39 Mich. 141; Daniels v. Smith, 38 Mich. 660; Livermore v. Burnap, 38

It is a Discretionary Writ, and should not be allowed where the equity of the case is against it.¹

Laches and Estoppel.—A party desiring a review by certiorari must use reasonable diligence in suing out the writ.² And one who

Mich. 350; *Kroop v. Forman*, 31 Mich. 144; *Purdy v. Martin*, 31 Mich. 455; *Harbaugh v. Martin*, 30 Mich. 234; *Burnett v. Scully*, 56 Mich. 374; *Bixby v. Goss*, 54 Mich. 551; *Bettis v. Geddes*, 54 Mich. 608; *Whiteford Tp. v. Phinney*, 53 Mich. 132; *Chapman v. Clark*, 49 Mich. 305; *Van Buskirk v. Harrod*, 48 Mich. 258; *Reinig v. Munson*, 46 Mich. 138; *Lampson v. Ingham County*, 45 Mich. 150; *Willcheck v. Edwards*, 42 Mich. 105; *Milton v. Wacker*, 40 Mich. 229; *Tireman v. Ruthruff*, 40 Mich. 175; *Whisler v. Lenawee County*, 40 Mich. 591; *Campau v. Charbeneau* (Mich. 1895), 63 N. W. Rep. 435; *Mason v. Detroit, etc., R. Co.*, 104 Mich. 631. Other instances of the use of the writ are *Kinnie v. Bare*, 80 Mich. 345; *Morse v. Williams*, 92 Mich. 250; *Horner v. Biggam*, 36 Mich. 243; *Davison v. Otis*, 24 Mich. 23; *Mabee v. Miner*, 45 Mich. 568; *Loree v. Smith*, 100 Mich. 252.

The Supreme Court will not, on certiorari, exercise an original jurisdiction for the purpose of curing defects in the proceedings for laying out a township drain. Parties aggrieved must first seek redress in the Circuit Court, whence the case may be taken to the Supreme Court on appeal. *Tucker v. Parker*, 50 Mich. 5.

Instances of Fatal Irregularities.—Among the irregularities which have been held fatal on certiorari are:

Failure to give notice of some step in the proceeding as required by statute. *Campau v. Charbeneau* (Mich. 1895), 63 N. W. Rep. 435; *Tireman v. Ruthruff*, 40 Mich. 175; *Milton v. Wacker*, 40 Mich. 229; *Van Buskirk v. Harrod*, 48 Mich. 258; *Reinig v. Munson*, 46 Mich. 138; *Lampson v. Ingham County*, 45 Mich. 150; *Willcheck v. Edwards*, 42 Mich. 105; *Whiteford Tp. v. Phinney*, 53 Mich. 132; *Bettis v. Geddes*, 54 Mich. 608; *Bixby v. Goss*, 54 Mich. 551; *Burnett v. Scully*, 56 Mich. 374; *Daniels v. Smith*, 38 Mich. 660; *Corey v. Probate Judge*, 56 Mich. 524; *Wright v. Rowley*, 44 Mich. 557; *Bullock v. Taylor*, 39 Mich. 141; *Taylor v. Burnap*, 39 Mich. 739; *Strachan v. Brown*, 39 Mich. 168. See also *State v. Lord*, 26 N. J. L. 140.

Or an omission of the record to show affirmatively that such notice was given. *Purdy v. Martin*, 31 Mich. 455; *Lane v. Burnap*, 39 Mich. 736.

Noncompliance with a statute requiring an attempt to obtain a right of way or a release of damages from landowners. *Whisler v. Lenawee County*, 40 Mich. 591; *Bullock v. Taylor*, 39 Mich. 141; *Stout v. Chosen Freeholders*, 25 N. J. L. 202.

Proceedings upon an application not in writing. *Kroop v. Forman*, 31 Mich. 144.

Petition for the drain not signed by the requisite number of interested persons. *Richman v. Muscatine County*, 70 Iowa 627; *Shepard v. Johnson County*, 72 Iowa 258.

Omission of the order laying out a ditch to show that it had first been determined that it would conduce to the public welfare, etc. *State v. Curtis*, 86 Wis. 140.

Joinder of Plaintiffs.—In *Iowa* several owners of land subject to assessment may join as plaintiffs in certiorari to quash the proceedings of the county supervisors. *Richman v. Muscatine County*, 70 Iowa 627.

1. *Roediger v. Wayne County*, 40 Mich. 745; *Hagar v. Yolo County*, 47 Cal. 222. See also *Horner v. Biggam*, 36 Mich. 243.

But it seems that the question cannot properly be considered on a motion to dismiss the writ. *Loree v. Smith*, 100 Mich. 252.

2. *State v. Blake*, 35 N. J. L. 208, holding that where there has been unreasonable delay, the writ may be quashed upon the argument of the merits. *State v. Clinton Tp.*, 39 N. J. L. 656. See also *Chapman v. Drainage Com'rs of Dist. No. 3*, 28 Ill. App. 17.

Establishment of Drain Distinguished from Assessment.—In *Shepard v. Johnson County*, 72 Iowa 258, the assessment and levy of a ditch tax was annulled on certiorari, although the court conceded that if the writ had been brought to annul the establishment of the ditch it would have been too late.

Excusable Delay.—The right to complain of proceedings to lay out a ditch

is cognizant of the irregularities, and participates in the proceedings or fails to object, cannot afterward have the proceedings quashed to the prejudice of those who were misled by his conduct.¹

Separate Proceedings cannot be reviewed on the same writ.²

Petitioner without Interest.—If it nowhere appears in the proceeding to obtain, or in the return to, the writ, that the petitioner has any interest to be affected, the writ will be dismissed as improvidently issued.³

Harmless Irregularity.—And it will be dismissed where the irregularity complained of was not prejudicial.⁴

3. On Collateral Attack—Mere Irregularities.—Proceedings for the establishment of drains or assessment of benefits cannot be collaterally attacked for mere irregularities.⁵ Thus they will not be set aside or enjoined on a bill in equity filed for that purpose,⁶ or to quiet title against a purchaser of the lands

is not lost by delay where the cause of complaint does not develop itself until after the work is done and paid for. *Wright v. Rowley*, 44 Mich. 557.

1. See *Roediger v. Wayne County*, 40 Mich. 745; *Mabee v. Miner*, 45 Mich. 568; *Hagar v. Yolo County*, 47 Cal. 223. Compare *Loree v. Smith*, 100 Mich. 252.

2. *Bullock v. Taylor*, 39 Mich. 141.

3. *Morse v. Williams*, 92 Mich. 250.

4. *Horner v. Biggam*, 36 Mich. 243; *Davison v. Otis*, 24 Mich. 23.

5. *McMullen v. State*, 105 Ind. 334; *Young v. Sellers*, 106 Ind. 101; *Prezinger v. Harness*, 114 Ind. 491; *Prezinger v. Fording*, 114 Ind. 599; *Donalson v. Lawson*, 126 Ind. 169; *Perkins v. Hayward*, 132 Ind. 95; *Riebling v. People*, 145 Ill. 120; *Clark v. Teller*, 50 Mich. 618; *Craig v. Mackey*, 48 N. J. L. 363; *Muskego v. Drainage Com'rs*, 78 Wis. 40. See also *Cox v. Bird*, 88 Ind. 142; *Simonton v. Hays*, 88 Ind. 70; *People v. Jones*, 137 Ill. 35; *Hall v. Slaybaugh*, 69 Mich. 484.

No Appointment of Guardian ad Litem.—An assessment is not void, although erroneous, because made without the appointment of a guardian *ad litem* for infant landowners. *McBride v. State*, 130 Ind. 525.

Motion in the Cause.—An attack by motion in the same proceeding is not a collateral but a direct attack. *Peters v. Griffee*, 108 Ind. 121. But compare *Muskego v. Drainage Com'rs*, 78 Wis. 40, expressly holding that on a motion to vacate assessments the right to relief must rest on the same grounds

as in a suit in equity to obtain that relief.

Action for Obstructing Ditch.—Mere irregularities in the proceedings are no defense in an action for obstructing a ditch, even where they would have been fatal if seasonable objection had been taken by the proper persons. *Freeman v. Weeks*, 48 Mich. 255.

6. *Young v. Sellers*, 106 Ind. 101; *Kleyla v. Haskett*, 112 Ind. 515; *Millikan v. Wall*, 133 Ind. 51; *Sunier v. Miller*, 105 Ind. 393; *Donalson v. Lawson*, 126 Ind. 169; *Zabel v. Harshman*, 68 Mich. 273; *Clark v. Teller*, 50 Mich. 618; *Darst v. Griffin*, 31 Neb. 668; *Montgomery v. Wasem*, 116 Ind. 343, and *Kepler v. Wright*, 136 Ind. 77, where the notice was merely defective, on which point see also *Kilian v. Andrews*, 130 Ind. 579. See further *Baker v. Clem*, 102 Ind. 109; *Harwood v. Huntoon*, 51 Mich. 639; *Reynolds v. Milksgrove Special Drainage Dist.*, 34 Ill. App. 302.

“Where the proceedings are not void a suit for injunction cannot be maintained, no matter how erroneous the proceedings may be.” *Per Elliott, J.*, in *Sunier v. Miller*, 105 Ind. 395, *citing* *Cauldwell v. Curry*, 93 Ind. 363; *Smith v. Clifford*, 99 Ind. 113.

“It has been decided in a very great number of cases that where the proceedings are not void an injunction will not lie.” *Jones v. Cardwell*, 98 Ind. 332, *citing* *Terre Haute v. Beach*, 96 Ind. 143; *Hume v. Little Flat Rock Drainage Assoc.*, 72 Ind. 499; *Caskey v. Greensburgh*, 78 Ind. 233; *Houk v.*

affected at a tax sale;¹ nor can a landowner successfully defend an action to recover an assessment.²

Jurisdictional Defects.—Proceedings that are not merely irregular but void by reason of jurisdictional defects may be overthrown on collateral attack.³ Under such circumstances their invalidity may be shown on a bill for injunction,⁴ or to remove a cloud on title,⁵ or to set aside an assessment⁶ or to restrain a

Barthold, 73 Ind. 21; *Madison v. Smith*, 83 Ind. 502; *Schmidt v. Wright*, 88 Ind. 56; *Catterlin v. Frankfort*, 87 Ind. 45; *Ricketts v. Spraker*, 77 Ind. 371; *Grimwood v. Macke*, 79 Ind. 100.

1. *Brosemer v. Kelsey*, 106 Ind. 504.

2. *Kennedy v. State*, 124 Ind. 239; *State v. Jackson*, 118 Ind. 553; *McMullen v. State*, 105 Ind. 334; *Johnson v. State*, 116 Ind. 374; *Otis v. DeBoer*, 116 Ind. 531; *Indianapolis, etc., Gravel Road Co. v. State*, 105 Ind. 37; *Wabash Eastern R. Co. v. East Lake Fork Drainage Dist.*, 134 Ill. 384; *Riebling v. People*, 145 Ill. 120; *Craig v. Mackey*, 48 N. J. L. 363.

In *McBride v. State*, 130 Ind. 525, the court said: "As this is an action to enforce the assessments, the attack here made is collateral and cannot prevail unless the defects in the proceedings urged against their collection are of such a character as to render the assessments void."

3. *Scudder v. Jones*, 134 Ind. 547; *Brosemer v. Kelsey*, 106 Ind. 504, where there was no notice; *McCollum v. Uhl*, 128 Ind. 304.

4. *Vizzard v. Taylor*, 97 Ind. 90, where the notice did not contain the names of the owners of the land as required by statute; *Tomlin v. Newcomb*, 70 Mich. 358; *Kinyon v. Duchene*, 21 Mich. 498. See also *Young v. Wells*, 97 Ind. 410. The Indiana case first above cited was distinguished in *Peters v. Griffiee*, 108 Ind. 121.

Averment of Want of Notice.—Where a ditch is ordered and established by a court of general jurisdiction, a complaint to restrain its construction and the collection of an assessment, on the ground, as alleged therein, that the plaintiff "never had any notice whatever of the proposed drainage, or of any proceedings under said petition, and never had any opportunity afforded to appear and contest the same," does not sufficiently allege a failure to give the notice required by statute. The complaint should allege what, if anything, is shown by the record of the

court in relation to notice. *Baltimore, etc., R. Co. v. North*, 103 Ind. 486. On the same point, see *McCollum v. Uhl*, 128 Ind. 304.

And in *Kleyla v. Haskett*, 112 Ind. 516, the court said: "Whether notices are or are not sufficient or are not such as are required by law, is a question to be decided by the court, and not by the pleader."

Improper Joinder of Plaintiffs.—Two persons owning separate tracts of land assessed for drainage cannot prosecute a joint action to restrain the collection of the assessments. *Jones v. Cardwell*, 98 Ind. 331.

Waiver of Jurisdictional Defect.—Although notice of the proceedings is usually a fundamental matter, it is so effectually waived by an appearance that injunction will not then lie because no notice was given to the party appearing. *Sunier v. Miller*, 105 Ind. 393.

Estoppel.—It was held in *Kellogg v. Ely*, 15 Ohio St. 64, that even if the proceedings are wholly illegal and void, a party who has stood by and failed to resort to any remedy until after the ditch has been constructed across his lands, cannot maintain a bill to enjoin collection of an assessment against him.

In Ohio, Rev. Stat., § 6708 provides that the proceedings may be reviewed by petition in error and reversed for errors appearing in the record. But where the proceedings are regular on their face, and it is shown *dehors* the record that there was no jurisdiction, the statutory remedy does not apply and an injunction may be granted. *Haff v. Fuller*, 45 Ohio St. 495. See also *Sessions v. Crunkilton*, 20 Ohio St. 349; *Baltimore, etc., R. Co. v. Wagener*, 43 Ohio St. 75.

5. *Killian v. Andrews*, 130 Ind. 579; *Frost v. Leatherman*, 55 Mich. 33. See also *Gillett v. McLaughlin*, 69 Mich. 547.

6. *Troyer v. Dyar*, 102 Ind. 396; *Scudder v. Jones*, 134 Ind. 547; *Alger*

tax sale to satisfy delinquent assessments.¹

X. COLLECTION OF ASSESSMENTS—1. The Remedy.—Assessments upon property benefited constitute a lien thereon and are enforced by a bill or complaint for foreclosure and sale.²

v. Slaght, 64 Mich. 589; *Frost v. Leatherman*, 55 Mich. 33; *Curran v. Sibley County*, 47 Minn. 313.

Requisite Averments in Bill.—The bill should in its body or by exhibits put the court in a position to determine the precise injury complained of. *Barker v. Vernon Tp.*, 63 Mich. 516.

Joinder of Plaintiffs.—Several land-owners cannot join in a bill to set aside drain taxes levied on their several tracts after the charges have assumed a new shape as individual assessments on the county roll, where there is nothing to show their relative positions. *Barker v. Vernon Tp.*, 63 Mich. 516.

Joinder of Defendants.—In *Michigan* a township has no interest sufficient to justify its joinder as a defendant in a suit to set aside a drain tax. *Barker v. Vernon Tp.*, 63 Mich. 516; *Emerson v. Walker Tp.*, 63 Mich. 483, where the bill was dismissed as to the township on a general demurrer for want of equity.

In such a suit the contractors for making the drain are not necessary parties defendant. *Palmer v. Rich*, 12 Mich. 414.

In *Frost v. Leatherman*, 55 Mich. 33, it was held that the township treasurer and the drain commissioner might properly be made defendants even though the tax had already been returned as unpaid to the county treasurer.

Complaint and Answer.—In an action to annul an assessment the complaint set forth certain irregularities and alleged that they did not appear on the face of the proceedings and would not necessarily appear in any proceedings to enforce the assessment. The answer denied the existence of the irregularities specified, but did not deny the other allegations above mentioned. It appeared on the trial that the assessment was invalid by reason of the irregularities alleged, and also by reason of an error appearing on the face of the proceedings. It was held that the court properly refused to dismiss the complaint. *Averell v. Day*, 26 Hun (N. Y.) 319.

1. *Palmer v. Rich*, 12 Mich. 414.

2. See the cases cited in the following notes to this subdivision.

Collection of Assessments.—See also *Reclamation Dist. No. 124 v. Coghill*, 56 Cal. 607, where under Cal. Pol. Code, § 3466, it was held that any person claiming an interest in the land might appear and answer after the publication of summons and posting, as it was the evident design of the statute to foreclose all right or claim in the land.

Trial by Jury.—The suit being of an equitable nature, there is no constitutional right to a trial by jury. *Laverty v. State*, 109 Ind. 217.

In *California* two assessments upon the same land at different times may be recovered in the same action. *Swamp, etc., Land Dist. No. 110 v. Feck*, 60 Cal. 403.

Assessment against Public Highway.—In *Illinois*, although the usual remedy is by foreclosure, it was held in *Highway Com'rs v. East Lake Fork Drainage Dist.*, 127 Ill. 581, that an assessment against public roads could be collected by an action of debt against the highway commissioners, payment of the judgment therein to be enforced by mandamus. See also *State v. Thompson*, 109 Ind. 353. But as to the easement of a turnpike company, see *Indianapolis, etc., Gravel Road Co. v. State*, 105 Ind. 37.

Lien on Railroad.—In *Illinois*, upon foreclosure of a lien on a railroad running through the drainage district, it is proper to decree a sale of that portion of the road within the district. *Wabash Eastern R. Co. v. East Lake Fork Drainage Dist.*, 134 Ill. 384. See *Illinois Cent. R. Co. v. East Lake Fork Drainage Dist.*, 129 Ill. 417, for the form of execution on the judgment.

In *Indiana* it was held by a divided court, *following Louisville, etc., R. Co. v. State*, 122 Ind. 443, that the right of way of a railroad could not be sold to satisfy a lien, but that a personal judgment could be entered against the company. *Louisville, etc., R. Co. v. State*, 8 Ind. App. 377.

2. Party Plaintiff.—The action is usually brought in the name of the people for the use of the corporate authorities entitled to the fund.¹

3. Necessary Allegations.—It is sufficient and also seems to be necessary to allege all the facts showing that the assessment and the proceedings prior thereto were according to law.²

1. Illinois.—In *Sennott v. Moredock*, etc., Drainage Dist. No. 1, 155 Ill. 96, it was held that the bill to foreclose should be prosecuted in the name of the people of the state of Illinois for the use of the drainage district, and not in the name of the district. But the action having been brought in the name of the district, judgment for the plaintiff was reversed with leave to amend. See also *Gauen v. Moredock*, etc., Drainage Dist. No. 1, 131 Ill. 446.

In *Indiana* the action is brought in the name of the state for the use of the drainage commissioner, *Stafford v. State*, 12 Ind. App. 540. See also *Smith v. State*, 131 Ind. 441.

If the complaint shows beyond question that the suit is in the name of the state for the use of the commissioner to enforce a ditch assessment, the mere fact that the commissioner has styled himself "relator" therein does not change the character of the action nor impair the legal effect of material averments. *McKinney v. State*, 101 Ind. 355.

In *California* actions brought under the provisions of the Political Code should be instituted in the name of the reclamation district. *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306; *Swamp Land Dist. No. 307 v. Gwynn*, 70 Cal. 566; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635. See also *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104.

The district is the real party in interest. *Reclamation Dist. No. 3 v. Parvin*, 67 Cal. 501; *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54.

But actions brought under the provisions of the Act of 1868 were in the name of the people. *People v. Haggins*, 57 Cal. 579; *People v. Hagar*, 52 Cal. 171. See also *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54.

2. For complaints held sufficient, see *Highway Com'rs v. East Lake Fork Drainage Dist.*, 127 Ill. 581; *State v. Angert*, 127 Mo. 456; *Kennedy v. State*, 124 Ind. 239; *Louisville, etc., R. Co. v. State*, 122 Ind. 443; *Wishmier v. State*,

110 Ind. 523; *Chaney v. State*, 118 Ind. 494; *Johnson v. State*, 116 Ind. 374; *Hackett v. State*, 113 Ind. 532; *Deegan v. State*, 108 Ind. 155; *Pickering v. State*, 106 Ind. 228; *McKinney v. State*, 101 Ind. 355; *Smith v. Clifford*, 99 Ind. 113; *Neiman v. State*, 98 Ind. 58; *Albertson v. State*, 95 Ind. 370.

California.—In *Reclamation Dist. No. 3 v. Parvin*, 67 Cal. 501, the court said: "The complaint alleges that the commissioners jointly viewed the lands in the district, and jointly assessed upon each and every acre to be reclaimed or benefited thereby the amount of the assessment in proportion to the whole expense and to the benefits to result from the works of reclamation, and that they made a list showing the amount of the charges assessed against each tract of land in the district, with other necessary particulars. This we think was sufficient." See also *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54; *People v. Haggins*, 57 Cal. 579.

In *Indiana* it was formerly held substantially that the complaint must state facts showing that the provisions of the statute had been essentially complied with, from the commencement of the original proceedings for the establishment and construction of the ditch to the last act necessary to be performed therein. *Shaw v. State*, 97 Ind. 23; *Wishmier v. State*, 97 Ind. 160. See also *Crist v. State*, 97 Ind. 389; *Albertson v. State*, 95 Ind. 370; *Smith v. Clifford*, 83 Ind. 520. But that rule has been materially modified. In *Kennedy v. State*, 109 Ind. 240, the following language of the court in *Lavery v. State*, 109 Ind. 217, was quoted with approval: "In suits for the collection of drainage assessments * * * all that the complaint of the plaintiff's relator need state or show of or concerning the original proceedings and judgment for the establishment of the ditch are: (1) that some notice was given of the filing of the petition for the ditch; (2) the filing of such petition; (3) the report of the commis-

4. Defenses.—In a suit to enforce an assessment mere irregularities in the assessment proceedings are no defense.¹

sioners of drainage, of the benefits and damages assessed; (4) that such report was approved and confirmed by the judgment of the court; and (5) a copy of the assessment against the defendant in all cases must be either set out in or filed with and made part of such complaint." See also *Ross v. State*, 119 Ind. 90; *Moss v. State*, 101 Ind. 321; *State v. Myers*, 100 Ind. 487; *State v. Turvey*, 99 Ind. 599.

The notice must be directly alleged in the complaint, and the filing of a copy of the proceedings from which it appears that due notice was given is not alone sufficient. *Jackson v. State*, 103 Ind. 250.

A *Bad Answer* will, on demurrer, be sufficient for a bad complaint. *Scott v. State*, 89 Ind. 368; *State v. Myers*, 100 Ind. 487.

1. See *supra*, IX. 3. *On Collateral Attack*.

Nul Tiel Corporation is a proper plea in a suit by a corporate body when it is denied that there is any such

body, but proof that the plaintiff is a *de facto* corporation is sufficient to overcome the plea. *Osborn v. People*, 103 Ill. 224.

In **California** the statute provides no opportunity for the owner of the land assessed to be heard in the original proceedings as to the equality of the assessment according to benefits, and he may show the inequality as a defense in an action to enforce the assessment. *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306.

It is not a ground of demurrer that the complaint does not show that the plaintiff had the legal capacity to sue. The omission can be taken advantage of only by answer. *Swamp, etc., Land Dist. No. 110 v. Feck*, 60 Cal. 403.

Indiana.—For various alleged defenses held insufficient, see *Stafford v. State*, 12 Ind. App. 540; *Wilson v. State*, 9 Ind. App. 696; *Racer v. State*, 131 Ind. 393; *Hackett v. State*, 113 Ind. 532; *Indianapolis, etc., Gravel Road Co. v. State*, 105 Ind. 37.

DRUGGISTS.

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I. INDICTMENT—1. Generally.—Where by statute it is made the duty of a druggist to preserve all prescriptions compounded by him or his employees, and to produce them in court or before any grand jury whenever thereto lawfully required, and a failure to comply is made a misdemeanor, an indictment charging the offense in the language of the statute is sufficient.¹ So, also, where a druggist is required by statute to be a registered pharmacist, an indictment for selling drugs without a license, following the language of the statute, is sufficient.²

2. Joinder of Defendants.—Two defendants may be indicted jointly for engaging in the business of retailing drugs and medicines without a license.³

II. CIVIL ACTIONS—1. Introductory Statement.—A civil action for damages will lie against a druggist who has by mistake sold a poison instead of the medicine called for.⁴

1. *State v. Davis*, 108 Mo. 666.

Statute must be Specifically Applied.—The general rule that it is sufficient in a statutory offense that the indictment charges the crime in the language of the statute, does not mean that it is sufficient to copy the statute into the indictment, or even where a form is prescribed that it is sufficient to simply fill the blanks. The indictment must make a specific application of the terms of the statute to the case in hand. *State v. Crooker*, 95 Mo. 389.

2. *People v. Rontey*, 117 N. Y. 624; *State v. Enoch*, 26 W. Va. 253.

Duplicity.—Such an indictment will not be held void for duplicity because it charges that the defendant, "not being a registered pharmacist known as a 'graduate in pharmacy,' or as a 'licentiate in pharmacy' [as meant by a certain act], did unlawfully open

and conduct a certain pharmacy and store for retailing, dispensing, and compounding medicines and poisons, and not being registered according to the requirements of the above mentioned title, did then and there unlawfully keep open shop for the retailing and dispensing of such medicines and poisons." *People v. Rontey*, 117 N. Y. 624, 4 N. Y. Supp. 235.

3. "The defendants are properly joined in the indictment. If more persons than one engage in the doing of a criminal thing in such a way as to make each one guilty of the crime, they may be indicted jointly, not necessarily in several counts, but in a single count." *State v. Forcier*, 65 N. H. 42; 1 Bish. Cr. Proc., § 467; 1 Whar. Cr. Law, § 429. See generally, upon this subject, the article INDICTMENTS.

4. *Davis v. Guarneri*, 45 Ohio St.

2. Nature of Action.—The action is one of tort, and where the common-law system still prevails, the proper form of action is case.¹

3. Allegations.—In an action against a druggist for selling a poison instead of a harmless medicine, which poison is administered and causes death or injury, the elements which go to make up the right of action should all be alleged in the declaration or complaint, such as the negligence of the defendant, the reliance of the plaintiff upon the defendant's care, etc.²

470; *Norton v. Sewall*, 106 Mass. 144; *Hansford v. Payne*, 11 Bush (Ky.) 380; *Hargrave v. Vaughn*, 82 Tex. 347; *Brunswick v. White*, 70 Tex. 504; *Walton v. Booth*, 34 La. Ann. 913; *McCubbin v. Hastings*, 27 La. Ann. 713; *Brown v. Marshall*, 47 Mich. 576; *Gwynn v. Duffield*, 61 Iowa 64; *Smith v. Hays*, 23 Ill. App. 244; *Beckwith v. Oatman*, 43 Hun (N. Y.) 265; *Thomas v. Winchester*, 6 N. Y. 397; *Minner v. Scherpich* (Brooklyn City Ct.), 5 N. Y. St. Rep. 851; *Lyons v. Laskey*, 5 Montreal L. Rep. 5. See, for a full description of this subject, Am. and Eng. Encyc. of Law, title DRUGGISTS.

1. See *Brown v. Marshall*, 47 Iowa 576.

2. *Beckwith v. Oatman*, 43 Hun (N. Y.) 265. In this case the complaint contained no allegation of negligence, and no testimony was given by the plaintiff tending to prove negligence, other than such as was given to show that the prescription had not been properly filled or put up by defendant's clerk.

What Are Sufficient Allegations of Negligence.—In an action for damages against a druggist for death by improperly compounding a prescription, the petition alleged that the death of the deceased was caused by the negligence of the defendant's clerk, and that the defendant might have prevented the act complained of. It was held that the use of the word "fault" was not necessary to fix the responsibility upon him. *McCubbin v. Hastings*, 27 La. Ann. 715.

Action against Both Master and Servant.—In an action by a parent against a firm of druggists and their clerk for damages caused by negligence of the clerk in filling a prescription, the petition alleged the cost of medicine, medical attendance, and cost of care of the child. It was held that such a petition alleged facts which would

entitle the plaintiff to maintain an action against the masters as well as the servant for injuries caused by the poisonous drug. *Hargrave v. Vaughn*, 82 Tex. 350.

Reliance on Defendant's Representations.—In an action against druggists for the death of the plaintiffs' child, caused by negligently selling plaintiff poison for a harmless medicine, the petition alleged facts showing the relation between plaintiff as customer and defendants as druggists, the sale and delivery of the morphine as quinine, and that in reliance upon the declaration of the druggists' clerk that the drug was quinine, and believing it to be such, the plaintiffs administered it to their child, from the effect of which it died. Such petition was held to state a good cause of action. *Brunswick v. White*, 70 Tex. 507.

Selling Chloroform to Minor.—A declaration in an action against a druggist for death of a minor son from chloroform sold him by the druggist, which fails to allege that the minor was inexperienced in the use of chloroform, that there was anything in his character or disposition rendering it dangerous to put the chloroform in his hands, or that he was ignorant of its use, is bad on demurrer for insufficiency. *Meyer v. King*, 72 Miss. 1.

Failure to Label Drug "Poison."—In a civil action against a druggist for causing death by selling a poison for a medicine, an averment in the petition that the defendant by his agent negligently put up and sold a poisonous drug, instead of a harmless medicine called for, is sufficient to authorize proof that such drug was not labeled "poison" as required by statute. "The plaintiff, in the case at bar, having alleged that the defendant carelessly sold and delivered to the plaintiff a poisonous drug for a harmless medicine, could safely rest the issue upon

Contributory Negligence.—The authorities on the question whether plaintiff must allege that he himself was free from contributory negligence, in an action against a druggist for selling a dangerous drug by which he was injured, are conflicting.¹ It is apprehended, however, that the better doctrine is that such allegation will not be necessary.²

4. Survival of Action.—The right of action against a druggist for selling a drug which causes death, instead of the medicine called for, survives to the personal representatives of the deceased.³

such averment. To plead specially all the facts and circumstances from which the negligence could be inferred would be to plead evidence instead of facts." *Davis v. Guarnieri*, 45 Ohio St. 485.

Instructions.—Where by statute it is made unlawful to sell a poisonous drug without labeling it "poison," it is not error for the court, in the trial of a civil action against a druggist for death caused by so selling a poison for a harmless medicine, to call attention to such statute. *Davis v. Guarnieri*, 45 Ohio St. 471.

"It was a question fairly addressed to the jury, in determining the issue of negligence, whether the omission to label the fatal drug contributed to the wrong complained of, and such omission was certainly none the less a negligent act because it is denounced

as a crime by the statute." *Davis v. Guarnieri*, 45 Ohio St. 486. See also *Fisher v. Golladay*, 38 Mo. App. 531.

1. Thus in *Rabe v. Sommerbeck* (Iowa, 1895), 63 N. W. Rep. 458, it was held that the plaintiff must aver and prove a want of negligence on his part contributing to the injury complained of. *Contra*, in *Meyer v. King*, 72 Miss. 1, it was held that in such action contributory negligence is a defense and the declaration need not aver its absence.

2. See article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 1.

3. *Hansford v. Payne*, 11 Bush (Ky.) 380; *Norton v. Sewall*, 106 Mass. 144; *Davis v. Guarnieri*, 45 Ohio St. 470; *Hackett v. Pratt*, 52 Ill. App. 346. See also article DEATH.

DRUNKENNESS.

I. THE COMPLAINT, 229.

II. INDICTMENT, 230.

I. THE COMPLAINT.—Where drunkenness is made an offense by statute, the complaint charging one with such offense should follow the general language of the statute, since the words by which the offense is created and defined are fully descriptive of it and are technical.¹

1. *Com. v. Boon*, 2 Gray (Mass.) 74; *Stratton v. Com.*, 10 Met. (Mass.) 217.

A complaint alleging that on a day named the defendant "was guilty of the crime of drunkenness by the voluntary use of intoxicating liquor," sufficiently charges the statutory offense. *Com. v. McNamara*, 116 Mass. 340.

Where a complaint and warrant charged that the defendant "was indecently drunk" contrary to the provisions of the act, etc., it was held that he was sufficiently charged with the offense defined in such act by the words "intoxicated under such circumstances as to amount to a violation of decency." *Alexander v. Card*, 3 R. I. 145.

Common Drunkard.—Where being a common drunkard is expressly made an offense by the statute, a complaint alleging that on divers days and times a person had been drunk and intoxicated by the voluntary and excessive use of intoxicating liquors, and that he was on a day certain a common drunkard, is sufficient. *Com. v. Boon*, 2 Gray (Mass.) 74. And see *State v. Kelly*, 12 R. I. 535.

Under a provision that "no person shall be fined or imprisoned for drunkenness except as a common drunkard," a complaint which alleges that the respondent, at, etc., on, etc., was found in a state of intoxication, is insufficient. *State v. Otis*, 42 N. H. 72.

A complaint does not sufficiently charge the offense of being a common drunkard by averring that the defendant "on divers days and times, not

less than three times within six months last past, was drunk by the voluntary use of intoxicating liquor, and so, on the day of making this complaint, was a common drunkard." *Com. v. Whitney*, 5 Gray (Mass.) 85. This case is distinguished from *Com. v. Boon*, 2 Gray (Mass.) 74.

On the trial of a complaint which alleges that on a day specified the defendant "was and is a common drunkard, having been at divers times since said day drunk and intoxicated by the voluntary and excessive use of intoxicating liquors," the evidence in support of the charge must be confined to acts of the defendant done on a single day. Such complaint alleges in proper form that defendant was a common drunkard on the day specified, but does not properly allege that he was such at any other time. *Com. v. Foley*, 99 Mass. 499.

Found Intoxicated.—Where a statute punishing intoxication contains the words "found intoxicated," in the description of the offense, a complaint which alleges that on a specified day the defendant "was drunk and intoxicated, whereby he was disabled and deprived of his reason," but does not aver that he was "found" in that condition, is insufficient. *State v. Bromley*, 25 Conn. 8.

So, also, where a complaint alleged that the respondent "became and was intoxicated by the use of intoxicating liquor," it was held on demurrer that no crime was charged, since by statute it was made an offense to be "found,"

Former Conviction.—Where a statute imposes a higher penalty upon a second or third conviction for drunkenness, it makes the former conviction a part of the description and character of the offense intended to be punished, and a complaint which fails to set forth the former convictions is insufficient.¹

II. INDICTMENT—Generally.—An indictment for open and notorious drunkenness, which avers that the defendant was openly and notoriously drunk upon the day stated in the indictment, and on divers other days before that time, is sufficient.² And an averment that in or at a town named, the defendant was openly drunk to the disturbance of the public peace, is good.³ A charge of drunkenness on a specified day and on divers other days and times not specified, is legally a charge of a single act of drunkenness.⁴

Former Conviction.—In an indictment for a second drunkenness, an averment that the defendant, at a certain time, and before a certain court, “was duly and legally convicted of the crime of drunkenness committed at” a certain time and place, is a sufficient allegation of a first conviction.⁵

Publicity.—Where drunkenness is no offense when private, but becomes so by being exposed to public view so as to become a nuisance, it must be so charged in the indictment.⁶ An indictment under a statute making drunkenness in a public place punishable should also describe the place with reasonable certainty, so that the court may see that it is a public place within the meaning of the statute,⁷ and the indictment will not be sufficient if the place be

not to “be,” intoxicated. *State v. Austin*, 62 Vt. 291.

1. Such complaint does not fully and substantially describe to the defendant the offense punishable with the higher penalty. *Com. v. Harrington*, 130 Mass. 35.

As to former convictions being a part of the description, see also *Tuttle v. Com.*, 2 Gray (Mass.) 505; *Com. v. Holley*, 3 Gray (Mass.) 458.

2. *Tipton v. State*, 2 Yerg. (Tenn.) 542.

Force and Arms.—It is not a sufficient reason to arrest the judgment, that the indictment did not charge the offense to have been committed with force and arms. *Tipton v. State*, 2 Yerg. (Tenn.) 542.

Bad Presentment.—A presentment charging that Robert Smith was, on the 5th of March, 1839, unlawfully, openly, publicly, and notoriously drunk, was held bad, as being an insufficient description of the offense. *Smith v. State*, 1 Humph. (Tenn.) 396.

3. *Young v. State*, 10 Lea (Tenn.) 166.

4. *Hutchison v. State*, 5 Humph. (Tenn.) 142.

5. It may be supported by a copy of a record of a conviction of the crime of drunkenness by the voluntary use of intoxicating liquor. *Com. v. Miller*, 8 Gray (Mass.) 484.

6. It must be so charged and the jury must so find it, before the court can render judgment. *State v. Waller*, 3 Murph. (N. Car.) 229.

7. *State v. Waggoner*, 52 Ind. 482; *State v. Welch*, 88 Ind. 308.

An indictment for being found in a public place in a state of intoxication, describing the place as “a public street, highway and sidewalk, situated in” a county named, “and state of Indiana,” was held to sufficiently describe a public place. *State v. Waggoner*, 52 Ind. 481.

A “public place,” as intended by such a statute, is a place where all persons are entitled to be. *State v. Waggoner*, 52 Ind. 482.

Places Held to be Public.—A *Public Highway*.—*State v. Moriarty*, 74 Ind. 103.

only generally stated as "a certain public place."¹ So an affidavit charging the offense of unlawful intoxication must, in addition to alleging it to have been in a public place, allege the kind or character of the place.²

Amendment.—Where the time alleged in the information as the day of the intoxication was more than thirty days (the period of limitation for prosecuting the offense) before the information was exhibited in court, the state was allowed to change the allegation to a time within the statutory period.³

Railway Depot.—Pratt v. Brown, 80 Tex. 608.

Grand Jury Room while Jury in Session.—Murchison v. State, 24 Tex. App. 8.

1. State v. Welch, 88 Ind. 308.

This is an exception to the rule that an offense may be charged in the language of the statute defining it. State v. Welch, 88 Ind. 308.

2. Rosenstein v. State, 9 Ind. App. 290.

3. State v. White, 64 Vt. 372.

Difference in Amendment of Indictments and Informations.—"Indictments are found upon the oaths of a jury, and ought to be amended only by themselves, but informations are as declarations in the king's suit. An officer of the Crown has the right of framing them originally; and may, with leave, amend in like manner as any plaintiff may do." Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2569. And see *State v. White*, 64 Vt. 373.

DUELLING.

I. DUEL RESULTING FATALLY, 232.

II. SENDING, ACCEPTING, OR CARRYING CHALLENGE, 232.

1. *Jurisdiction*, 232.
2. *Requisites of Indictment*, 233.
 - a. *For Sending a Challenge*, 233.
 - b. *For Carrying a Challenge*, 234.

I. DUEL RESULTING FATALLY.—Where a duel is actually fought and results fatally the offense is murder, and the indictment is as in the case of homicide.¹

II. SENDING, ACCEPTING, OR CARRYING CHALLENGE—1. **Jurisdiction.**—A challenge to fight a duel is indictable in the state where the challenge is given although the place of meeting is in another state,² and the county of such state in which the challenge was given must be averred.³

1. See article HOMICIDE.

Indictment of Deceased Person's Second.—The person who acted as the second of the deceased person in such duel may be convicted of murder on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned. *Reg. v. Cuddy*, 1 C. & K. 210, 47 E. C. L. 210. See also 1 Hank P. C. Ch., § 21.

2. *Com. v. Boott*, Thach. Cr. Cas. (Mass.) 390; *State v. Taylor*, 3 Brev. (S. Car.) 243; *Ivey v. State*, 12 Ala. 276. See also *State v. Cunningham*, 2 Spears (S. Car.) 246.

“A challenge to fight a duel out of the state is indictable for the same reason that a challenge to fight in the state is, because its tendency is to break the peace of the state.” *State v. Farrier*, 1 Hawks (N. Car.) 487.

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post office in a street in Westminster, addressed to the prosecutor in the city of London, by whom it was there received, Lord Ellenbor-

ough, C. J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offense would have been the same. *Rex v. Williams*, 2 Campb. 506.

Consent to Act as Second.—If the indictment alleges that the consent to act as second in a duel was given in the state, it is immaterial where the duel was fought. The gravamen of this offense, under section 4517 of the Ga. Code, is the consent; if that took place in the state the offense is complete. *Harris v. State*, 58 Ga. 332.

3. *Com. v. Boott*, Thach. Cr. Cas. (Mass.) 390.

In an indictment for bearing a challenge to fight a duel, it must appear from the evidence, that the offense of which the prisoner is convicted was committed within the state or within the jurisdiction of the court. *Gordon v. State*, 4 Mo. 375.

2. Requisites of Indictment—*a*. FOR SENDING A CHALLENGE.—An indictment under a statute prohibiting the challenging of another to fight a duel should show that the challenge was perfected; that some person was challenged.¹

Setting out Challenge.—An indictment for sending a challenge need not set out a copy thereof.² It is not, however, objectionable to set out such copy if desired.³ Where this is done, if the writing does not necessarily imply a challenge, the indictment should aver that a challenge was intended.⁴ It need not, however,

Indictment for Leaving the State to Fight.—In *State v. Warren*, 14 Tex. 406, an indictment which charged the defendant with leaving the state to elude the provisions of the Act of 1840 to suppress duelling, but which stated no venue, was held bad for want of venue, in the absence of any express statutory provision on the subject other than that which requires all offenses to be prosecuted in the county where committed.

1. In *State v. Gibbons*, 4 N. J. L. 45, an indictment alleging that the defendant wrote, or caused to be written, a certain paper writing (reciting it), meaning and intending by the said paper writing a challenge to O. to fight a duel with pistols, and that he sent and offered the same to the said O. for acceptance, was held defective in that "it does not say that the defendant challenged O. to fight a duel with pistols; it does not say that the paper writing, by him written and sent, was a challenge to fight, or that it contained in it such challenge; but merely that he wrote and sent it intending it as such. The offense created by the statute is *challenging*; the charge in the indictment is writing and sending a paper intending to challenge. The indictment, then, does not, according to the rule, follow the very words of the statute, nor expressly charge the very offense created upon the defendant."

Whether or Not there Is a Challenge Is a Question for Jury.—As to whether there has been a challenge from one person to another, is a question to be decided by the jury. *Com. v. Hart*, 6 J. J. Marsh. (Ky.) 119. See also *Ivey v. State*, 12 Ala. 276; *State v. Strickland*, 2 Nott & M. (S. Car.) 181; *Herriott v. State*, 1 McMull. (S. Car.) 126.

An indictment under the act to suppress duelling may contain a copy of the alleged challenge; and though it may seem to be merely a demand of

satisfaction—nothing more—yet, if the indictment alleges that it was intended and understood as a challenge to fight with deadly weapons, or even if it goes further and charges that the intent was to fight, etc., to wit, *with pistols*, it will be good on its face; for the true intent and meaning of the supposed challenge may be shown upon the trial, by proof written or oral. *Com. v. Pope*, 3 Dana (Ky.) 418. See also *Com. v. Rowan*, 3 Dana (Ky.) 395; *State v. Taylor*, 3 Brev. (S. Car.) 243.

Sufficient Averment of Challenge.—An allegation that the prisoner gave the prosecutor a challenge to fight in single combat is equivalent to an averment that he *challenged* him to fight. *Ivey v. State*, 12 Ala. 276.

2. *State v. Farrier*, 1 Hawks (N. Car.) 487.

An indictment for sending a challenge in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. *Brown v. Com.*, 2 Va. Cas. 516.

Words of Verbal Challenge need Not be Set out.—*State v. Perkins*, 6 Blackf. (Ind.) 20; *State v. Strickland*, 2 Nott & M. (S. Car.) 181.

Indictment for Provoking to Challenge need Not Set out Words.—An indictment for endeavoring to provoke another to a challenge need not set out the words used by the defendant. 2 Bishop's New. Crim. Proc., § 310.

3. *Com. v. Pope*, 3 Dana (Ky.) 418; *Com. v. Rowan*, 3 Dana (Ky.) 395.

Slight Variance Not Fatal.—If an attempt is made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, in no way altering the sense, *semble* such variance is not fatal, and after verdict it is cured by the Act of 1811. *State v. Farrier*, 1 Hawks (N. Car.) 487.

4. In *Com. v. Rowan*, 3 Dana (Ky.) 395, the indictment charged that defend-

allege that the writing averred to have been intended as a challenge was so understood by the parties.¹

Need Not Aver Place of Fighting.—The place where a duel is intended to be fought, being no part of the definition of the offense, need not be averred in the indictment.²

b. FOR CARRYING A CHALLENGE —Scienter.—Where a person is indicted for unlawfully carrying a challenge to fight a duel, it should be averred that he did so knowing it to be a challenge, and this averment must be proved.³

Residence of Challenger.—In an indictment against one for carrying a challenge, it need not be averred that the challenger is a citizen or resident of the state.⁴

ant accepted a written challenge to fight with deadly weapons, viz. with pistols, "which writing (it alleged) is as follows"—reciting a letter, which, without being more explicit in its object, required "ultimate arrangements customary under such circumstances;" and averred the acceptance of "said challenge" by a letter also recited in full. It was held that the indictment was not sufficient; without the correspondence the charge would have been sufficient; or with it, had there been an averment that the parties intended

and understood the letter as a challenge. *Heffren v. Com.*, 4 Metc. (Ky.) 5. See also *Moody v. Com.*, 4 Metc. (Ky.) 1.

1. *Moody v. Com.*, 4 Metc. (Ky.) 1; *Heffren v. Com.*, 4 Metc. (Ky.) 5.

2. *Ivey v. State*, 12 Ala. 276.

3. *U. S. v. Shackelford*, 3 Cranch (C. C.) 178.

4. These words are not a part of the statutory definition of the offense, and need not be set out in the indictment at all. *State v. Cunningham*, 2 Spears (S. Car.) 246.

DUPLICITY.

BY JOHN LEHMAN.

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CROSS-REFERENCES.

As to Joinder of Actions, see articles *ACTIONS*, vol. 1, p. 108; *COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS*, vol. 5, p. 302.

Manner of Statement of Cause of Action or Defense in Code Pleading, see articles *ANSWERS IN CODE PLEADING*, vol. 1, p. 777; *COMPLAINTS AND PETITIONS IN CODE PLEADING*, vol. 4, p. 587; *COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS*, vol. 5, p. 302.

Duplicity in Pleas in Equity, see article *PLEAS*.

Duplicity in Indictments, see generally article *INDICTMENTS*, and particular criminal articles, as *CONSPIRACY*, vol. 4, p. 719; *DEATH BY WRONGFUL ACT*, vol. 5, p. 893.

I. NATURE AND EXTENT.—Duplicity is a violation of the general rule of pleading at common law against several issues in support of or in reply to one and the same demand.¹ It is a fault which may be impressed upon and vitiate not only the declaration, but also all pleadings subsequent thereto.²

Evasion of the Rule Against.—At an early date, however, the rule against duplicity was evaded by setting out the different grounds of recovery for the same demand in separate counts purporting to be based upon different demands,³ and this practice became a rule by long judicial recognition.⁴

Statutes Permitting Double Pleading.—The privilege of pleading as many several matters as the pleader may deem necessary is now generally permitted by statute in the *United States*.⁵ In the

1. Stephen's Pl. (Tyler's ed.) 242; 1 Chitty Pl. (16th Am. ed.) 249; Bac. Abr., Pleas, K, 2; Little v. Blunt, 13 Pick. (Mass.) 475; State v. Commercial Bank, 33 Miss. 474; Gaffney v. Colvill, 6 Hill (N. Y.) 575.

Confusion at Trial Avoided.—Duplicity in pleading is prohibited in order to prevent confusion at the trial. Richmond v. Patterson, 3 Ohio 369.

2. 1 Chitty Pl. (16th Am. ed.) 250; Hereford v. Crow, 4 Ill. 423.

3. Stephen's Pl. (Tyler's ed.) 254.

4. Stephen's Pl. (Tyler's ed.) 254. See article COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS, vol. 5, p. 302.

Assigning Several Breaches.—The practice of assigning more than one breach in the same count or statement of the cause of action, prior to the code, was permitted only in covenant upon a deed and by statute in debt upon a bond with a condition, or to secure covenants. When an ordinary contract contains different substantive and independent provisions, as in a case to pay for labor performed and to furnish transportation to laborers, if there is a breach, or failure to perform more than one of the stipulations, there are distinct causes of action which should be stated separately. Oh Chow v. Hallett, 2 Sawy. (U. S.) 259.

In Nave v. Berry, 22 Ala. 393, it was held that where a contract contains several stipulations a pleader may in each count assign as many breaches as he pleases, but each breach must be on a distinct stipulation in the contract; he cannot assign two breaches in the same count on one and the same stipulation.

Limitation of the Practice.—The practice of declaring in two forms upon

the same cause of action was originally a mere evasion of the rule against duplicity; but it has been so long sanctioned as a relaxation of the rule that it has now come to be recognized as a matter of privilege to which the party is legally entitled. The declaration, however, will not be permitted to be swelled with superfluous counts, and if any appear on the face to be so, the court will order them to be expunged. Little v. Blunt, 13 Pick. (Mass.) 476.

Explanatory Note—Scope of Article.—Inasmuch as the term "duplicity" is sometimes applied in a sense not strictly embraced in the definition given in the text, the following observation is made to prevent any confusion that may arise from the omission to treat the term herein in any other sense than that conveyed in its common-law use. The objection to a declaration upon the ground that it is double will not be considered, except in those cases where in a single demand is sought to be supported by more than one fact, or set of facts, any one of which would be sufficient for that purpose. For kindred questions, see articles ACTIONS, vol. 1, p. 108; COMPLAINTS AND PETITIONS IN CODE PLEADING, vol. 4, p. 587; COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS, vol. 5, p. 302.

5. See article PLEAS.

Leave to Plead Double.—This privilege is sometimes conditioned upon the previous leave of court. See Little v. Blunt, 13 Pick. (Mass.) 475; Hunter v. Wilkinson, 44 Miss. 728; Wilton Mfg. Co. v. Woodman, 32 Me. 185. And the granting or refusal of leave to file an additional plea has been held to be discretionary and not subject to review, except in cases

construction of such statutes, however, it is held that they do not authorize the defendant to allege more than one defense in one plea; in other words, that each plea must still be single, as at common law.¹

II. DUPLICITY IN THE DECLARATION—1. **The General Rule.**—A declaration is duplicitous when it contains in the same count more than one fact, or set of facts, for the recovery of a single demand, any one of which would justify the recovery.²

2. **Immaterial Matters.**—Mere immaterial matters, however, upon which it is apparent the demand is not based, will not have the effect of rendering the declaration duplicitous.³

of gross abuse of the discretion. *Gormley v. Bunyan*, 138 U. S. 630.

1. *In re Ouimette*, 1 Sawy. (U. S.) 47; *Rumbarger v. Stiver*, 6 Ohio 99; *Chesapeake, etc., R. Co. v. American Exch. Bank*, 1 Va. L. Reg. 836, note.

In *Virginia*, under Code 1887, § 3264, allowing a defendant to "plead as many several matters, whether of law or fact, as he shall think necessary," it was held that as to subsequent stages of the pleading there has been no change in the common law. *Chesapeake, etc., R. Co. v. American Exch. Bank*, 1 Va. L. Reg. 827.

Demurrer and Plea at Same Time.—See article DEMURRERS AT COMMON LAW AND UNDER THE CODE, vol. 6, p. 292.

2. *Nave v. Berry*, 22 Ala. 393; *Holly v. Brown*, 14 Conn. 268; *Raymond v. Sturges*, 23 Conn. 146; *Jarman v. Windsor*, 2 Harr. (Del.) 162; *Noetling v. Wright*, 72 Ill. 390; *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 665; *Green v. Kelly*, 18 N. J. L. 246; *Gaffney v. Colvill*, 6 Hill (N. Y.) 577; *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 106.

Under the Code.—Where a plaintiff filed a petition for the recovery of damages for the killing of a horse, and set up facts which would entitle him to the recovery for common-law negligence of the defendant, also setting up statutory grounds for the recovery of the same damages, such a petition was held to be double. *Harris v. Wabash R. Co.*, 51 Mo. App. 125. See also *Mulholland v. Rapp*, 50 Mo. 43. For the manner of statement of a cause of action in a complaint or petition under the code, see articles COMPLAINTS AND PETITIONS IN CODE PLEADING, vol. 4, p. 587; COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS, vol. 5, p. 302.

3. *Nave v. Berry*, 22 Ala. 382; *Smith*

v. Smith, 2 Root (Conn.) 42; *Liddon v. Hodnett*, 22 Fla. 271; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 66 Fed. Rep. 69.

Thus, in an action for the fraudulent sale of an order, the declaration is not double because in addition to the fraud it is alleged that the payment of the order had been refused, as such a statement is immaterial, not being to the point of the action, but only to the damages. *Bacon v. Sanford*, 1 Root (Conn.) 164.

In an Action against a Bank Director, under a statute containing "regulations to prevent the insolvency of moneyed corporations and to secure the rights of their creditors and stockholders," which provides in the first section of the article that it shall not be lawful for a director of any moneyed corporation to divide or reduce the capital stock without the consent of the legislature, the second count of the declaration alleged that the directors did divide, withdraw, and pay to the stockholders a portion of the capital stock of the bank, and did thereby reduce the capital stock without the consent of the legislature. Upon demurrer on the ground of duplicity, the court held that the reducing of the capital stock was not set forth as a substantive charge, but merely as a consequence of what had been alleged, and therefore the plea was not double. *Gaffney v. Colvill*, 6 Hill (N. Y.) 577.

If a Declaration to Recover Damages for the loss of a slave who was killed while working on defendant's house avers fraudulent concealment by defendant of the dangerous condition of the house, and also fraudulent representations that it was safe, it is not demurrable for duplicity, but the latter averment may be stricken out as surplusage. *Perry v. Marsh*, 25 Ala. 659.

3. Facts Tending to the Same Point.—Nor will the mere diversity of facts set up in a count render it double when all the facts taken together tend to the statement of one point or ground of recovery.¹

III. DUPLICITY IN THE PLEA—1. **General Rule.**—A plea which contains more than one independent fact, or set of facts, either of which alone is a sufficient answer to the allegations of the declaration, is bad for duplicity whether the defense is in bar,²

Allegations Descriptive of Cause of Action.—"It is very common for the plaintiff, especially in actions *ex delicto*, in connection with the facts on which he claims to recover, to state matters from which it appears that he has another cause of action against the defendant, either by way of amplifying or strengthening his description of the cause of action on which he relies. * * * It has never been considered that they rendered the declaration double where it was apparent that he did not rest his claim to recover upon them." *Raymond v. Sturges*, 23 Conn. 146.

1. *Raymond v. Sturges*, 23 Conn. 146.

Where the plaintiff alleged that the defendant had fraudulently transferred to another thirty-five shares of stock in one bank, eighty-one shares in another bank, and sixteen shares of stock in a third bank, with intent to evade taxation and defraud the town of which plaintiff was treasurer, etc., it was held that the declaration was not double because all the transfers might, as far as appeared, have been made by a single act. *Darrow v. Langdon*, 20 Conn. 293.

Principal and Interest.—It is not duplicity in a declaration to pray for a judgment for certain sums and for interest on the same. *Starr v. Henshaw*, 1 Root (Conn.) 242.

Various Kinds of Damage from a Single Act.—An enumeration of various kinds of damage resulting from a single act will not render the pleading duplicitous. *Wolfe v. Beecher Mfg. Co.*, 47 Conn. 233.

Several Assaults and Batteries.—A series of assaults and batteries may be declared for in one count where they are so connected that each of them will characterize the other. *Earl v. Tupper*, 45 Vt. 275.

Sums Due on Several Coupons.—A single count for sums due on several coupons of several bonds was upheld

against an objection upon the ground of duplicity, for the reason that, the vice of duplicity tending to prolixity, which is the reason for discountenancing it, to require the plaintiff to count on each of the separate coupons would be to promote rather than to prevent the fault. *New London City Nat. Bank v. Ware River R. Co.*, 47 Conn. 547.

Ejectment.—An objection on the ground of duplicity to a declaration in ejectment containing but one count for several distinct parcels of land was overruled because it was said that the practice of discouraging double pleading was sanctioned in order to avoid delay and expense, and that to sustain an objection in a case like this would be to pervert the reason of that practice. *Hotchkiss v. Butler*, 18 Conn. 287.

2. *Arkansas.*—*Kellogg v. Miller*, 6 Ark. 468; *McDaniel v. Grace*, 15 Ark. 485.

Colorado.—*Munro v. King*, 3 Colo. 238.

Florida.—*Bemis v. State*, 3 Fla. 16.

Georgia.—*Cox v. Griffin*, 17 Ga. 249.

Illinois.—*Burrass v. Hewett*, 4 Ill. 224; *Witter v. McNeil*, 4 Ill. 433.

Indiana.—*Hand v. Taylor*, 4 Ind. 409; *Porter v. Brackenridge*, 2 Blackf. (Ind.) 385; *Benner v. Elliott*, 5 Blackf. (Ind.) 451.

Kentucky.—*Bruce v. Mathers*, 2 Bibb (Ky.) 294.

Massachusetts.—*Dunning v. Owen*, 14 Mass. 157; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Lord v. Tyler*, 14 Pick. (Mass.) 164; *Hooper v. Jellison*, 22 Pick. (Mass.) 250.

Mississippi.—*Welch v. Jamison*, 1 How. (Miss.) 160; *Clopton v. Spratt*, 52 Miss. 255.

New Hampshire.—*Bell v. Lamprey*, 52 N. H. 51.

New Jersey.—*Conover v. Tindall*, 20 N. J. L. 513; *Harker v. Brink*, 24 N. J. L. 344.

or in abatement,¹ or in both.²

2. Effect of Matters Ill Pleaded.—A material averment in a plea, although it may be ill pleaded in connection with other material and issuable matters, renders the plea double.³

New York.—*Connelly v. Pierce*, 7 Wend. (N. Y.) 130; *Kennedy v. Strong*, 10 Johns. (N. Y.) 289; *Camp v. Morse*, 5 Den. (N. Y.) 161; *Ford v. Babcock*, 2 Sandf. (N. Y.) 520.

South Carolina.—*Beckley v. Moore*, 1 McCord (S. Car.) 464.

Vermont.—*Andover v. Mount Holy*, 58 Vt. 372; *Torrey v. Field*, 10 Vt. 353; *Luce v. Hoisington*, 55 Vt. 341; *Waddams v. Burnham*, 1 Tyler (Vt.) 237.

Virginia.—*Cunningham v. Smith*, 10 Gratt. (Va.) 255.

Performance and Excuse for Nonperformance.—In an action for the breach of a contract, a plea of performance which at the same time contains an excuse for nonperformance is bad for duplicity. *Benner v. Elliott*, 5 Blackf. (Ind.) 452; *Star Brick Co. v. Ridsdale*, 34 N. J. L. 429. See also article PERFORMANCE.

Payment and Release.—In an action of debt on a promissory note, a plea of payment and also that the plaintiff executed a release is double. *Calhoun v. Wright*, 4 Ill. 74.

Justification under Legal Process and Denial of Arrest.—In an action for false imprisonment, the defendant justified under legal process, which would have been a sufficient defense, and then averred that he did not arrest the plaintiff; the latter also being a separate and sufficient defense, the plea was held bad for duplicity. *Stanton v. Seymour*, 5 McLean (U. S.) 268.

Justification under Process and Order of Court.—In an action of trover for the conversion of personal property, the defendant in his plea justified by virtue of an attachment and levy and also by a judgment or order of court. This plea was held bad for duplicity because it was impossible to ascertain whether the defendant relied upon the delivery by the sheriff or on an order of the court, both being set up as an excuse, and either presenting traversable points. *Welch v. Jamison*, 1 How. (Miss.) 160.

Plea by Executor.—Upon scire facias against an executor charged with having received a certain amount of money which he had failed to account

for, a plea by the defendant that he had fully administered, and at the same time that he had not received the amount, is bad for duplicity, because each of these averments is a separate and distinct defense. *Rumbarger v. Stiver*, 6 Ohio 99.

Upon an Application to Amend a Plea it was held proper to refuse to allow the amendment, it appearing that the amendment would render the plea duplicitous. *Dockery v. Miller*, 9 Humph. (Tenn.) 735.

Answer under the Code.—Duplicity in an answer under the code arises where two or more defenses are set up in the same paragraph of one answer to the same claim in a complaint. *State v. Newlin*, 69 Ind. 108. For statement of defenses under the code, see article ANSWERS IN CODE PLEADING, vol. 1, p. 777.

1. A plea is double which sets up several facts either of which, if true, would abate the attachment. *State Bank v. Hinton*, 1 Dev. (N. Car.) 400; *Cobb v. Force*, 6 Ala. 468; *Cobb v. Miller*, 9 Ala. 499.

2. *McConnell v. Stettinius*, 7 Ill. 714.

Issue of Fact and Law.—A plea in abatement which presents an issue of fact for the jury, and at the same time an issue of law for the court, is bad for duplicity. *Trabue v. Higden*, 4 Coldw. (Tenn.) 625.

3. *Conover v. Tindall*, 20 N. J. L. 517; *Wright v. Watts*, 3 Q. B. 89, 43 E. C. L. 645; *Stephen's Pl.* (Tyler's ed.) 249.

Bad Plea of Tender.—In an action against the comptroller of public accounts of Florida and his trustees under his official bond for a breach of the conditions of said bond, defendant pleaded a performance of all his duties as comptroller, and also a tender in warrants on the treasury of the territory of Florida. It was held that this plea was double, notwithstanding the fact that the defense of tender was not well pleaded, inasmuch as the treasury notes mentioned were not legal tender. *Bemis v. State*, 3 Fla. 16.

Reference to Structure as Well as Subject-matter of Plea.—For the purpose of determining whether a plea is

3. Facts Converging to One Point.—While the plea should set forth only one defense, it is not necessary that that defense should consist of a single fact, and no matter how numerous the facts may be, so long as they all tend to one point or defense, the plea is not thereby rendered double.¹

double, reference should be had to the frame and construction of the plea as well as to the matter therein; and where two defenses are combined in one plea, it is not necessary that both should be sufficient as pleaded in order to render the plea double. *Vaughan v. Everts*, 40 Vt. 526.

But in *Kipp v. Bell*, 86 Ill. 577, the defendant in an action by a creditor of a private corporation against a shareholder to recover money due on an unpaid subscription, under the Act of 1857 of *Illinois*, pleaded that he had paid all he had subscribed, and that he had paid to the creditors an amount of money equal to the amount of stock held by him. The court held that this plea was not bad as presenting two grounds of defense, because only one defense had been sufficiently set out under the statute.

Plea in Abatement.—In *Hooper v. Jellison*, 22 Pick. (Mass.) 250, it was held that it must appear that the several facts set up in a plea in abatement are not only such as might be traversed by the plaintiff and a material issue joined thereon, but each of the facts must be such as would alone be sufficient to abate the writ.

The Test of Duplicity.—“The only safe test of duplicity is to see whether a single issue can be made to controvert the pleading, by denying any one material fact.” *People v. River Raisin*, etc., R. Co., 12 Mich. 389.

Answers in Code Pleading.—An answer under the code is not double when issue could not be taken on either or both of the defenses. *Booher v. Goldsborough*, 44 Ind. 499. And technical deficiency in the pleading will not relieve it of the fault of duplicity. *Swinney v. Nave*, 22 Ind. 178, *disapproving Thompson v. Oskamp*, 19 Ind. 399. For the manner of stating defenses in an answer, see articles **ANSWERS IN CODE PLEADING**, vol. 1, p. 777; **COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS**, vol. 5, p. 302.

1. *Florida*.—*Sanderson v. Thomas*, 17 Fla. 468.

Illinois.—*Kinney v. Turner*, 15 Ill. 182; *Holland v. Kibbe*, 16 Ill. 133.

Indiana.—*Porter v. Brackenridge*, 2 Blackf. (Ind.) 385.

Maine.—*Potter v. Titcomb*, 10 Me. 53; *Sturdivant v. Smith*, 29 Me. 387.

Maryland.—*Stewardson v. White*, 3 Har. & M. (Md.) 455.

Mississippi.—*Clopton v. Spratt*, 52 Miss. 251.

New Jersey.—*Harker v. Brink*, 24 N. J. L. 344; *Star Brick Co. v. Ridsdale*, 34 N. J. L. 428.

New York.—*Tucker v. Ladd*, 7 Cow. (N. Y.) 450; *Connelly v. Pierce*, 7 Wend. (N. Y.) 130; *Russell v. Rogers*, 15 Wend. (N. Y.) 351; *Strong v. Smith*, 3 Cai. (N. Y.) 160; *Currie v. Henry*, 2 Johns. (N. Y.) 433; *Patcher v. Sprague*, 2 Johns. (N. Y.) 463; *Bradner v. Demick*, 20 Johns. (N. Y.) 405.

North Carolina.—*State Bank v. Hinton*, 1 Dev. (N. Car.) 400.

Pennsylvania.—*Philadelphia v. Wistar*, 92 Pa. St. 404; *Cummings v. Boyd*, 83 Pa. St. 372.

South Carolina.—*Beckley v. Moore*, 1 McCord (S. Car.) 464.

Vermont.—*Torrey v. Field*, 10 Vt. 353; *Waddams v. Burnham*, 1 Tyler (Vt.) 233.

England.—*Robinson v. Raley*, 1 Burr. 320.

Thus in an Action of Trespass for taking and converting plaintiff's horse, the defendants pleaded in bar that they were selectmen of the town, etc., that “the town voted to raise the sum of two thousand dollars for the expenditures of that year,” that the plaintiff was duly assessed his portion of the taxes and that he failed to pay the same, and that the collector took the said horse and sold him to pay said tax. This plea was held to be good because the facts set up therein constituted but one defense. *Adams v. Mack*, 3 N. H. 493.

Set-off.—In an action for the recovery of the purchase price of land, a plea of set-off alleging a partial failure of consideration by reason of the fact that one-half of a spring was represented to be on the land when, in fact, it was not, and also that there was a deficiency of fourteen acres in the

4. Matters of Inducement.—So also facts which are merely matters of inducement will not operate to make a plea double.¹

5. Immaterial Matters—Surplusage.—Nor will facts upon which issue cannot be taken and which are merely surplusage render a plea double.²

IV. DUPLICITY IN THE REPLICATION AND SUBSEQUENT PLEADINGS—

1. Duplicity in the Replication—*a. IN GENERAL.*—The same general rules hereinbefore stated also apply to the replication and subsequent pleadings. Thus the replication must not contain more than one complete answer to the plea.³ See also article DEPARTURE, vol. 6, p. 460.

tract, is not duplicitous, because these matters constitute but one entire point. *Grayson v. Buchanan*, 88 Va. 251.

Duress.—In an action of assumpsit on a promissory note, where the defendant pleaded duress and set forth in detail the circumstances of the duress, it was held that the plea was not double, inasmuch as the details formed one connected proposition and raised but one issue. *Bingham v. Sessions*, 6 Smed. & M. (Miss.) 21.

Usury and Payment.—In an action upon a usurious contract, a plea which set up payment of a part of the amount claimed, and also the usurious interest, was upheld over an objection that it was double. *Fugate v. Ferguson*, 1 Blackf. (Ind.) 366.

1. *Lord v. Tyler*, 14 Pick. (Mass.) 165; *Hampshire Mfg. Bank v. Billings*, 17 Pick. (Mass.) 87; *Hooper v. Jellison*, 22 Pick. (Mass.) 250; *Ellis v. Martin*, 2 Smed. & M. (Miss.) 187; *Ransom v. Cothran*, 6 Smed. & M. (Miss.) 178; *State v. Commercial Bank*, 33 Miss. 474; *Willey v. Carpenter*, 64 Vt. 212; *Ryalls v. Bramall*, 1 Exch. 734.

Coverture and Release by Husband.—Thus in an action brought by a woman, the defendant may plead that the plaintiff was married after the cause of action accrued and that her husband executed a release to him, and this plea will not be double, because while at common law the coverture alone is a defense, as is also the release, yet, to plead the release, the averment of coverture is a necessary inducement. *Bac. Abr., Pleas, K, 2, cited in Stephen's Pl. (Tyler's ed.) 249.*

2. *Dalton v. Drake*, 75 Ga. 115; *Richmond, etc., Turnpike Co. v. Rife*, 2 Ind. 318; *Bruce v. Mathers*, 2 Bibb (Ky.) 294; *Rathbone v. Rathbone*, 5 Pick. (Mass.) 222; *State v. Commercial*

Bank, 33 Miss. 474; *Conover v. Tindall*, 20 N. J. L. 517; *Ford v. Babcock*, 2 Sandf. (N. Y.) 520; *Bradner v. Demick*, 20 Johns. (N. Y.) 406; *Derby v. Jacques*, 1 Cliff. (U. S.) 425; *Elminger v. Drew*, 4 McLean (U. S.) 388.

Matter Necessarily Implied.—The statement of facts which must necessarily be implied from the defense pleaded will not render a plea duplicitous. *Ford v. Babcock*, 2 Sandf. (N. Y.) 520.

3. *Arkansas.*—*Kellogg v. Miller*, 6 Ark. 468; *McDaniel v. Grace*, 15 Ark. 485.

New Jersey.—*Stults v. Buckelew*, 28 N. J. L. 151; *Berry v. Cahanan*, 7 N. J. L. 77.

New York.—*McNulty v. Frame*, 1 Sandf. (N. Y.) 130; *Service v. Heermance*, 2 Johns. (N. Y.) 96; *Cooper v. Heermance*, 3 Johns. (N. Y.) 315.

Pennsylvania.—*McElroy v. Railroad Co.*, 7 Phila. (Pa.) 206; *Martin v. Dearie*, 1 W. N. C. (Pa.) 9; *Ga-rotry v. Trelawney*, 1 W. N. C. (Pa.) 156; *Wood v. Flannigan*, 2 W. N. C. (Pa.) 406; *DeCoursey v. Guarantee Trust, etc.*, *Deposit Co.*, 3 W. N. C. (Pa.) 518; *McCann v. Hosie*, 1 Kulp (Pa.) 197.

United States.—*Craig v. Brown*, *Pet. (C. C.) 443.*

See also *U. S. v. Gurney*, 1 Wash. (U. S.) 447; *Cheasley v. Barnes*, 10 East 73.

Assignment of Two Distinct Breaches.—If defendant pleads *omnia performavit* or *non damnificatus* to an action on a bond, a replication assigning two breaches of the conditions of the bond is bad for duplicity. *Sevey v. Blacklin*, 2 Mass. 541, *citing Otis v. Blake*, 6 Mass. 337; *Austin v. Parker*, 13 Pick. (Mass.) 222; *African Co. v. Mason*, 10

b. SEVERAL FACTS TO ONE POINT.—But a replication may contain several distinct facts, and it will not be rendered double thereby when such facts do not constitute distinct answers to the plea, but all tend to and make one reply.¹ On the other hand, a simple denial of the facts alleged to one point in a plea will not make the replication double.²

c. CUMULATIVE DENIAL.—The replication may also put in issue several distinct facts set out in the plea which make but one defense, without denying each separately.³

d. IMMATERIAL FACTS—INDUCEMENT.—It is not sufficient to

Mod. 227; *Cornwallis v. Savery*, 2 Burr. 772. See also article BONDS, vol. 3, p. 635.

Joint Promise and Release.—Where a plea to an action on a promissory note sets up that the promise was made by the defendant and a third person, and that a release was executed to such third person, it would have been a sufficient answer to deny either of these facts, and a replication which denies both the joint promise and the release is therefore bad for duplicity. *Tubbs v. Caswell*, 8 Wend. (N. Y.) 130.

Matters Divisible.—If an action be brought for trespass in two closes and the defendant pleads one matter of defense applying to both, the plaintiff may in his replication reply one answer to so much of the plea as covers one close and another answer to that part of the plea which covers the other close. *Little v. Blunt*, 13 Pick. (Mass.) 475. See also *Owen v. Henderson*, 7 Ala. 641; *Trethewy v. Ackland*, 2 Saund. 486; *Johns v. Whitley*, 3 Wils. 127.

1. *Alabama*.—*Owen v. Henderson*, 7 Ala. 641.

Illinois.—*Hereford v. Crow*, 4 Ill. 423.

Massachusetts.—*Otis v. Blake*, 6 Mass. 337.

Mississippi.—*State v. Commercial Bank*, 33 Miss. 496.

New Hampshire.—*Tebbetts v. Tilton*, 24 N. H. 122; *Hunt v. Haven*, 52 N. H. 162.

New York.—*Russell v. Rogers*, 15 Wend. (N. Y.) 351; *McClure v. Erwin*, 3 Cow. (N. Y.) 313.

Tennessee.—*Pilcher v. Hart*, 1 Humph. (Tenn.) 536.

Virginia.—*Virginia F. & M. Ins. Co. v. Saunders*, 86 Va. 973.

United States.—*Jackson v. Rundlet*, 1 Woodb. & M. (U. S.) 381.

England.—*Cornwallis v. Savery*, 2 Burr. 772.

2. *Calhoun v. Wright*, 4 Ill. 74; *Deut v. Coleman*, 10 Smed. & M. (Miss.) 83; *Eden v. Turtle*, 10 M. & W. 635.

3. In *O'Brien v. Saxon*, 2 B. & C. 908, 9 E. C. L. 268, the declaration was for maliciously and without reasonable or probable cause suing out a commission of bankruptcy against the plaintiff. The defendant pleaded that the plaintiff, before suing out the commission, being a trader, and indebted to the defendant in one hundred pounds, became bankrupt, etc. The plaintiff replied *de injuria*. The defendant demurred, and assigned for cause that the plaintiff had attempted to put in issue three distinct things: viz., the trading, the petitioning creditor's debt, and the bankruptcy. The court held the replication good, because the "three facts connected together constitute but one entire proposition, and therefore the replication is good." See also *Bennison v. Thelwell*, 7 M. & W. 512; *Webb v. Weatherby*, 1 Bing. N. Cas. 502, 27 E. C. L. 474; *Bell v. Tuckett*, 3 M. & G. 785, 42 E. C. L. 409; *Pigeon v. Osborn*, 12 Ad. & El. 715, 40 E. C. L. 166; *Iron Clad Dryer Co. v. Chicago Trust, etc., Bank*, 50 Ill. App. 464, decided upon the authority of *Isaac v. Farrar*, 1 M. & W. 65; *Griffin v. Yates*, 2 Bing. N. Cas. 579, 29 E. C. L. 430.

Denial of Several Facts Disjunctively.

—But it is said that though several facts may often be traversed cumulatively, where they together constitute but one ground of defense, yet care must be taken to traverse them, not copulatively, but in the disjunctive, whenever proof of all of them is not absolutely incumbent on the opposite party. *Goram v. Sweeting*, 2 Saund. 207; *Moore v. Barthrop*, 1 B. & C. 5, 8 E. C. L. 3; *Stubbs v. Lainson*, 5 D. P. C. 162.

render a replication double that it sets out facts which are immaterial, or are only matter of inducement.¹

2. Pleadings Subsequent to Replication.—As hereinbefore stated, the vice of duplicity may occur in any pleading,² and it is unnecessary to repeat the general rules already set out.³

V. OBJECTION FOR DUPLICITY—HOW TAKEN—1. At Common Law.—At common law duplicity is ground for special demurrer only, the objection being waived unless it is so taken,⁴ and the

1. *Hereford v. Crow*, 4 Ill. 423; *State v. Commercial Bank*, 33 Miss. 495; *Nelson v. Lounsbury*, 3 Barb. (N. Y.) 125; *Livingston v. Ostrander*, 9 Wend. (N. Y.) 306; *Webb v. Weatherby*, 1 Bing. N. Cas. 502, 27 E. C. L. 474.

2. 1 Chitty Pl. (16th Am. ed.) 250.

3. **Rejoinder.**—The defendant should deny in his rejoinder only such facts as are necessary to be denied in order to make a complete defense to the replication, and if two facts are denied, the denial of either of which is sufficient to defeat the cause of action, the rejoinder is double. *Satterlee v. Sterling*, 8 Cow. (N. Y.) 233; *Tuttle v. Smith*, 10 Wend. (N. Y.) 388; *Boatright v. State*, 8 Blackf. (Ind.) 8. See also article REJOINDER.

Surrejoinder—Statement of Several Facts to One Point.—The statement of several facts in a surrejoinder is not objectionable where they constitute the same entire defense to the preceding pleading, and form one connected proposition. *Potter v. Titcomb*, 10 Me. 53.

4. *Alabama*.—*Garnett v. Yoe*, 17 Ala. 74.

Connecticut.—*Holly v. Brown*, 14 Conn. 268; *Havens v. Hartford*, etc., R. Co., 26 Conn. 224; *Starr v. Henshaw*, 1 Root (Conn.) 242.

Georgia.—*Martin v. Bartow Iron Works*, 35 Ga. 320.

Illinois.—*Iron Clad Dryer Co. v. Chicago Trust*, etc., Bank, 50 Ill. App. 464; *Armstrong v. Webster*, 30 Ill. 333; *St. Louis*, etc., R. Co. v. Hill, 11 Ill. App. 248; *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 665.

Indiana.—*Reno v. Hollowell*, 2 Blackf. (Ind.) 38; *King v. Anthony*, 2 Blackf. (Ind.) 131; *Barrett v. Ruitt*, 3 Ind. 571; *Neff v. Powell*, 6 Blackf. (Ind.) 420; *Martin v. Ray*, 1 Blackf. (Ind.) 291.

Kentucky.—*Richards v. Allen*, 1 Bibb (Ky.) 190; *Singleton v. Carr*, 292.

1 Bibb (Ky.) 554; *Arnold v. Com.*, 8 B. Mon. (Ky.) 110.

Maine.—*Ryan v. Watson*, 2 Me. 382; *Briggs v. Grand Trunk R. Co.*, 54 Me. 375; *Scott v. Whipple*, 6 Me. 425.

Maryland.—*State v. Green*, 4 Har. & J. (Md.) 542; *Shafer v. Stonebraker*, 4 Gill & J. (Md.) 345.

Massachusetts.—*Otis v. Blake*, 6 Mass. 337; *Com. v. Tuck*, 20 Pick. (Mass.) 361.

Mississippi.—*State v. Brown*, 34 Miss. 688; *Mobley v. Keys*, 13 Smed. & M. (Miss.) 679.

New York.—*Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Roberts v. Kelly*, 2 Hall (N. Y.) 307; *McNulty v. Frame*, 1 Sandf. (N. Y.) 128; *Bradner v. Demick*, 20 Johns. (N. Y.) 405.

Ohio.—*Franklin Bank v. Bartlet*, Wright (Ohio) 741.

Pennsylvania.—*Smith v. Latour*, 18 Pa. St. 247.

Vermont.—*Green v. Seymour*, 59 Vt. 459; *Walker v. Sargeant*, 14 Vt. 247; *Onion v. Clark*, 18 Vt. 365; *Willey v. Carpenter*, 64 Vt. 212.

Not Available by Exception to Testimony.—The question of duplicity cannot be raised by objection to the admission of testimony. *Griffen v. Barr*, 60 Vt. 599.

Motion in Arrest of Judgment.—By the weight of authority, duplicity cannot be taken advantage of on motion in arrest of judgment. But there is considerable conflict among the decided cases upon this question. See, for a collection of all the cases, article ARREST OF JUDGMENT, vol. 2, p. 802.

Exception—Plea in Abatement.—Duplicity in a plea in abatement may be reached on general demurrer. This is an exception to the general rule. *State Bank v. Hinton*, 1 Dev. (N. Car.) 400; *Walker v. Sargeant*, 14 Vt. 247; *Ryalls v. Bramall*, 1 Exch. 738. See also article DEMURRERS AT COMMON LAW AND UNDER CODE, vol. 6, p. 292.

demurrer must not only assign it as a cause, but must point out wherein the duplicity consists.¹

2. Under Codes and Statutes.—This rule has been changed, however, in many of the states, as where codes of procedure have been adopted, in which case the objection is generally taken by a motion to strike out or to separate,² while in other states which have not adopted the code, the common-law practice has been modified by statutes abolishing the special demurrer.³

1. Georgia.—*Martin v. Bartow Iron Works*, 35 Ga. 320.

Illinois.—*Holmes v. Chicago, etc.*, R. Co., 94 Ill. 445.

Maine.—*Briggs v. Grand Trunk R. Co.*, 54 Me. 375; *Scott v. Whipple*, 6 Me. 425.

Mississippi.—*Mobley v. Keys*, 13 Smed. & M. (Miss.) 679.

New York.—*Bradner v. Demick*, 20 Johns. (N. Y.) 405; *McNulty v. Frame*, 1 Sandf. (N. Y.) 128.

Ohio.—*Franklin Bank v. Bartlet*, Wright (Ohio) 741.

Vermont.—*Willey v. Carpenter*, 64 Vt. 212; *Onion v. Clark*, 18 Vt. 365; *Green v. Seymour*, 59 Vt. 459.

England.—*Lamplough v. Shortridge*, 1 Salk. 219.

Sufficiency of Demurrer.—A demurrer to the replication on the ground of duplicity is sufficiently specific by an averment that the replication traverses several distinct and material allegations in the plea. *McNulty v. Frame*, 1 Sandf. (N. Y.) 128.

The cause of demurrer is sufficiently assigned in a special demurrer which states that the plaintiff, having by his first count complained of one single act and trespass, by his replication and new assignment attempts to introduce and put in issue several distinct acts of trespass with respect to the breaking and entering the same close. *Cheasley v. Barnes*, 10 East 73.

2. See articles COUNTS, PARAGRAPHS AND SEPARATE STATEMENTS, vol. 5, p. 302; **ANSWERS IN CODE PLEADING**, vol. 1, p. 777.

3. Motion in Lieu of Special Demurrer.—A motion to strike out is the proper remedy in lieu of a special demurrer. *Star Brick Co. v. Ridsdale*, 34 N. J. L. 429; *Stults v. Buckelew*, 28 N. J. L. 151; *Wilson v. Johnson* (N. J. 1894), 29 Atl. Rep. 421; *Trabue v. Higden*, 4 Coldw. (Tenn.) 625. See also *Hunter v. Wilkinson*, 44 Miss. 728.

In Alabama a demurrer will not lie for duplicity, but the proper remedy was held to be a motion to strike out or an explanatory charge. *Bolling v. McKenzie*, 89 Ala. 470. See also *Corpening v. Worthington*, 99 Ala. 541. But it seems that duplicity in a dilatory plea is still subject to demurrer. *Houston v. Hilton*, 67 Ala. 374; *Lewis v. Lee County*, 66 Ala. 488; *Ewing v. Shaw*, 83 Ala. 333; *Cannon v. Lindsey*, 85 Ala. 198.

In Massachusetts it was held that the special demurrer having been abolished, and duplicity being only a ground for special demurrer at common law, an objection on that ground could not be taken in any case. *King v. Howard*, 1 Cush. (Mass.) 141. See also *Sweeney v. Baker*, 13 W. Va. 201; *Coyle v. Baltimore, etc.*, R. Co., 11 W. Va. 106.

DURESS AND COMPOUNDING FELONY.

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CROSS-REFERENCES.

As to Actions to Recover Involuntary Payments, see article *PAYMENTS*.

Other Matters Related to the Subject, see articles *EXTORTION*;
OFFICIAL BONDS.

I. DURESS—1. Who may Plead.—While unquestionably the party against whom duress has been exercised may plead it to avoid his act procured thereby, the right of coactors or of strangers to avail themselves of a like plea is by no means well settled. The early English cases denied the right to any person other than him upon whom the duress was practiced,¹ and the doctrine thus established seems to have been adopted by many of the courts of this country.² In accordance with this rule a surety cannot plead

1. In one of the earliest cases, *Huscombe v. Standing*, Cro. Jac. 187, it was held that where a bond was obtained from two persons, from one freely and from the other by duress, the one who executed the obligation of his free will could not escape liability by setting up and establishing the duress of his coöbligor. And see *Bacon's Abr.*, tit. *Duress* (A); 2 *Rolle's Abr.* 124; *Keilway*, 154 A. Pl. 3; *Baylie v. Clare*, 2 *Brownl.* 276; *Mantell v. Gibbs*, 1 *Brownl.* 64; *Wayne v. Sands*, *Freem.* 351.

2. *McClintick v. Cummins*, 3 *McLean* (U. S.) 158; *Steinbaker v. Wilson*, 1 *Leg. Gaz.* (Pa.) 76; *Oak v. Dustin*, 79 *Me.* 23.

Obligor and Obligee.—In an action on a bond, one joint obligor cannot plead the duress of his coöbligor. *Spaulding v. Crawford*, 27 *Tex.* 155.

Grantor and Grantee.—None but the grantor or his heirs can plead that a deed made by him was obtained by duress. *Worcester v. Eaton*, 13 *Mass.* 371.

Grantor of Lessee and Lessor.—A grantee of land, a portion of which is under lease, made by his grantor, cannot set up that the lease was executed under duress. *Schee v. McQuilken*, 59 *Ind.* 269.

Purchaser and Creditors of Seller.—That a bill of sale was procured by duress cannot be set up by creditors of

the duress of his principal,¹ nor can a person occupying a like relation to the maker of a promissory note plead the duress of the latter to avoid his own liability.²

On the other hand, this doctrine has been held applicable only to cases depending upon common-law principles, and not to cases where statutory principles interpose,³ and in some jurisdictions indorsers and makers of promissory notes are accorded the right to plead the duress of the maker or the comaker of the note

the seller, or by an officer attaching the goods in their behalf. *Lewis v. Bannister*, 16 Gray (Mass.) 500.

Parent and Child.—A father may plead the duress of his child. *Harris v. Carmody*, 131 Mass. 51, 20 Am. L. Reg. (N. S.) 663; *Bacon's Abr.*, tit. Duress (B).

Husband and Wife.—See *Bacon's Abr.*, tit. Duress (B).

A wife may plead the duress of her husband in an action by her to recover her property wrongfully obtained from him. *Koehler v. Wilson*, 40 Iowa 183, *distinguishing* *Huscombe v. Standing*, Cro. Jac. 187.

In *Solinger v. Earle*, 82 N. Y. 393, it is said that the doctrine of *Smith v. Bromley*, Doug. 696, wherein the sister of a bankrupt was allowed to recover back money exacted by a creditor, and cases following it, can only be asserted in behalf of the debtor himself, or of a wife or husband or near relative of blood of the debtor who intervenes in his behalf, and that a person remotely related by marriage to a debtor, who pays money to his creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs. See also *Davis v. Luster*, 64 Mo. 43.

1. *Mantell v. Gibbs*, 1 Brownl. 64; *Plummer v. People*, 16 Ill. 358; *Thompson v. Buckhannon*, 2 J. J. Marsh. (Ky.) 418; *Tucker v. State*, 72 Ind. 242; *Oak v. Dustin*, 79 Me. 23. And see *Hugins v. People*, 39 Ill. 246.

Knowledge by Surety of Duress.—A surety on a recognizance cannot plead duress of imprisonment of the principal if he had full knowledge of the circumstances of the detention of the prisoner and with such knowledge voluntarily entered on the obligation. *Haney v. People*, 12 Colo. 345.

Duress to the principal upon a bond may not be pleaded by the surety, at least unless the surety at the time of

executing the obligation was ignorant of the circumstances which rendered it avoidable by the principal. *Hazard v. Griswold*, 21 Fed. Rep. 178.

2. **Maker.**—A plea by the maker of a promissory note, that it was given to release a third party from an unlawful arrest, presents no defense. *Robinson v. Gould*, 11 Cush. (Mass.) 55.

Joint Maker.—One who freely signs a promissory note cannot successfully plead the duress of another who signed with him. *Peirce v. McIntire* (Mass. 1785), *cited* in 2 *Dane's Abr. & Dig.* 224. And see also *Fay v. Dailey*, 6 Wis. 42.

Indorser.—A plea by the voluntary indorser of a promissory note, that it was procured to be made by duress, is insufficient as a defense. *Bowman v. Hiller*, 130 Mass. 153.

3. *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256 (commenting on and *distinguishing* *Huscombe v. Standing*, Cro. Jac. 187); *Hazard v. Griswold*, 21 Fed. Rep. 178. And see *State v. Brantley*, 27 Ala. 45; *Deer Lodge County v. At*, 3 Mont. 168.

Unauthorized Bond to Sheriff.—The rule that one obligor cannot plead that a bond was obtained of his coobligor by duress does not apply to a bond taken by a sheriff from a defendant whom he had no right to detain in custody. *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256.

Defective Bond.—Sureties may plead the duress of their principal to a bond not executed according to law and while the party was under arrest. *Governor v. Williams*, *Dudley* (Ga.) 244.

Bond for Jail Liberties.—A surety may plead that a statutory bond for the liberties of the prison was executed by the debtor under duress. *Hawes v. Marchant*, 1 Curt. (U. S.) 143.

Bastardy Bond.—The surety on a bastardy bond may plead the duress of the principal. *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

upon which their liability is predicated.¹

For treatment of this branch of the subject *in extenso*, see title DURESS, Am. and Eng. Encyc. of Law.

2. Necessity of Special Plea.—Duress is not available as a defense under the general issue, but must be specially pleaded,² and the nature of the duress relied on should be specifically stated.³

3. Setting Out Facts.—Neither evidence nor legal conclusions should be set forth, but the substantive facts constituting the alleged duress should be shown and their effect left for the determination of the court.⁴

1. Strong *v.* Grannis, 26 Barb. (N. Y.) 122; Ingersoll *v.* Roe, 65 Barb. (N. Y.) 346; Osborn *v.* Robbins, 36 N. Y. 365; Griffith *v.* Sitgreaves, 90 Pa. St. 161; Evans *v.* Huey, 1 Bay (S. Car.) 13.

Retention of Indemnity.—The maker of a promissory note is not precluded from setting up that it was obtained by duress, for the reason that he retains an indemnity from the liability for which the note was given. Gillett *v.* Ball, 9 Pa. St. 13.

2. Bacon's Abr., Duress (D); 5 Dane Abr. & Dig. 373; 6 Dane Abr. & Dig. 130; 2 Inst. 482; Tidd's Prac. 650; 2 Chitty Pl. (16th Am. ed.) 369; Whelpdale's Case, 5 Coke 119b; Edwards *v.* Brown, 1 Tyr. 182; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 325; Worcester *v.* Eaton, 13 Mass. 371. But see Hinesburgh *v.* Sumner, 9 Vt. 23.

Non Est Factum.—If a deed is voidable at the time of pleading, for duress, the obligor cannot plead *non est factum*, but should plead the duress specially. 3 Dane's Abr. & Dig. 466, citing 1 Saund. 391; Taylor's R. 281.

Debt on Bond.—In debt on a bond for arrears of account, duress may be pleaded, and without such a plea the bond will not be avoided. 5 Dane's Abr. & Dig. 372.

Proof of Execution of Deed by Duress.—Proof that a deed executed in pursuance of a trust was made under duress is inadmissible, unless the duress is specially pleaded as affirmative matter in avoidance. Nordholt *v.* Nordholt, 87 Cal. 552.

Rule in New Jersey.—In New Jersey duress is a matter of strict defense. Bordentown Tp. *v.* Wallace, 50 N. J. L. 13.

Recovery of Mortgaged Premises—Construction of Massachusetts Statute.—In a suit under Gen. Stat. Mass., c. 137, to recover possession of mortgaged

premises, the provisions of Gen. Stat., c. 129, §§ 17-27, requiring duress, when relied on as a defense to a declaration upon an executory contract, to be specified in the answer, have no application, and the defense need not be specially pleaded. Harris *v.* Carmody, 131 Mass. 51, 20 Am. L. Reg. (N. S.) 663.

Pleading Duress in Equity.—Where a contract is sought to be enforced in equity, undue influence to procure the execution of the contract may be set up by answer as a defense, though a cross bill will be necessary if the defendant seeks relief by the delivery or the cancellation of the contract. Rau *v.* Von Zedlitz, 132 Mass. 164.

Where, under Gen. Stat. Mass., c. 113, § 2, Laws 11, a single creditor files a bill in equity against husband and wife and a trustee, under a marriage settlement, seeking to establish his debt and to procure payment out of the trust fund, the equitable defense of undue influence and threats may properly be set up, and the defendant need not show duress at law for the purpose of avoiding liability on the claim. Rau *v.* Von Zedlitz, 132 Mass. 164.

3. At common law the special manner of the duress was required to be pleaded, *i. e.*, whether *per minas vitæ*, *minas imprisonment*, etc. 3 Bacon's Abr. 255; Whelpdale's Case, 5 Coke 119, 5 Dane Abr. & Dig. 375.

Double Pleading.—A plea *per duress* and *per minas* is double, and bad on special demurrer. 5 Dane Abr. & Dig. 372.

4. Richardson *v.* Hittle, 31 Ind. 119; Kraemer *v.* Deustermann, 37 Minn. 469; Buchanan *v.* Sahlein, 9 Mo. App. 552; Turley *v.* Edwards, 18 Mo. App. 690.

Necessity of Use of Word "Duress."—While it is not necessary to use the

4. Sufficiency of Plea—Imprisonment.—A plea of duress by imprisonment must show that the imprisonment was unlawful.¹

Per Minas. — And where *per minas* is relied on, the plea must state the nature of the threats² as well as the nature of

word "duress" in a plea thereof, yet facts constituting it must be properly set forth. *Gates v. Dundon* (City Ct.), 18 N. Y. Supp. 149.

Unlawful Imprisonment.—In *scire facias* against bail upon recognizance in a case of felony, a plea that at the time of entering into the recognizance the principal was unlawfully imprisoned by the commonwealth and detained in prison until by force and duress of the imprisonment the recognizance was entered into, does not present a defense for the bail, as such a plea tenders no issue of fact, but presents a mere question of law—whether the imprisonment alleged in the *scire facias* and confessed in the plea was unlawful and the recognizance consequently void for duress. *Archer v. Com.*, 10 Gratt. (Va.) 627.

Coercion of Wife by Husband.—An answer by a wife, to a suit upon a note and a mortgage given to secure the same, that she was induced by the persuasion of the payee and the coercion of her husband to execute the mortgage, is bad in failing to aver facts constituting the alleged coercion. *Richardson v. Hittle*, 31 Ind. 119.

Duress of Goods.—A plea, in an action on a promissory note, that the note was obtained by duress of goods, should, it seems, allege the circumstances under which the plaintiff claimed to detain the goods. *Kearns v. Durell*, 13 Jur. 153, 6 C. B. 596, 60 E. C. L. 596, 18 L. J. C. P. 28.

Code Pleading.—In pleading under code practice it is necessary to allege the facts upon which the duress is predicated. *Commercial Bank v. Rochester*, 41 Barb. (N. Y.) 341.

Unnecessary Detail.—A plea to an action on a note, that the note was procured by duress, and setting forth in detail the nature of the duress, is not vitiated by such detail, though it may be unnecessary. *Bingham v. Sessions*, 6 Smed. & M. (Miss.) 13.

1. Plea by Surety on Recognizance.—To *scire facias* on a forfeited recognizance it is a good plea by the sureties that their principal, at the time of its execution, "was illegally and by force imprisoned and restrained of his liberty,

and that under such illegal and forcible imprisonment and restraint of his liberty, and to procure a release and discharge from such illegal and forcible imprisonment and restraint of his liberty, defendant made and subscribed said writing," etc. *State v. Brantley*, 27 Ala. 45.

Where *scire facias* on a recognizance shows the indictment of the principal, that he was held to bail, and that he was lawfully in the custody of the sheriff for that purpose, a plea by the sureties of duress of the principal, which fails to show that the imprisonment was unlawful, is bad. *Huggins v. People*, 39 Ill. 241.

Legal Imprisonment.—When imprisonment was by virtue of legal process, a plea of duress is not supported unless it appear that the arrest was process sued out maliciously and without probable cause, or, that while the party was under lawful arrest, unlawful force, constraint, or severity was inflicted upon him, by reason of which the instrument sought to be avoided was executed. *Spaulding v. Crawford*, 27 Tex. 155.

Plea against Note by Father to Secure Release of Son.—An answer to a complaint on a promissory note, that it was given for the purpose of securing the release of the defendant's infant son from an illegal arrest on a charge preferred against him by the plaintiff, is bad in not showing in what the alleged illegality of the arrest consisted. *Gariott v. Abbott*, 28 Ind. 9.

Motion to Strike Out Plea.—To entitle a plea of duress of imprisonment to stand against a motion to strike out, it must appear that the duress of imprisonment was other than by lawful process. *Clark v. Turnbull*, 47 N. J. L. 265. 2. 2 Greenleaf Ev., § 301; 1 Bl. Com. 131; Civ. Code La., arts. 1845-1847.

A plea, in an answer to an action on a promissory note, that defendant signed the same because of his inability to withstand the threats, intimidation, and overbearing persistency of plaintiff then and there employed, etc., is insufficient as a plea of duress, because failing to state the nature of the

the fear of their execution.¹

Generally.—And in general, a plea of either character should contain substantially all requisites necessary to properly present it,² its sufficiency in any given case largely depending upon the

threats. *Murdock v. Lewis*, 26 Mo. App. 234.

1. *Coke Litt.* 253*b*; *Murdock v. Lewis*, 26 Mo. App. 234.

Fear of Battery or Destruction of Property.—A fear of mere battery or of destruction of property is not technically duress, and, therefore, is not pleadable in bar. 2 *Greenleaf on Evidence*, § 301.

Fear of Bodily Harm.—An averment, in an answer to a complaint on a promissory note, that the plaintiff induced the defendant, the maker, he then being in a feeble condition both physically and mentally, to go with him to a retired and secluded place, and then and there charged him with a crime, representing and inducing him to believe that a person then present was an officer, having full power to arrest and imprison the defendant, said person aiding and assisting in the representation, and that the plaintiff then threatened the defendant with immediate arrest and imprisonment unless he would execute the note in suit; together with a statement by the defendant that he never committed any such crime as that with which he was charged, but signed the note in fear of bodily harm, is a sufficient plea of duress in the procurement of the note. *Bush v. Brown*, 49 Ind. 573.

Fear of Harm to Brother.—A petition in equity to set aside a conveyance because of its inducement by threats to prosecute complainant's brother for adultery, which fails to allege that the brother was innocent or that the threatened prosecution would be unlawful, is insufficient; nor is it rendered sufficient by allegations that such threats were coupled with threats to stir up a mob and hang the brother, where no foundation for separate relief is laid by alleging a belief that failure to execute the conveyance would result in the latter threats being carried out. *Davis v. Luster*, 64 Mo. 43.

Attachment of Corporate Property.—Under the defenses of duress, fraudulent representation, and failure of consideration, defendant may show that he was induced to make the note sued upon, because of a threat on the

part of the plaintiff to immediately attach property of a corporation in which he, defendant, was financially interested, and that the plaintiff knew at the time of the making of the note that he had no claim against the corporation, but was in fact in its debt. *Newman v. Curiel*, 75 Hun (N. Y.) 31.

Allowance of Supplemental Pleading to Show Actual Execution of Threat.—Where an original bill was filed to set aside conveyances of real estate and to cancel promissory notes, upon the ground that they were executed under a threat made by the defendant that he would take the life of the complainant if the papers were not executed, and that he would take his life if the notes were not paid at maturity, the court refused to allow the administrator of the original complainant to file a supplemental bill setting up that in pursuance of such threats, and subsequent to the commencement of the suit, the defendant did take the life of the original complainant, because the rights of the original complainant and his administrator depended upon the facts as they existed when the conveyance and the notes were executed. *Lyster v. Stickney*, 12 Fed. Rep. 609.

2. **Plea against Bond.**—In a note to *Cumming v. Ince*, 11 Q. B. 116, 63 E. C. L. 116, it is said that the objection in *Yearb. Hil. 43 Ed. III.*, fol. 10 B, pl. 32, cited in *Bacon's Abr.*, *Duress (A)*, in the margin, seems to have finally been that the plea of duress did not aver that the bond was made against the will of the defendant, and that the plea was amended by inserting *contre son gree et volunt*, which was thereupon traversed by the plaintiff.

Plea by Coobligor — Jurisdiction to Require Bond.—A plea of duress by a coobligor, which does not aver a want of jurisdiction in the court or officer to whom the bond was given, is bad. *Bordentown Tp. v. Wallace*, 50 N. J. L. 13.

Plea by Father to Avoid Bastardy Bond for Unlawful Imprisonment of Son.—In an action on a joint and several bastardy bond, a joint plea of unlawful imprisonment of one defendant is bad where the relationship, such as father

peculiar circumstances thereof.¹

5. Effect of Plea.—The effect of the plea of duress, set up in a

and son, is not averred in the plea. *Bordentown Tp. v. Wallace*, 50 N. J. L. 13.

Wife Averring Duress of Husband.—An answer by a wife that she executed a mortgage under duress by her husband is insufficient if it contains no averment that the mortgagee was in any manner connected with or had any knowledge of the duress. *Gardner v. Case*, 111 Ind. 494.

In an action to foreclose a mortgage executed by a wife on her separate property to secure a personal debt of her husband, under threats by him to abandon her if she refused to make the mortgage, the failure of the answer by the wife to show that the mortgagees in any way participated in the duress complained of, or that they knew of the threats to induce the execution of the mortgage, will render the defense unavailable as to them. *Line v. Blizard*, 70 Ind. 23.

Action on Note—Notice to Assignee of Note.—A plea of duress by the maker of a note is not good as against the assignee, unless there be an allegation of notice to the assignee. *McClintick v. Johnston*, 1 McLean (U. S.) 414.

Action to Set Aside Deed—Alleging Execution of Deed.—In an action to set aside a deed upon the ground that it was procured by duress, a complaint is not insufficient because not directly alleging the execution of the deed by the plaintiff. *De Flores v. Santa Cruz*, 86 Cal. 191.

1. General Averments.—A written agreement provided that if a mortgagor should be unable to get a certain judgment set aside and discharged, and plaintiff should be of opinion that it was necessary, for the purpose of protecting his interest under certain leases, that the judgment should be discharged of record, he might satisfy it, and include the amount in a note and mortgage which were to be executed to him. Plaintiff paid the judgment, and the amount was included in the note and mortgage. It was held on foreclosure of the mortgage that mere general averments in the answer, that the mortgagors permitted its inclusion under "duress and compulsion," etc., did not show that they were entitled to

have the instruments reformed by omitting the amount of such judgment. *Macloon v. Smith*, 49 Wis. 201.

An answer in an action to foreclose a mortgage averred that, "under like duress and compulsion," defendants were compelled to allow plaintiff to include in the note and mortgage certain expenses in finishing off said building, which expenses were alleged to have been unnecessary; but no reason was shown for defendants' allowing plaintiff's claim for such expenses in the accounting between them; nor were any further facts alleged to show that the claim was fraudulent, or that the execution of the instruments for an amount including such claim was under duress, and it was held that the answer was insufficient to impeach the instrument for fraud or duress. *Macloon v. Smith*, 49 Wis. 201.

Construction of Pleading.—In *Butterfield v. Davenport*, 84 Ind. 590, the facts relied on to defeat the action were such as to make it difficult to classify the defense which they tended most to make out, but the court construed the facts charged to constitute a conspiracy to defraud the defendant, which was finally accomplished by threats and putting him in fear to an extent amounting to constraint and consequent duress.

Surplusage.—In an action on a promissory note, in which the defendant pleads want of consideration and also fraud and duress, it is error to strike the plea out because setting up fraud and duress, as they may be treated as surplusage. *Hall v. Morrison*, 92 Ga. 311.

Sufficiency of Averments—Procurement of Mortgage.—On foreclosure of a real estate mortgage, securing a note, the answer, to show that the instruments were executed under duress, averred that plaintiff, holding the title to the property, refused to convey it as he had agreed, unless defendant would include in the note and mortgage (which were to be executed by him to plaintiff simultaneously with such conveyance) certain unjust and fraudulent claims for moneys unjustly and fraudulently expended upon the property, etc. The answer, however, showed that, by previous written agreement

suit or action to recover upon an obligation which the obligee claims was not his free act, is to admit the act sought to be

between the parties, plaintiff was to advance moneys for the erection of a building on the premises, and defendants were to execute a note and mortgage to secure repayment of such moneys, and that, after an accounting between the parties, the instruments in suit were executed pursuant to such agreement; and it was held that the answer showed no defense. *Macloon v. Smith*, 49 Wis. 200.

Compulsory Execution of Promissory Note.—An answer which alleges false representations as to the value of materials for which the note in suit was given, and threats to file a lien, but which avers an agreement that the note should be corrected if necessary, and a willingness to pay the amount actually due, does not set up the defense of duress. *Gates v. Dundon* (C. Pl.), 19 N. Y. Supp. 390.

Procurement of Goods by Duress.—A complaint to recover personal property alleged to have been obtained from the plaintiff by fraud and duress, which substantially avers that the defendant threatened to arrest and send the plaintiff to a state prison for a crime; threatened to beat and wound him; refused to permit him to confer with an attorney, or to consult with his friends; that the defendant and another did by acts, threats, and gestures induce the plaintiff to believe that they were armed with deadly weapons; that they put the plaintiff in great fear; that the defendant knew that the plaintiff was not guilty of the offense charged, and that the property transferred was surrendered because of such wrongful acts and upon no other consideration, is not based upon fraudulent representations alone, and the question whether or not the representations made to induce the transfer misled the plaintiff or not did not affect the sufficiency of the complaint. *Reynolds v. Copeland*, 71 Ind. 422.

Threat to Institute Bankruptcy Proceedings.—An answer in an action upon promissory notes, that they were executed simply because of a threat by the plaintiff to institute bankruptcy proceedings against a debtor of the plaintiff, from whom the defendant had purchased certain goods sold by the plaintiff, and thus to injuriously affect the defendant, does not set up facts

constituting duress. *Barnes v. Stevens*, 62 Ind. 226.

Threatened Sale of Property under Invalid Execution.—A plea to an action on a note, that it was given to release property levied on by virtue of an execution fraudulently issued on a satisfied judgment, under which the plaintiff threatened to sell the property, is bad as a plea of duress. *Bingham v. Sessions*, 6 Smed. & M. (Miss.) 13.

Verification of Plea—Colorado Statute.—Under a statute (Code Colo., § 66) providing that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified," the defense of threats and duress must be sworn to. *Parkison v. Boddiker*, 10 Colo. 503.

Amendment of Defective Plea.—A plea, though bad as a plea of duress, may be amended, by permission of the court, so as to allow a defense arising out of the fraud of the plaintiff to be shown. *Bingham v. Sessions*, 6 Smed. & M. (Miss.) 13.

Cure of Defective Allegation by Answer.—Where a demurrer to a complaint in an action to set aside a deed upon the ground that it was procured by duress is overruled by consent, alleged error in the complaint, *i. e.*, that it failed to directly allege the execution of the deed by plaintiff, is cured by an answer alleging the execution of the deed, but denying its procurement by duress. *De Flores v. Santa Cruz*, 86 Cal. 191.

Questioning Sufficiency of Complaint for First Time on Appeal.—Where, in an action to set aside a deed upon the ground that it was procured by duress, an allegation in the complaint is made certain by the answer, the sufficiency of the complaint cannot be questioned for the first time in the appellate court. *De Flores v. Santa Cruz*, 86 Cal. 191.

Replication—Avoiding Plea—Averting Voluntary Action.—To a plea of duress in debt on a bond the plaintiff may reply that the making of the bond was voluntary and not *per minas*. 5 Dane Abr. & Dig. 372. And see 5 Com. Dig., Pleader, 2. W. 19; 2 Inst. 482, Cl. Ass. 72.

avoided by it,¹ unless otherwise provided by statute.²

6. Instructions.—Instructions which fairly present to the jury the whole law of duress as raised by the pleadings and proof, and which taken as a whole have no tendency to mislead a jury of ordinary intelligence, will be deemed sufficient.³

7. Findings.—And findings of fact must be either specific, or sufficient to warrant a conclusion of the existence of the duress charged.⁴

Alder by Verdict.—In an action of debt on a bond, defendant pleaded duress, and plaintiff replied that the defendant was at liberty and made the bond of his own free will, and that he made it not for fear of imprisonment, and the replication was adjudged good after verdict, and was helped, if informal, by the statutes 4 and 5 Anne. *Tomlin v. Burlace*, 1 Wils. 6.

Defendant at Large.—To a plea of duress in debt on a bond for arrears of account, the plaintiff may reply that the defendant was at large and thus avoid the duress. 5 Dane Abr. & Dig. 372. And see 5 Com. Dig., Pleader, 2. *W.* 19; 2 Inst. 482, Cl. Ass. 72.

Necessity of Avoiding Plea of Duress—Bastardy Bond.—In an action on a bastardy bond, in which the obligor pleaded duress, it appeared that the obligor appeared in compliance with the bond, but did not plead to the complaint, and that the proceedings were continued because the child was not born. It was held that the appearance did not amount to a waiver of the duress, and that if it did it could not be taken advantage of by plaintiff unless it were set forth in her replication as avoiding the plea of duress. *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

Early Practice at Common Law.—In debt on bond, it was pleaded that the defendant was in prison, and that the bond was given by duress. Plaintiff replied that the defendant executed it of his own free will and for a good and valuable consideration, *absque hoc* that he executed it by duress of imprisonment; and concluded with an averment. Defendant demurred, and showed this for cause, whereas he should have concluded to the country; and so was the court's opinion, though it was urged for the plaintiff that he could not take issue on the whole plea, as the fact was that the party was actually in prison, but gave the bond for a just debt. Hence the plaintiff was obliged to deny it was given by duress, as he could not

deny the imprisonment; but the court held he might have replied in the common form, and though the defendant was in prison, yet, if the bond was not given by duress, the issue must be found for the plaintiff, for the duress is the substance of the plea. *Hayman v. Gerrard*, 1 Saund. 103, citing *Knight v. Newton*, 3 Leon. 239.

1. Buller N. P. 172; Bacon's Abr., Duress (*D*); Viner's Abr., vol. 9, p. 322; *Whelpdale's Case*, 5 Coke 119.

2. A defense of duress amounts to a denial of the execution and delivery of a promissory note within Code Colo., § 66, requiring such a denial to be sworn to. *Parkison v. Boddiker*, 10 Colo. 503.

3. *Walbridge v. Arnold*, 21 Conn. 431.

Verbal Inaccuracies.—A verbal inaccuracy in instructions, consisting in the use of the words "illegal imprisonment," of which there was no testimony, will not be held to have misled the jury where the question as to whether or not there was such coercion and undue influence exerted as to overcome the free agency of the person against whom the alleged duress was practiced, and to amount to such duress, was fairly presented. *Schultz v. Culbertson*, 49 Wis. 122.

Exposition of Law.—In an action on a bond which the defendant averred was executed under duress, the plaintiff denied the duress, and denied the making of threats or promises to induce the execution of the bond, and the court instructed the jury that if they should find from the evidence that the bond was obtained by duress, or was given with an intent to turn aside the course of justice or to prevent the prosecution or punishment of crime, it was not binding and their verdict should be in favor of the defendant; it was held that the instruction was as favorable as the defendant could ask. *Avery v. Layton*, 119 Pa. St. 604.

4. A finding of facts which does not specifically find duress, is not in legal

II. COMPOUNDING FELONY.—In some jurisdictions, and for the purpose of avoiding a written instrument, the party executing it may plead that it was executed for the purpose of compounding a criminal offense.¹ Whenever, therefore, this plea is allowable, it must be shown that at the time of the procurement of the writing sought to be avoided, a criminal prosecution had been commenced² or was threat-

effect equivalent to a finding of duress, unless the facts set forth are such that the conclusion of duress must inevitably follow. It is insufficient that they lead to a very strong inference. *Feller v. Green*, 26 Mich. 70.

1. *Collins v. Blantern*, 2 Wils. 341, 1 Smith's Lead. Cas. 387. See Am. and Eng. Encyc. of Law, title COMPOUNDING OFFENSES.

Form of Plea.—In *Collins v. Blantern*, 2 Wils. 341, 1 Smith's Lead. Cas. 387, Lord Chief Justice Wilmut, in considering the sufficiency of the plea, held that after alleging the facts upon which the alleged composition of felony was based, the plea might properly conclude with "and so the said bond is void," instead of *non est factum*, and further stated that in his opinion the proper way to conclude such a plea was "and so the written obligation is void *et hoc*," etc.

Andrews v. Eaton Explained.—In Com. Dig., Pleader, 2. W. 27, it is stated that composition of felony may be pleaded to debt on a bond, and *Andrews v. Eaton*, Fitzg. 4, is cited in support thereof. Cowen, J., in *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.) 251, after substantially setting out the plea in the case cited by Comyns, the objections thereto, and the conclusion of the court thereon, and after referring to *Collins v. Blantern*, 2 Wils. 347, decided a few years thereafter, stated that the judgment in *Andrews v. Eaton*, Fitzg. 4, could have been on no other ground than that the pendency of the prosecution agreed to be discontinued was not averred directly, but only by recital, the demurrer probably being special.

Necessary Parties to Bill to Cancel Note.—A bill by the maker of a promissory note given to the father of a female to compound a felony alleged to have been committed on her, and which seeks cancellation of the note in the father's hands, need not make the daughter a party. *Loomis v. Cline*, 4 Barb. (N. Y.) 453.

In an Action on an Assigned Bond, it is not a good plea for the obligor that the assignment was extorted from the obligee by threats of a prosecution for felony, notwithstanding the former was notified by the latter of the fraud, and required not to pay the contents of the bond to the assignee. *McCausland v. Drake*, 3 Stew. (Ala.) 344.

Sufficiency of Pleading to Admit Proof of Composition of Felony.—Under an allegation that a mortgage was given with notice to the mortgagee of plaintiff's equity and that there was a cloud upon her title, proof is not admissible that the mortgage and notes secured thereby were given to compound a felony. *Slocum v. Slocum*, 9 Ill. App. 142.

2. **Sufficiency of Affidavit of Defense.**—An affidavit of defense alleging that the debt secured by the bond in suit was for money embezzled, that the creditor accepted the bond in lieu of the money embezzled, and that the acceptance worked a release of the debtor "from all liability for prosecution for said crime of embezzlement," is insufficient because failing to allege the commencement of criminal proceedings, or a threat to resort to them as a means of coercion to compel the execution of the bond. *Portner v. Kirschner*, 169 Pa. St. 472.

Sufficiency of Plea—Implication of Commission of Offense.—Although a plea shows that the prosecution had not been formally commenced, and does not show explicitly that a felony had been committed, yet it will be sufficient if it presents strong ground for the implication that a public offense had been committed which amounted to a felony or was of a character deeply affecting the peace and good order of society, that a public prosecution was intended and just about to be commenced by the proper authorities through the information and testimony of the party injured, and that the suppression, so far as he could affect it, of that prosecution, and of

ened,¹ or that a crime had been actually committed.² See

his evidence in support of it, was in part a consideration of the note in suit. *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90.

Alleging Contents of Note in Suit.—An answer to an action on a note need not aver that the omission to insert in the note that the stopping of the prosecution was a part of the consideration thereof, was by mistake of the draughtsman. *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90.

1. *Groesbeck v. Marshall*, 44 S. Car. 538; *Portner v. Kirschner*, 169 Pa. St. 472.

Insufficiency of Plea of Threats.—A plea that a note was given because of threats to institute a prosecution for a felony is insufficient to set up the defense of compounding felony. *Catlin v. Henton*, 9 Wis. 476.

Sufficiency of Allegations of Threats to Authorize Instruction Thereon.—An averment in a complaint to cancel a note, that it was executed upon demand of the defendant and that he would receive and accept it in full satisfaction and compromise of a crime, and that plaintiff, being then pressed and threatened and being put in fear of great bodily harm, did execute the note, etc., tenders an issue which authorizes the court to instruct the jury that if the defendant took the note under an agreement, expressed or implied, that he would not prosecute the defendant for the crime, without any further consideration, they should find for the plaintiff. *Stout v. Turner*, 102 Ind. 418.

Instruction Confining Defense to Proof of Express Agreement.—Where it is contended that the note in suit was executed in consideration of an agreement not to prosecute a third party criminally, an instruction is erroneous which confines the defense to proof of an express agreement, since the court should submit to the jury whether or not the execution of the note was made in consideration of an agreement not to prosecute, and leave the jury to determine from all the facts whether or not an express agreement had been made or could be inferred from the circumstances. *Wegner v. Biering* (Tex. Civ. App. 1893), 22 S. W. Rep. 258.

Necessity of Submission to Jury.—In *Mills v. Hudgins* (Ga. 1896), 24 S. E. Rep. 146, it plainly appeared that the property of the plaintiff, a married

woman, was given up by her for the purpose of suppressing a criminal prosecution against her husband and son, to settle a debt of the husband's, and it was held, in an action by her against the person who took the property, that she might recover it back, and that the action of the trial judge in rendering judgment for the defendant without a jury was error.

2. **Necessity when Institution of Prosecution is Alleged.**—Where the institution of a prosecution is alleged it is necessary that there should be an allegation that the crime had been committed. *Cheltenham Fire-Brick Co. v. Cook*, 44 Mo. 29.

Necessity when Institution of Prosecution is Not Alleged—Allegation of Actual Commission of Crime.—Where the pendency of criminal proceedings at the time the instrument sought to be avoided was executed is not stated, the plea must show the actual commission of the felony; an averment that the plaintiff alleged the crime to have been committed is not enough. *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.) 249.

An answer that the note in suit was given to suppress a prosecution against a third person need not aver that such person actually committed the crime. *Crowder v. Reed*, 80 Ind. 1. In this case it is said that if the person attacking an agreement made to prevent a prosecution were required to prove the actual commission of the offense, it would make the whole question turn upon the guilt or innocence of the accused and thus bring in an issue which ought to be elsewhere tried and determined.

Averment of Agreement to Stifle Prosecution.—A plea in an action on a bond which alleges that it was given in consideration of an agreement to stop or embarrass the course of a criminal prosecution then pending is sufficient, though it does not aver that a felony had in fact been committed. *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.) 249.

Necessity of Averment of Knowledge of Crime by Oblige.—Where no prosecution has been instituted it is necessary to allege that a crime was committed, and that the party taking obligation in pursuance of forbearance to institute a prosecution "had knowl-

Am. and Eng. Encyc. of Law, title COMPOUNDING OFFENSES.

edge" of the existence of the supposed crime. *Cheltenham Fire-Brick Co. v. Cook*, 44 Mo. 29. But the actual commission of the crime need not be shown. *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.) 249.

Pleading in Justice Court.—Where no pleadings are required, as in a suit on a note before a justice, it is not necessary to allege that the crime had been committed, and that the payee at the time of taking the note knew of that fact. *Baker v. Farris*, 61 Mo. 389.

Sufficiency of Answer to Show Composition of Felony—Failure to Show Crime or Prosecution Therefor.—An answer that the note in suit was given to compound a felony does not sufficiently show that the felony was compounded, if it denies that the felony was in fact committed or fails to show that a prosecution for one was commenced before the making of the note. *Catlin v. Hen-*

ton, 9 Wis. 476; *Schultz v. Catlin*, 78 Wis. 611.

Effect of Demurrer to Answer Denying Commission of Crime.—Where a petition by the payee of a check, for the cancellation thereof, avers that a note, for which the check was exchanged, "was executed and delivered by the plaintiff for no purpose or consideration whatever except to avoid being criminally prosecuted on a charge of which he is not guilty," a demurrer thereto entitles the plaintiff to the relief demanded, because it admits his innocence of the crime charged. *Moeckly v. Gorton*, 78 Iowa 202.

Necessity of Showing Means Taken to Prevent Prosecution.—An answer alleging that the consideration of a contract was a promise to suppress a prosecution need not show what means were to be taken to prevent the prosecution. *Crowder v. Reed*, 80 Ind. 1.

DUTIES.

See *TAXES*.

EASEMENTS.

By S. B. FISHER.

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CROSS-REFERENCES.

See also, in general relation to this subject, articles *EMINENT DOMAIN*; *HIGHWAYS*; *STREET RAILWAYS*; *RAILROADS*.

I. ACTION BASED ON INJURY TO EASEMENT—1. Who may Maintain Action—*a. PARTIES IN POSSESSION.*—An action for an obstruction or disturbance of the enjoyment of an easement may be maintained by any person in possession of the premises to which such easement is appurtenant.¹

A Tenant at Will may bring such an action for an interruption of a passageway appurtenant to the land occupied by him.²

1. Com. Dig., Action upon the Case for a Nuisance, *B.*; Washb. Easements and Servitudes (4th ed.), c. 6, § 2, 6; *Brown v. Bowen*, 30 N. Y. 519.

Master may Declare on Servant's Occupation as His Own.—A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over the defendant's close to such cottage. *Bertie v. Beaumont*, 16 East 33.

Action by Agents.—An agent may commence and carry on, in the name of the owner of the premises, an action

to remove an obstruction to a right of way appendant to such premises, but he cannot maintain such action in his own name either individually or as agent. "Not individually, because he has no right; and not as agent, because, as a general rule (and this case is not within any exception), the rights of principals must be enforced in their own names, as well where an agent conducts a proceeding in their behalf as where they conduct it in person." *Cunningham v. Elliott*, 92 Ga. 159.

2. "He was in possession as well of the ways as of the land to the full enjoyment of which they were indispensable; and therefore any unlawful act

b. REVERSIONER.—A reversioner may maintain an action for the disturbance or obstruction of an easement where the disturbance or obstruction will be an injury to the inheritance.¹

c. WHO MAY JOIN AS PLAINTIFFS.—It has been held that where several persons have separate tracts of land through which a stream of water flows, they may join as plaintiffs to restrain the diversion of such stream at a point above their lands.² It is held that husband and wife may join in an action on the case for an obstruction of a way appurtenant to the wife's land, such land being in their joint occupation or possession.³

2. Form of Action.—An action on the case is the proper remedy for disturbance of or injury to an easement,⁴ and not trespass.⁵

by which he is deprived of the use of the way is an injury for which he may maintain an action as well as if it had directly interfered with and disturbed him in the occupation of the land." *Foley v. Wyeth*, 2 Allen (Mass.) 135. See also *Hamilton v. Dennison*, 56 Conn. 359.

So a tenant at will may bring such an action for obstructing a drain. *Hastings v. Livermore*, 7 Gray (Mass.) 194.

1. *Brown v. Bowen*, 30 N. Y. 519.

The owner of land leased at will for purposes of pasturage may maintain an action for the obstruction of a right to drain the land through an ancient watercourse; but can only recover for the injury thereby occasioned to the reversion. *Hastings v. Livermore*, 7 Gray (Mass.) 194.

Act also Injurious to Tenant.—It is no objection to an action by a reversioner that the act complained of is also an injury to the tenant in possession. The tenant and reversioner may each maintain his action for the selfsame act, and each may recover for the injury they respectively sustain by reason thereof. *Tinsman v. Belvidere Delaware R. Co.*, 25 N. J. L. 262.

Ancient Lights.—A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights is sufficient if it shows an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right. *Metropolitan Assoc. v. Petch*, 5 C. B. N. S. 504, 94 E. C. L. 504. See also *Kidgill v. Moor*, 9 C. B. 364, 67 E. C. L. 364.

Lessor.—An obstruction of a way appurtenant to land in the occupation of a tenant at will may be an injury to the lessor, although it does not affect

the reversion nor cause an abatement in the rent; consequently it has been held that the lessor may maintain an action on the case for such obstruction upon showing that he has been damaged thereby. *Cushing v. Adams*, 18 Pick. (Mass.) 110.

2. *Churchill v. Lauer*, 84 Cal. 233.

3. *Cushing v. Adams*, 18 Pick. (Mass.) 110.

Husband and wife cannot recover joint damages for the infringement of a right when it does not appear that their right is joint. *Noyes v. Hemphill*, 58 N. H. 537.

4. 1 Chitty on Pldgs. 160; Washb. Easements and Servitudes (4th ed.), c. 6, § 2; *Osborne v. Butcher*, 26 N. J. L. 309; *Smith v. Wiggin*, 48 N. H. 105; *Kurkel v. Haley*, 47 How. Pr. (N. Y. Supreme Ct.) 75; *Lambert v. Hoke*, 14 Johns. (N. Y.) 383; *Beach v. Child*, 13 Wend. (N. Y.) 343; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Tibbetts v. Penley*, 83 Me. 118; *Tuttle v. Walker*, 46 Me. 280; *Baer v. Martin*, 8 Blackf. (Ind.) 317; *Allen v. Ormond*, 8 East 4.

5. 1 Chitty on Pldgs. 159; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Baer v. Martin*, 8 Blackf. (Ind.) 317.

"The obstructing and blocking up of the road may have been direct, immediate, wilful, and forcible, but that was not to or upon the land of the plaintiff, or to his possession; it was not direct and immediate to him. The injury to him was the depriving him of the use of the byroad by reason of such obstruction. It was indirect and consequential, and therefore the subject of an action on the case, and not of trespass." *Osborne v. Butcher*, 26 N. J. L. 309.

3. Declaration, Petition, or Complaint—How Ownership Alleged.—In stating ownership of an easement, it is not necessary to show the particular manner in which title thereto was acquired. It will be sufficient to allege ownership generally.¹

Description of Easement.—The easement should be described with particularity.²

Allegations of Injury.—The declaration, petition, or complaint should allege injury to the plaintiff by reason of the obstruction of the easement.³

Allegations of Damage.—In an action for interfering with or obstructing an easement, the plaintiff need not show actual damage or injury. The law imports damage from the invasion of the right.⁴

II. EASEMENT AS A DEFENSE—1. To be Specially Plead.—The right to an easement as a defense to an action must be pleaded specially and cannot be taken advantage of under the general issue.⁵

1. The averment in a complaint that the plaintiff is the owner of a certain tract of real estate, and also of an easement and right of way across the land of the defendant (describing it), is a sufficient allegation of ownership to withstand a demurrer. *Hall v. Hedrick*, 125 Ind. 326. See also article TITLE, OWNERSHIP, AND POSSESSION.

2. Private Way.—In an action to enjoin the obstruction of an alleged private way, a complaint alleging that the way claimed is a well-defined road, thirty feet wide, which has been in use for more than twenty years, and is now open and in use, is sufficiently specific without setting out the beginning, course, and termini of the way. *Harding v. Cowgar*, 127 Ind. 245.

A complaint in an action for damages against defendant for obstructing a right of way across his land, claimed by plaintiff, which does not define the way by metes and bounds, but merely states a habit of crossing defendant's grounds; which fails to state whether such crossing was by right on the part of plaintiff, or by mere license by the defendant, or whether such way has been open and continuous for the whole period alleged; and which also omits to state from whom either party derived title to their lands, is bad on demurrer. *Johnson v. Lewis*, 47 Ark. 66.

Public Highway.—Where one has a private easement in the public highway, in order to maintain an action to enjoin its obstruction the complaint should describe it as a public high-

way. *Harding v. Cowgar*, 127 Ind. 245.

Allegations of public highway proved by evidence of public footway. *Allen v. Ormond*, 8 East 4.

3. Obstruction of View.—A petition which states the obstruction of a view and does not show that plaintiff was benefited by such view or injured by its obstruction is bad as showing no cause of action. *Lyon v. McDonald*, 78 Tex. 71.

Private Way.—A landowner maintained a way necessary for access from one piece of his land to a highway, over another piece of his land. The land nearest the highway was allotted after his death to the widow, and the remainder sold. In an action by the holder of the dominant estate against a purchaser from the widow, it need not be alleged in the complaint that no way to the highway can be obtained over the land of other parties. *Ellis v. Bassett*, 128 Ind. 118. And see *Pernan v. Wead*, 2 Mass. 203; *Collins v. Prentice*, 15 Conn. 423.

4. *Collins v. St. Peters*, 65 Vt. 618; *Fullam v. Stearns*, 30 Vt. 443; *Blodgett v. Stone*, 60 N. H. 167; *Tillotson v. Smith*, 32 N. H. 90; *Woodman v. Tufts*, 9 N. H. 88; *Atkins v. Bordenman*, 2 Met. (Mass.) 469; *Ashby v. White*, 2 Ld. Raym. 938; *Bower v. Hill*, 1 Bing. N. Cas. 549, 27 E. C. L. 489; *Harrop v. Hirst*, L. R. 4 Exch. 43.

5. *Strout v. Berry*, 7 Mass. 385; 1 Chitty on Pldgs. 541.

"If defendant claims an easement, he must plead it specially, and cannot give it in evidence on the general

2. Particularity Required.—Great exactness and particularity are demanded of one who, in stating his right, thus attempts to justify on the ground of an easement.¹ Thus, in pleading a right of way over plaintiff's lands, defendant must show that he had such an easement as justified his entry,² and that he was using his easement in the manner and for the purpose for which it was granted.³ In pleading an easement claimed to have been created by an agreement between the parties, it is not necessary to allege that the agreement was in writing.⁴

issue." Com. Dig., Pleader, E. 15; *Hawkins v. Wallis*, 2 Wils. 173.

"It seems to be an established rule of pleading, that wherever the defendant in trespass *clausum fregit* justifies the trespass by reason of some title, or easement, which gives him a legal right to do the act which is the subject of the action, he must set forth his title, or right to enjoy the easement especially, so that the plaintiff may have an opportunity of traversing it; and so it is in replevin." *Pearle v. Bridges*, 2 Saund. 402, note 1.

1. Washb. Easements and Servitudes (4th ed.), c. 6, § 2, 16.

Easement must be Defined.—"It is a rule of law necessary for the protection of property, that any one who comes on the soil of another shall be deemed a wrongdoer till he shows distinctly that he had a right. If he enters under pretense of an easement, he must show precisely such an easement as will warrant what he has done; he is not to enter by virtue of a fancied right, not accurately defined." *Rouse v. Bardin*, 1 H. Bl. 352.

So, a plea justifying a nuisance on the ground that the defendant had for twenty years exercised the right of keeping a mixen on his own land, and thus of causing offensive smells, was held bad because it did not allege the right to cause the smells to pass onto the plaintiff's premises. "There is no claim of an easement unless you make it appear that the offensive smells had been used for twenty years to go over to the plaintiff's land." *Flight v. Thomas*, 10 Ad. & El. 590, 37 E. C. L. 182.

A plea which meant to set up in defense and rely upon a right of way of necessity, but which sets up merely a convenience and not a necessity, is bad. *Anderson v. Buchanan*, 8 Ind. 132.

2. Upon demurrer to a plea of a right of passage, the bar was adjudged

ill, among other reasons, for this, that it was not shown what manner of passage it was, whether on foot, or horse, or cartway; so that it was on the whole uncertain. *Alban v. Brounsall*, Yelv. 163.

3. In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose. *Peppin v. Shakespear*, 6 T. R. 748.

A plea that a party was passing in his way to the place where he was authorized to go by his grant is a sufficient averment of a lawful use of his right. *French v. Marstin*, 24 N. H. 440.

Pleading Public Highway.—In pleading a public highway it is not necessary to state any termini. *Rouse v. Bardin*, 1 H. Bl. 351.

"It has been adjudged that it is sufficient to state, both in indictments and in pleas in trespass justifying under a right of way, in a compendious manner, that it is a highway." *Rex v. Stoughton*, 2 Saund. 1586, note 4; *Aspindall v. Brown*, 3 T. R. 265; *Barker v. Clark*, 4 N. H. 380.

4. "It is settled law that where one has agreed to sell a piece of real property and an action is brought to enforce the agreement, the plaintiff is not required to allege that the agreement was in writing. * * * Now, if this be the rule where one agrees to transfer to another his whole interest in real property, why should it not be the rule when he agrees only to transfer some smaller interest, or create an easement? We are unable to perceive any distinction between the two supposed cases." *Emerson v. Bergin*, 76 Cal. 202.

EJECTMENT.

BY WARD B. COE AND GEORGE C. MORRISON.

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CROSS-REFERENCES.

As to other Remedies for the Recovery of the Possession of Real Property. see cross-references under the titles *REAL ACTIONS*; *REAL PROPERTY*.

Jurisdiction in Ejectment as Dependent on Value of Property in Dispute, see article *AMOUNT IN CONTROVERSY*, vol. I, p. 727.

Splitting Causes of Action in Ejectment, see article *ACTIONS*, vol. 1, p. 162.

Action of Ejectment to Enforce Award, see article *AWARDS*, vol. 3, p. 132.

Ejectment to Settle Questions of Boundary, see article *BOUNDARIES*, vol. 3, p. 672.

Effect of Death of Party on Action of Ejectment, see article *DEATH*, vol. 5, pp. 803, 825.

Ejectment by Landowner where Land is Taken for Public Use, see article *EMINENT DOMAIN*.

Judgment by Default in Ejectment, see article *DEFAULTS*, vol. 6, p. 14.

Use in One Ejectment Suit of Deposition Taken in Another, see article *DEPOSITIONS*, vol. 6, p. 579.

I. DEFINITION.—The action of ejectment is a fictitious mode of legal proceeding by which possessory titles to corporeal hereditaments and tithes may be tried and possession obtained without the process of a real action.¹

II. HISTORY OF THE ACTION.—In order to obtain a clear understanding of the modern action of ejectment, it is necessary briefly to trace its origin and development in the common law. In the early periods of our legal history, very little regard was paid to any interest in land less than a freehold. Estates for years, as now existing, were then practically unknown. The lord, indeed, did sometimes grant his vassal the right to the possession of land, but such grants were not considered as transferring to the grantee any title to the land, but merely as agreements, or contracts, between the lord and his vassal, the position of the latter being hardly above that of bailiff, or servant, from whom an account of the profits and receipts was due as a matter of right. The remedy of tenants, when ousted of possession under these contracts or leases, was the old writ of covenant, adapted at that time to the recovery both of the term and of damages for its detention; but this writ extended only to breaches of the original agreement. The tenant was therefore altogether without redress when dispossessed by a stranger; and even when dispossessed by one claiming under the original grantor, his only redress was against such grantor for damages sustained by the ouster, his term not being recoverable. To meet these difficulties, the writ of *quare ejecit infra terminum* was devised after the passage of the statute of Westminster 2, c. 24,² and, as is said by Blackstone, “upon the equity” of that statute.³ Under this writ were recoverable both the term, if unexpired, and damages against not only the grantor himself, but (of especial importance) against all persons claiming under him.⁴ Still the tenant was left without remedy when

1. Adams on Ejec. 1.

2. 13 Edw. 1.

3. 3 Black. Com. 207.

4. The introduction of the remedy

by ejectment and its application, made easy in the course of its development, to the trial of titles against any tenants in possession (by whatever means

ousted by a mere stranger, not claiming under the original grantor; and a new writ, called the writ of *ejectione firmæ*, was invented, according to Adams, in the reign of Edward II., or in the early part of that of Edward III.¹ This writ is the foundation of the modern action of ejectment. It gave the lessee or tenant a remedy against all persons whatsoever who ousted him of his term, excepting, indeed, where the grantor himself ejected his lessee, in which case the old writ of *quare ejecit* was resorted to.² But since the plaintiff did not possess a freehold interest in the lands sued for, his recovery was limited to damages for the injury he had sustained, but did not include a restoration to his term. It then became the practice of leaseholders, when disturbed in their possessions, to apply to courts of equity for redress, and the latter used to compel a restitution of the land itself to the party immediately injured. The courts of common law soon afterwards adopted this method of rendering substantial justice; not, indeed, by the invention of a new writ, but by adapting the one already in existence to the circumstances of the times, and by introducing, in the prosecution of a writ of ejectment, a species of remedy, neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term and a writ of possession thereupon.³ The results of this innovation were important and far reaching. A new efficacy was given to the action of ejectment, which was ingeniously turned into an original and convenient method of trying all possessory titles, to freeholds as well as to terms for years, thereby causing all the old real actions to fall into disuse. The method of proceeding in such cases was as follows: Since the judgment in ejectment is for the recovery of a term, it is necessary in the first place that a term should be created; and, further, since the injury complained of is a loss of the possession, it is also necessary that the termor should be ejected. In order to meet these requirements the claimant of the premises in question entered upon them, accompanied by another person, and then and there sealed and delivered to the latter a lease for years of the same. This lessee was thereupon ousted either by the actual tenant, or by some one coming upon the premises, either by agreement or by chance, called the casual ejector, and immediately brought his action of ejectment against either the actual tenant or the casual ejector, as the case might

they acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, caused the remedy by writ of *quare ejecit infra terminum* to fall into disuse. 3 Black. Com. 207.

Both this writ and the old writ of covenant real, above referred to, were abolished by statute 3 and 4 Will. IV., c. 27, § 36 (1834).

1. Adams on Ejec. 7.

2. Adams on Ejec. 7.

Even the grantor was liable to be sued upon this new writ, notwithstanding the old doctrine that a man could not enter *vi et armis* into his own freehold. Adams on Ejec. 8.

3. Adams on Ejec. 9. The period when this change took place is placed by Adams between the years 1455 and 1499.

be, to recover his term, damages, and possession, for which the writ of possession issued. If the action was brought against the casual ejector, notice of the proceedings was required to be given by the plaintiff, or claimant, to the actual tenant, who, if he had any title to the premises, would then apply to the court for permission to defend the action, which application was uniformly granted on certain minor conditions. The action then proceeded in the name of the original defendant, but the tenant in possession was allowed at the trial to give his own title in evidence. In order to maintain the action in this form it was necessary for the plaintiff, in case of defense, to make out four points, to wit: Title, lease, entry, and ouster. Various difficulties were found to attend the making of the lease, entry, and ouster, and a remedy was devised by Lord Chief Justice Rolle, during the time of the protectorate, which soon became an established system. Under it no lease is sealed and no entry or ouster really made, and all the preliminaries above referred to are merely feigned. A, the person claiming title, delivers to B, the party in possession, a declaration in ejectment, in which C and D, two fictitious persons, are made respectively plaintiff and defendant; and in which C states a fictitious lease of the land in question from A to himself for a term of years, and complains of an ouster from them by D during its continuance. To this declaration is annexed a notice, supposed to be written and signed by D, informing B of the proceedings, and advising him to apply to the court for permission to be made defendant in his place, as he, having no title, will leave the suit undefended.¹ Upon failure of B so to apply, judgment by default will be entered up against the casual ejector at the proper time, and possession of the land given to A. If, however, B should apply for permission to defend the action, the court will grant him that privilege on condition that he enter into a rule, commonly called the consent rule, by which he undertakes that at the trial he will make confession of the lease, entry, and ouster, and rely for his defense solely on his title. The declaration is then altered by inserting as defendant the name of B instead of D, and the case then goes to trial as other actions.²

III. THE MODERN ACTION OF EJECTMENT.—Such is the history of the action of ejectment.* Many states in this country have altogether abolished the action, substituting for it various forms of action for the recovery of real property. Many others still retain the old action, though modified and improved in many material respects. In such cases, however, the common-law principles of ejectment are still recognized and followed, the changes established by statutes having reference less to such principles than to methods of procedure. This article will deal solely with the action of ejectment, omitting all consideration of statutory actions for the recovery of real property.

1. Adams on Ejec. 15.

2. Adams on Ejec. 1-17.

IV. FOR WHAT THINGS THE ACTION WILL LIE—1. In General.—

This matter is governed now almost entirely by statutes in the various states. The rule at the common law has been negatively stated thus: An ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession. In other words, it is maintainable only for a corporeal hereditament.¹ But wherever a right of entry exists, and the interest is visible and tangible, so that possession of it can be delivered in execution of a judgment for its recovery, the action is maintainable.²

Exceptions.—It has been said that one of the reasons for the rule preventing the recovery in ejectment of incorporeal hereditaments, to wit, the impossibility of the sheriff's delivering possession of the same, has met with no particular favor.³ Exceptions to the rule, more or less pronounced, are to be found in the cases of titles,⁴ commons,⁵ and fisheries.⁶

1. Adams on Ejec. 20; Aiken v. Benedict, 39 Barb. (N. Y.) 400.

2. Wood v. Truckee Turnpike Co., 24 Cal. 474; Southern Pac. Co. v. Burr, 86 Cal. 279; Nichols v. Lewis, 15 Conn. 137; Den v. Craig, 15 N. J. L. 192; Jackson v. Buel, 9 Johns. (N. Y.) 298; Jackson v. May, 16 Johns. (N. Y.) 184; Rowan v. Kelsey, 18 Barb. (N. Y.) 484; Child v. Chappell, 9 N. Y. 246; Champlain, etc., R. Co. v. Valentine, 19 Barb. (N. Y.) 484; Black v. Hepburne, 2 Yeates (Pa.) 331; Patch v. Keeler, 27 Vt. 252. And see Grand Rapids v. Whittlesey, 33 Mich. 109; Bay County v. Bradley, 39 Mich. 163; Taylor v. Gladwin, 40 Mich. 232.

Right to Erect a Milldam.—Where a grantor reserved to himself, his heirs, and assigns forever, "the right and privilege of erecting a milldam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee or his heirs," it was held that the right reserved was such an interest in the land as that ejectment would lie. Jackson v. Buel, 9 Johns. (N. Y.) 298.

Where Right of Entry Gone.—In Rowan v. Kelsey, 18 Barb. (N. Y.) 484, it was held that upon the destruction of certain buildings of which the demised premises were a part, the lessee's right of entry was gone and no longer existed, because his interest was not tangible or visible, and the delivery of possession by sheriff upon a writ of *habere facias* not possible, and consequently ejectment was not maintainable.

Land below High-water Mark being capable of being entered upon and possession given by sheriff, ejectment will lie for the same. Nichols v. Lewis, 15 Conn. 137.

3. Nichols v. Lewis, 15 Conn. 144.

4. Titles may be recovered in ejectment. See *supra*, I. Definition. The right to recover them in this action, however, did not exist at common law, but was given by the statute 32 Henry VIII., c. 7; Adams on Ejec. 30; 2 Wms. Saund., p. 700, note 9; Doe v. Roe, 8 M. & W. 579.

5. Commons.—The case of commons is also, to some extent, an exception to the rule. Black v. Hepburne, 2 Yeates (Pa.) 331. These may be recovered in ejectment when the action is brought for lands to which the common is appendant or appurtenant; because he who has possession of the land has also possession of the common, and the sheriff, by giving possession of the one, also executes the writ as to the other. Adams on Ejec. 20; Baker v. Roe, Cas. temp. Hard. 127; Newman v. Holdmyfast, 1 Stra. 54; Wellington v. Goodtitle, Andr. 106.

In Barton v. Hamshire, 3 Keb. 738, it was held that ejectment did not lie for a right of common alone, but only as appurtenant to other land claimed in the same action.

6. Fisheries.—It was formerly held that ejectment would not lie for fisheries. Molineux v. Molineux, Cro. Jac. 144; Herbert v. Laughlyn, Cro. Car. 492; Waddy v. Newton, 8 Mod. 277; but this doctrine has been *overruled*,

2 Accretions and Relictions.—Ejectment will lie for accretions, or alluvion,¹ and relictions,² but the action will fail where the boundary of the river is changed by excessive floods producing violent and visible alterations.³

3. Buildings and Parts of Buildings—*a. IN GENERAL.*—Ejectment can be maintained for a building, without more,⁴ as a cottage,⁵ or a stable,⁶ since the description is certain enough to show the sheriff of what to deliver possession.⁷ So the action may be maintained for a house and garden.⁸ Ejectment will also lie for a portion of a building when held separately from the ground,⁹ as the second story of a house,¹⁰ a room, or chamber,¹¹ a passage-room,¹² or a certain place called the vestry.¹³

b. CHAPELS AND CHURCHES.—It was formerly held that chapels and churches could not be recovered in ejectment, being *res sacræ*;

Ashhurst, J., in *Rex v. Old Alresford*, 1 T. R. 358.

Ejectment for premises on the river Delaware, part of which was described in the declaration as "a fishery," was also sustained in *New Jersey*, and the right or title of either party thereto was not doubted on account of the paramount title of the state. *Bispham v. Rice*, cited in 22 N. J. L. 463.

1. *St. Clair County v. Lovington*, 23 Wall. (U. S.) 46; *Johnston v. Jones*, 1 Black (U. S.) 209; *Benson v. Morrow*, 61 Mo. 352; *Lovington v. St. Clair County*, 64 Ill. 56; *Giraud v. Hughes*, 1 Gill & J. (Md.) 249; *Baltimore*, etc., R. Co. v. *Chase*, 43 Md. 23; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Kraut v. Crawford*, 18 Iowa 549; *Godfrey v. Alton*, 12 Ill. 29; *Cook v. McClure*, 58 N. Y. 437; *Morris v. Brooke*, 25 Alb. L. J. 90.

2. *Den v. Sermon*, 1 Hawks (N. Car.) 56; *Baltimore*, etc., R. Co. v. *Chase*, 43 Md. 23.

Definition of Terms.—See these terms defined in Am. and Eng. Encyc. of Law, tit. Accretion. See also *St. Clair County v. Lovington*, 23 Wall. (U. S.) 46.

A Rule to Divide Accretions will be found stated in *Deerfield v. Arms*, 17 Pick. (Mass.) 41. It has been followed by the Supreme Court of the United States in the case of *Johnston v. Jones*, 1 Black (U. S.) 209.

Plaintiff must Show Ownership of Shore before his rights in or under the waters adjoining will be inquired into. Until he establishes this, such inquiry is speculative and useless. *Bates v. Illinois Cent. R. Co.*, 1 Black (U. S.) 204.

3. *Lynch v. Allen*, 4 Dev. & B. (N. Car.) 62. And see generally Am. & Eng. Encyc. of Law, tit. Accretion.

4. *Stancel v. Calvert*, 1 Winst. (N. Car.) 104; *Gilliam v. Bird*, 8 Ired. (N. Car.) 280.

5. *Hill v. Giles*, Cro. Eliz. 818.

6. *Dacre's Case*, 1 Lev. 58.

7. *Hammond v. Ireland*, Sty. 215.

8. *Royston v. Eccleston*, Cro. Jac. 654, Palm. 337.

9. *Asheville Div. No. 15 v. Aston*, 92 N. Car. 578; *Gilliam v. Bird*, 8 Ired. (N. Car.) 280.

10. *Asheville Div. No. 15 v. Aston*, 92 N. Car. 578.

11. *Otis v. Smith*, 9 Pick. (Mass.) 297; *Ezzard v. Findley Gold Min. Co.*, 74 Ga. 520, 58 Am. Rep. 447; *White v. White*, 16 N. J. L. 202.

Or the upper chamber of a house. *Gilliam v. Bird*, 8 Ired. (N. Car.) 280.

A chamber in the middle story. *Anonymous*, 3 Leon 210.

Stalls in Barn.—In *Patch v. Keeler*, 27 Vt. 252, ejectment was sustained for two stalls in a horse-barn.

12. *Bindover v. Sindercombe*, Ld. Raym. 1470. In one case the action was brought for "part of a house known by the name of the Three Kings in A." *Sullivan v. Seagrave*, 1 Stra. 695.

13. *Hutchinson v. Puller*, 3 Lev. 95.

Kitchen.—It has been held that ejectment would not lie for a kitchen because any chamber in the house might be applied to that use, and the sheriff has not certainty enough to direct him in execution. *Ford v. Lerke*, Noy 109. But the reasoning of the case is doubted. *Adams on Ejec.* 27.

but this doctrine has long since been exploded, and the action may now be maintained for them just as for any other kind of real estate.¹

4. Fixtures.²—Where land is recovered in ejectment, the plaintiff recovers also all improvements thereon that form part of the realty, including fixtures.³ In such cases the recovery of fixtures is incidental to the recovery of the land itself, and, although we have seen that ejectment will lie for buildings and parts of buildings without land, things that are clearly portions of the realty,⁴ yet ejectment will not lie for the recovery of mere chattels annexed to land without becoming a part of the realty or fixtures; and it is not clear that the action may be maintained in regard to such chattels to try the question whether they are fixtures or not.⁵

5. Herbage, Grass, and Aftermath.—Ejectment will also lie at common law in favor of one who has the right to take herbage, grass, and aftermath.⁶ So the action will lie for the right to pasture.⁷

6. Land Subject to Easement—*a.* IN GENERAL.—It may be stated as a general rule that ejectment will lie to recover possession of land which is subject to an easement or servitude.⁸

1. *Lucas v. Johnson*, 8 Barb. (N. Y.) 244; *Van Deuzen v. Presbyterian Congregation*, 3 Keyes (N. Y.) 550. See also *Harjur's Case*, 11 Coke 25; *Thyn v. Thyn*, Sty. 101; *Hillingsworth v. Brewster*, 1 Salk. 256; *Rex v. London*, 1 Wils. 11.

2. **Definition of Term.**—As this word has two exactly opposite significations, both among text writers and in decisions, it is necessary to state the meaning it will have in this section. By the word "fixture," therefore, we shall designate an article which was a chattel, but which, by being physically annexed, or affixed, to the realty, becomes a part and parcel of it. See Am. and Eng. Encyc. of Law, tit. Fixtures.

3. *McMinn v. Mayes*, 4 Cal. 209; *Fitzgerald v. Marshall*, 1 Mod. 90. See *Ewell on Fixtures*, p. 441.

4. See *supra*, IV. 3. *Buildings and Parts of Buildings*.

Where A agreed to permit B to put a sawmill and houses and fixtures on his land, for carrying on the business of sawing lumber, "as long as B wished," he having the privilege of taking away the improvements, it was held that B had a determinable life interest in the easement on A's land, and that ejectment would lie to recover the house and other improvements, together with the easement on the land. *Stancel v. Calvert*, 1 Winst. (N. Car.) 104.

5. *Ewell on Fixtures*, pp. 441, 442.

Where a boiler, engine, and stack are erected on plaintiff's land, jointly at the expense of himself and the defendant, under an agreement to use the same as a common source of power, without limitation as to time, the interests thereby created in the fixtures are in the nature of real estate; and if one of the tenants in common exclude the other from the use and possession of such fixtures, ejectment will lie to enforce the agreement. *Hill v. Hill*, 43 Pa. St. 521.

6. *Wheeler v. Toulson*, Hard. 330; *Ward v. Petifer*, Cro. Car. 362.

The Principle here is that he who has a grant of the herbage has a particular interest in the soil, although by such grant the soil itself does not pass. *Adams on Ejec.* 22. See *Rex v. Stoke*, 2 T. R. 451.

7. Anonymous, 2 Dal. 95.

Pannage.—But the right to pannage is not sufficient, as that is only a right to the mast that falls from the trees, and is not part of the soil itself. *Pemble v. Stern*, 1 Lev. 212.

8. *Tillmes v. Marsh*, 67 Pa. St. 507; *Cooper v. Smith*, 9 S. & R. (Pa.) 31; *Skowhegan First Nat. Bank v. Morrison*, 88 Me. 162; *Morgan v. Moore*, 3 Gray (Mass.) 319. See *Rogers v. Sinshheimer*, 50 N. Y. 646.

Where a deed conveying certain premises reserved a right to build a basement story thereon, to be used

b. HIGHWAYS, ROADS, AND STREETS.—The most common application of this rule is found in the case of highways, roads, streets, and the like. These, in our law, are regarded as easements, and the owner of the land through which a road or street dedicated to public use passes may maintain ejectment against any one who appropriates the same exclusively to his own use, or who uses the same in a manner inconsistent with the public easement, or with the rights of the said owner to use the land in any way that is itself not inconsistent with the public right.¹ But while this is

solely for the purposes of a school, with a right of passage to and from, the grantee to build a church upon the basement walls, it was held that the deed conveyed a fee with the reservation of an easement only, and that ejectment would lie by the grantee against any persons occupying the said basement for any other than school purposes. *Reformed Church v. Schoolcraft*, 65 N. Y. 134. (5 Lans. (N. Y.) 206 reversed.)

1. *California*.—*Coburn v. Ames*, 52 Cal. 385; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202; *Porter v. Pacific Coast R. Co.* (Cal. 1888), 18 Pac. Rep. 428.

Connecticut.—*Peck v. Smith*, 1 Conn. 103.

Georgia.—*Savannah v. Georgia Steam Boat Co.*, R. M. Charl. (Ga.) 342.

Kentucky.—*Louisville, etc., R. Co. v. Liebfried*, 92 Ky. 407.

Maine.—*Blake v. Ham*, 53 Me. 430.

Massachusetts.—*Alden v. Murdock*, 13 Mass. 256; *Perley v. Chandler*, 6 Mass. 454; *Com. v. Peters*, 2 Mass. 127.

Michigan.—*Smeberg v. Cunningham*, 96 Mich. 378.

Missouri.—*Thomas v. Hunt* (Mo. App. 1896), 35 S. W. Rep. 581.

New Jersey.—*Wright v. Carter*, 27 N. J. L. 76.

New York.—*Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Pearsall v. Post*, 20 Wend. (N. Y.) 126; *Benedict v. Goit*, 3 Barb. (N. Y.) 468; *Northern Turnpike Road Co. v. Smith*, 15 Barb. (N. Y.) 355; *Sherman v. McKeon*, 38 N. Y. 266; *Lozier v. New York Cent. R. Co.*, 42 Barb. (N. Y.) 465; *Westlake v. Koch* (Supreme Ct.), 8 N. Y. Supp. 665, 29 N. Y. St. Rep. 283; *Carpenter v. Oswego, etc., R. Co.*, 24 N. Y. 655; *Gas-Light Co. v. Rome, etc., R. Co.*, 51 Hun (N. Y.) 119; *Brown v. Galley*, Hill & D. Supp. (N. Y.) 308; *Wager v. Troy Union R. Co.*, 25 N. Y. 527.

Pennsylvania.—*Chambers v. Furry*, 1 Yeates (Pa.) 167.

Virginia.—*Bolling v. Petersburg*, 3 Rand. (Va.) 573.

Wisconsin.—*Weisbrod v. Chicago, etc., R. Co.*, 21 Wis. 602; *Gardiner v. Tisdale*, 2 Wis. 153.

"The owner of the soil has right to all above and under ground, except only the right of passage for the king and his people." *Goodtitle v. Alker*, 1 Burr. 146.

"Highways are regarded in our law as easements. The public acquire no more than the right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can be enjoyed, subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is may maintain trespass, or ejectment, or waste." *Jackson v. Hathaway*, 15 Johns. (N. Y.) 453.

Land Dedicated by Proprietors of Town.

—So where the proprietors of a town set apart a piece of undivided land for the use of the public as a public common, it was held that any proprietor of an undivided share of land in the town may maintain ejectment against any one who is in exclusive possession of any part of the land so set apart, and recover, subject to such easement. *Pomeroy v. Mills*, 3 Vt. 279.

Toll Road.—So ejectment lies to recover land used as a toll road, where the action is brought to recover the road itself, and not the right of way over it. *Mahon v. San Rafael Turnpike Road Co.*, 49 Cal. 269.

the general principle and is supported by the great majority of decisions, there are, nevertheless, some cases that qualify and some that altogether deny the principle.¹

Use of Road.—It is immaterial, in the application of this principle, whether the road was laid out for the use of the public, or for the accommodation of only a private party.²

Recovery Subject to Easement.—The recovery in such cases, as well as the delivery of possession by the sheriff, is necessarily subject to the easement.³

Where the Fee of Lands Taken for public use has been acquired by a municipal corporation, the former owner cannot maintain the action on the ground of its having been devoted to other uses than those contemplated by law.⁴

Land Dedicated to Particular Purpose.—Where land has been dedicated to a particular purpose, and the authorities have appropriated it to an entirely different purpose, the rule as to whether ejectment may or may not be maintained by the original owner does not seem to be established.⁵

Grazing.—So the public have no right to graze their cattle on a public highway. The remedy is by either trespass or ejectment. *Stackpole v. Healy*, 16 Mass. 33; *Woodruff v. Neal*, 28 Conn. 165.

1. See *dissenting* opinion of Ingersoll, J., in *Peck v. Smith*, 1 Conn. 103.

In *West Covington v. Freking*, 8 Bush (Ky.) 126, it was held that the action of ejectment would not lie to recover possession of a street or highway dedicated to public use, the proper remedy being by indictment or injunction.

Stall in Street.—So it has been held that ejectment will not lie by a parish owning a street against one who sets up a stall therein. The proper remedy is trespass. *Doe v. Cowley*, 1 C. & P. 123, 11 E. C. L. 339.

Possession must Be Wholly Inconsistent with Public Easement.—It was held in *Adams v. Saratoga, etc.*, R. Co., 11 Barb. (N. Y.) 414, that the action could not be maintained for a street by the owner of the land through which said owner had laid it out, unless the occupation thereof by defendants was wholly inconsistent with the public easement. See also *Brondage v. Warner*, 2 Hill (N. Y.) 145; *Redfield v. Utica, etc.*, R. Co., 25 Barb. (N. Y.) 54; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377; *Cincinnati v. White*, 6 Pet. (U. S.) 431.

Possession of Easement.—It has also been doubted whether the owner of an

easement in land ever has such exclusive possession of the same as to make him liable to the action of ejectment. *Wilkow v. Lane*, 37 Barb. (N. Y.) 244.

2. *Saunders v. Wilson*, 15 Wend. (N. Y.) 338. See *Morgan v. Moore*, 3 Gray (Mass.) 319; *Hancock v. Wentworth*, 5 Met. (Mass.) 446.

3. *Etz v. Daily*, 20 Barb. (N. Y.) 32; *Gordon v. Sizer*, 39 Miss. 805; *Pomeroy v. Mills*, 3 Vt. 279; *Alden v. Murdock*, 13 Mass. 256.

"Trespass would undoubtedly lie; why, then, should not an ejectment? It is said that the sheriff cannot deliver full possession. But why not? Indeed, it must be subject to the easement, but there is no other difficulty in the matter." *Goodtitle v. Alker*, 1 Burr. 145.

The Right of the Public Is Not Drawn in Question by a controversy as to the ownership of the soil. *Warwick v. Mayo*, 15 Gratt. (Va.) 528.

Defendant Entitled to Easement.—Where a defendant in ejectment is lawfully entitled to an easement in the land for which suit is brought, he cannot, of course, be disturbed in its enjoyment. *Kurkel v. Haley*, 47 How. Pr. (N. Y. Supreme Ct.) 75.

4. *Sweet v. Buffalo, etc.*, R. Co., 13 Hun (N. Y.) 643, 79 N. Y. 293.

5. Thus in *Barclay v. Howell*, 6 Pet. (U. S.) 499, it was held that where ground had been dedicated to a particular purpose, and the authorities had appropriated it to an entirely dif-

7. Land under Water, and Watercourses.—Ejectment is maintainable for land under water, as possession of the same may be given by the sheriff;¹ and, of course, ejectment will lie for lands formerly below high-water mark but now fast land.² But the action cannot be maintained for a rivulet or watercourse, because *non moratur*, and possession of it cannot be given.³

8. Mines and Mining Rights.—*a. IN GENERAL.*—Ejectment may be maintained for the recovery of possession of a mine by one who has the right to the same, even as against the owner of the soil.⁴

Where Grant a Mere License.—But where the grant of the mine is that of a mere license to enter upon the premises, dig, and take minerals within a certain tract, it seems that the right of the lessee, until actual possession of some part of the land is taken, is a mere incorporeal right or privilege, too floating and indefinite to be enforced by ejectment.⁵

ferent purpose, an action of ejectment would not lie by the original owner on this ground. It would seem that his remedy is in chancery, to compel the specific execution of the trust by restraining the corporation, or by causing the removal of the obstructions.

Yet in the case of *Ruch v. Rock Island*, 97 U. S. 693, it was held that where land had been specifically dedicated for schools and churches, and there had been conveyances of parts of the premises by some of those bodies for other purposes, an ejectment would lie at the suit of the original grantor, or his heirs, to reclaim the same.

And see generally, upon the substantive law of this subject, Am. and Eng. Encyc. of Law, tit. Dedication.

1. Champlain, etc., R. Co. v. Valentine, 19 Barb. (N. Y.) 484.

A Grant from the State of lands under water will support ejectment. *E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons Iron Works*, 129 N. Y. 155, 59 Hun (N. Y.) 209.

Land between High and Low-water Marks.—Ejectment also lies by a riparian owner on a navigable stream for land between high and low-water marks, from a person in possession who does not claim rights as a navigator or fisherman. *Gibson v. Kelly*, 15 Mont. 417; *Nichols v. Lewis*, 15 Conn. 137.

2. People v. Mauran, 5 Den. (N. Y.) 389.

Pool of Water.—The action will lie for a pool of water for the same reason.

Challenor v. Thomas, Yelv. 143, 1 Brownl. 142.

3. Swift v. Goodrich, 70 Cal. 103.

But if claimant owns the land, he may recover, it seems, by bringing the action for so much land covered by water. *Challenor v. Thomas*, Yelv. 143, 1 Brownl. 142.

4. Wyld's Case, cited in *Commyn v. Kincto*, Cro. Jac. 150; *Whittingham v. Andrews*, 1 Salk. 255, Carth. 277; *Cullen v. Rich*, Buller's N. P. 102*b*; *Grotz v. Lehigh, etc., Coal Co.*, 1 Kulp (Pa.) 53.

The law, as stated by Adams, is as follows: "For it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself, which may be delivered in execution; and though a man may have a right to the mine without any title to the soil, yet, the mine being fixed in a certain place, the sheriff has a thing certain before him, of which he can deliver possession." Adams on Ejec. 20. See Bainbridge on Mines 498.

"One who has the exclusive right to mine coal upon a tract of land has the right of possession, even as against the owner of the soil, so far as it is necessary to carry on his mining operations." *Turner v. Reynolds*, 23 Pa. St. 206.

Boilary of Salt.—So ejectment is maintainable for a boilary of salt, for, by the grant of the same, the soil shall pass, inasmuch as it is the whole profit of the soil. *Smith v. Barrett*, Sid. 161, 1 Lev. 114.

5. Adams on Ejec. 20; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105;

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The Question in These Cases, therefore, generally resolves itself into the question whether the right granted is a mere incorporeal hereditament or not, and is frequently more or less difficult of determination.¹

b. OIL AND OIL WELLS.—It has been decided that petroleum oil is, like coal or any other natural product, a mineral, and, as such, forms a party of the realty. The general rules of law, therefore, with reference to mines and mining rights, are applied alike to oils and oil wells.² The question here, as elsewhere, is whether the grant is of a mere incorporeal hereditament—to enter upon and dig for the mineral—or whether it amounts to an entire ownership of the mineral and place.³

Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173; *Doe v. Wood*, 2 B. & Ald. 724; *Crocker v. Fothergill*, 2 B. & Ald. 652; *Falmouth v. Alderson*, 1 Gale 441; *Muskett v. Hill*, 5 Bing. N. Cas. 694, 35 E. C. L. 272.

Parol License and Entry Thereunder.—But a parol license to enter upon and mine lands, an entry under such license, and an expenditure of labor and money in sinking shafts, etc., for mining under said license, gives the licensee a valid subsisting interest in the real estate, which the licensee may assert in an action of ejectment. *Beatty v. Gregory*, 17 Iowa 109.

Mere Incorporeal Privilege.—The right of a person to work a mine and to have the sole benefit of the products thereof is a mere right and incorporeal privilege, insufficient to sustain ejectment. *Moore v. Brown*, 139 N. Y. 127, *reversing* 16 N. Y. Supp. 592, 62 Hun (N. Y.) 618. See also *Colorado Cent. Consol. Min. Co. v. Turck*, 50 Fed. Rep. 888, and *Bell v. Skillicorn* (N. Mex. 1892), 28 Pac. Rep. 768.

The law stated by Adams, in full, is as follows: "When a grant of mines is so worded as not to operate as an actual demise, but only as a license to dig, search for, and take metals and minerals within a certain district during the term granted, it seems that a party claiming under such a grant, and who shall open and work and be in actual possession of any mines, may, if ousted, maintain ejectment in respect of them; but he cannot maintain ejectment either in respect of mines within the district, which he has not opened, or which, having opened, he has abandoned." Adams on Ejec. 20.

Grantees in deed reserving mining rights below the surface, but providing

that in case any of the surface be permanently occupied by grantor he shall compensate owner of fee, cannot bring ejectment on account of such occupation, so far as the same is necessary to the operation of the mine. *Erickson v. Michigan Land, etc., Co.*, 50 Mich. 604.

1. The following cases, while not involving the action of ejectment, will throw some light on the general question: *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Grubb v. Bayard*, 2 Wall. Jr. (C. C.) 81; *Grubb v. Grubb*, 74 Pa. St. 25; *Funk v. Haldeman*, 53 Pa. St. 229; *Muskett v. Hill*, 5 Bing. N. Cas. 694, 35 E. C. L. 272; *Chetham v. Williamson*, 4 East 469. And see generally Am. and Eng. Encyc. of Law, tit. Mines and Mining.

2. *Stoughton's Appeal*, 88 Pa. St. 198. In this case the lessee was to have "the sole and exclusive right to bore and dig for oil in said lot, and gather and collect the same therefrom, for the term of twenty-one years from the date hereof." The court thought this certainly amounted to an "absolute sale of all the oil contained within the land described in the lease." See *Barker v. Dale*, 3 Pittsb. (Pa.) 190.

3. *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173. See also *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397.

Where, under a mining lease, the lessee has agreed to commence testing land within three years, and to pay the lessor part of the profits, etc., the former cannot maintain ejectment unless he has had possession and opened mines on the land. *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381.

Where Possession Taken under Lease.—In *Karns v. Tanner*, 66 Pa. St. 297, it

9. Overhanging Roofs and Cornices.—The cases are not altogether harmonious as to whether or not the action will lie against the owner of an overhanging roof, or a projecting cornice, but the weight of authority is, we think, that the action in such case cannot be maintained. The reason would seem to be that the sheriff cannot deliver possession, and the proper remedy is by an action for a nuisance.¹ Where some of the stones of defendant's wall extended a few inches over plaintiff's land, it was held that plaintiff might treat this as disseisin rather than trespass, and bring ejectment; but if, when plaintiff begins to make excavations, the defendant offers to remove the stones and give entire possession to plaintiff, this is not disseisin and ejectment will not lie.²

10. Miscellaneous.—Ejectment will lie for lands, although they have been, for some purposes, impressed with the character of personality in accordance with the provisions of a will;³ and in *Pennsylvania* the action may be maintained to compel the payment of money charged on lands.⁴ The action will also lie against a contractor erecting a house who refuses to allow the owner to enter while the work is in progress to inspect the same.⁵

was held that where oil territory had been leased and entered upon, and operations by the lessee had subsequently ceased, if the lessee had not abandoned, ejectment would lie, notwithstanding the grant under the lease might have been of an incorporeal interest.

Gas Wells.—Where a tract of land has been acquired for the purpose and with the exclusive right to have and maintain gas wells thereon, under a contract by which the owner covenants not to permit any wells to be bored on an adjoining tract, ejectment cannot be maintained by the person so acquiring the land against one who enters on the adjoining tract and threatens to bore wells, since, as to the latter tract, he only has the right to gas under the surface. *Indianapolis Nat. Gas Co. v. Kibbey*, 135 Ind. 357.

1. *Aiken v. Benedict*, 39 Barb. (N. Y.) 400 (*overruling Sherry v. Freckling*, 4 Duer (N. Y.) 456); *Vrooman v. Jackson*, 6 Hun (N. Y.) 326. And see *Leprell v. Kleinschmidt*, 112 N. Y. 364, where the question is left undecided.

Compare *Meyer v. Metzler*, 51 Cal. 142; *Grove v. Fort Wayne*, 45 Ind. 429; *Silliman v. Paine* (Supreme Ct.), 1 N. Y. Supp. 75.

Contra.—But in a recent case in Vermont (1888) the question has again undergone an elaborate discussion and the conclusion of the court is the reverse of the rule stated in the text.

Some of the reasons advanced or supposed to be advanced in support of the doctrine of the text by the cases adjudging it are thus met by Tyler, J.: "It clearly is not essential that the intruding object should actually rest upon the plaintiff's soil to entitle him to the action of ejectment, for this action will lie for an upper room in a dwelling-house or other building. As the law gives the owner of the land all above it within its boundaries, we can find no reason, resting in principle, why, for the projection by one party of a portion of his building over the land of another, as in this case, he may not be liable in ejectment. The plaintiff was disseised of his land, and the defendant was in the wrongful possession thereof by his projecting roof. * * * There is no more difficulty in describing in a declaration a projection above the soil than one upon it, nor can there be any difficulty in the sheriff delivering possession to the plaintiff." *Murphy v. Bolger*, 60 Vt. 723.

To the same effect is *Sherry v. Freckling*, 4 Duer (N. Y.) 452, since *overruled* by *Aiken v. Benedict*, 39 Barb. (N. Y.) 400.

2. *McCourt v. Eckstein*, 22 Wis. 153.

3. *Shaw v. Chambers*, 48 Mich. 355.

4. *Galbraith v. Fenton*, 3 S. & R. (Pa.) 359.

5. *Smith v. Revels*, 79 Hun (N. Y.) 213.

V. FOR WHAT THINGS THE ACTION WILL NOT LIE—1. In General.—As stated heretofore, ejectment will not lie, with certain exceptions, for an incorporeal hereditament, or for any interest in land which is not visible or tangible.¹

2. Rights and Privileges.—It will not lie for a mere right or privilege,² or for things that lie in grant,³ as the sheriff must know of what to deliver possession.⁴

3. Ferries.—A ferry franchise ranks as an incorporeal hereditament, and consequently ejectment will not lie for it.⁵

4. Wharves and Wharfage Rights.—A wharfage right is in the

1. *Winona v. Huff*, 11 Minn. 119; *Caldwell v. Fulton*, 31 Pa. St. 483. See, for an excellent discussion of this question, the case of *Den v. Craig*, 15 N. J. L. 191, where it was said that the action of ejectment had been substituted for an assize in those cases where a corporeal hereditament was its object, but not in cases of incorporeal hereditaments, and especially not of rents reserved in leases.

2. *Black v. Hepburne*, 2 Yeates (Pa.) 331.

License to Make Interments.—An exclusive license or privilege to make interments in certain described lots gives no such interest or right of possession as will sustain an action of ejectment. *Hancock v. McAvoy*, 151 Pa. St. 460.

3. *Smith v. Wiggin*, 48 N. H. 109.

"As a general rule it cannot be sustained for things that lie merely in grant, not being capable of being delivered in execution, as an advowson, rent, common appendant, a water-course, a mere grant of a privilege to erect a machine without defining the place." *Northern Turnpike Road Co. v. Smith*, 15 Barb. (N. Y.) 358.

Privilege of Erecting Machines on Land.—So the grant of a privilege to erect a machine and buildings on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without actual location and entry, confer such right as will enable the lessee to maintain ejectment. *Jackson v. May*, 16 Johns. (N. Y.) 184. Yet it has been held that the "right or privilege of erecting a milldam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee or his heirs," was such an interest in land as would support eject-

ment. *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

So where a boiler, engine, and stack were erected on land of plaintiff, jointly at the expense of himself and defendant, under an agreement to use the same as a common source of power, without limitation as to time, it was held that the interest thus created was in the nature of real estate, and sufficient to support ejectment on ouster. *Hill v. Hill*, 43 Pa. St. 521.

Where a deed conveys lands, mills thereon, and appurtenances, including an acre of land on the opposite side of a stream which had been condemned for an abutment, and reserves the right to build a sawmill on the opposite side of the river or at the further end of the dam, the reservation is too uncertain to withdraw any part of the land from the operation of the deed, and ejectment cannot be maintained for it. *Butcher v. Creel*, 9 Gratt. (Va.) 201.

4. *New York v. Union Ferry Co.*, 55 How. Pr. (N. Y. Supreme Ct.) 138; *Judd v. Leonard*, 1 D. Chp. (Vt.) 204.

5. *New York v. Union Ferry Co.*, 55 How. Pr. (N. Y. Supreme Ct.) 138. *Rees v. Lawless*, Litt. Sel. Cas. (Ky.) 184, where it was said: "A ferry is of that description of property which in technical language is denominated incorporeal, and which in legal consideration is not tangible. Like a right of way or of common, or other incorporeal right, no entry in point of fact can, in strict propriety, be said to be made upon it, nor could the sheriff, in case of a judgment of restitution, deliver possession. In such a case an ejectment would not lie, and upon the same principle a warrant for a forcible entry would not." *State v. Wilson*, 42 Me. 9; *Bowman v. Wathen*, 1 How. (U. S.) 189. *Compare New York v. Mabie*, 13 N. Y. 151.

nature of an incorporeal hereditament, and is insufficient to support ejectment.¹

5. Easements—In General.—It is a general rule that ejectment will not lie against a party claiming an easement in land and using it according to his right to try his title to it;² nor will it lie in favor of such party to try his right to enjoy the same.³

Highways, Roads, and Streets.—This principle finds its customary application in the case of rights of way over highways, streets, roads, alleys, and the like.⁴

1. *Parker v. West Coast Packing Co.*, 17 Oregon 510. And see *New York v. Mabie*, 13 N. Y. 151.

The claim of a right to use a wharf situated on the margin of a canal basin for the purpose of unloading and loading boats, etc., as an easement appurtenant to will of claimant, in connection with like right matters and the occasional exercise of the same, is not such possession or claim of interest in lands as to support an action of ejectment. *Child v. Chappell*, 9 N. Y. 246.

Wharves Constructed on Soil of State.—Where a wharf is erected in tide waters, upon soil of the state, without license from the state, it will belong to the latter, which may recover possession of the same by ejectment. *People v. Davidson*, 30 Cal. 379.

Wharf Extending Into Ocean.—So where a wharf, built over the land of a riparian owner, extends below low-water mark into deep water, such owner cannot have ejectment for that part of the wharf which extends beyond low-water mark into the ocean. *Coburn v. Ames*, 52 Cal. 385.

2. *Wood v. Truckee Turnpike Co.*, 24 Cal. 488; *Child v. Chappell*, 9 N. Y. 246; *Kurkel v. Haley*, 47 How. Pr. (N. Y. Supreme Ct.) 75; *Smith v. Wiggin*, 48 N. H. 109; *Wilklow v. Lane*, 37 Barb. (N. Y.) 244; *Racine v. Crotsenberg*, 61 Wis. 481.

3. *Wood v. Truckee Turnpike Co.*, 24 Cal. 488, where it was said: "And the reason is obvious—the very subject-matter of controversy is incorporeal. It is for that reason that an easement 'lyeth in grant and not in livery.' It is for that reason that the owner of a way cannot be disseized or otherwise ousted of it; he can only be 'disturbed' or 'obstructed' in its enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity."

See also *Child v. Chappell*, 9 N. Y. 246; *Smith v. Wiggin*, 48 N. H. 109; *Buckner v. Hutchings*, 83 Wis. 299; *Mahon v. San Rafael Turnpike Road Co.*, 49 Cal. 269; *Southern Pac. Co. v. Burr*, 86 Cal. 279.

Northern Turnpike Road Co. v. Smith, 15 Barb. (N. Y.) 355; *Brady v. Hennion*, 8 Bosw. (N. Y.) 528.

Lands Condemned for Roadbed by Railroad Company—Exception to Rule.—Though, as a general rule, ejectment will not lie for an easement or to be let into the use and occupation of a servitude, yet where lands have been condemned as a roadbed and right of way of a railroad company, the easements in said lands thereby acquired stand in a different category from that of ordinary easements, for over the lands so condemned is acquired, not the right of use to be enjoyed in common with the public or with other persons, but an exclusive right and use, and ejectment may be brought by the railroad. *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 75 Ala. 524.

4. *Northern Turnpike Road Co. v. Smith*, 15 Barb. (N. Y.) 355; *Wood v. Truckee Turnpike Co.*, 24 Cal. 488; *Fritsche v. Fritsche*, 77 Wis. 270; *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Bay County v. Bradley*, 39 Mich. 163; *Taylor v. Gladwin*, 40 Mich. 232; *Judd v. Leonard*, 1 D. Chip. (Vt.), 204, where it was said: "If the plaintiff can, in this case, maintain his action of ejectment, although entitled to an easement only, a right of way over the land demanded, yet he will recover the soil itself. For such with us is the consequence of a recovery in this action, in which the land itself, not merely the easement, is demanded; and a recovery in this case will give the plaintiff, not the easement only, which he has a right to claim, but the fee of the land."

6. **Party Walls.**—It is sometimes said that party walls are incorporeal hereditaments, mere easements, and that ejectment will not lie therefor, nor for the land on which they stand.¹

7. **Miscellaneous.**—Ejectment will not lie for a failure to convey property agreed to be sold.² Nor will ejectment lie for a life estate after the death of the tenant for life,³ and in *Mississippi* the homestead exemption cannot be allotted in ejectment.⁴

VI. WHO CAN MAINTAIN THE ACTION—1. **In General.**—It may be stated as a general rule that the owner of land, or of an interest therein in fee for life, or for years, who has an immediate right of possession, or, as it is sometimes laid down by statute, "any person having a valid subsisting interest in real property and a right to the immediate possession thereof," may maintain ejectment to recover the same.⁵

2. **Aliens, Felons, and Indians**—**Aliens.**—By the common law of *England* an alien could not maintain a real or a mixed action,⁶ and this doctrine has been adopted in some of our states,⁷ but the general current of authority in this country is that an alien may not only take and hold real estate until office found against all persons except the state, but he may maintain the action of

1. *Robinson v. Gunnis*, 2 W. N. C. (Pa.) 224; *Kurkel v. Haley*, 47 How. Pr. (N. Y. Supreme Ct.) 75; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Brondage v. Warner*, 2 Hill (N. Y.) 145.

But the contrary has been held in *Blake v. Ham*, 53 Me. 430, and *Trotter v. Simpson*, 5 C. & P. 51, 24 E. C. L. 207. And there seems no good reason why a recovery should not be had, subject, of course, to the easement if the same has a valid existence. See *Bradbury v. Cony*, 59 Me. 494.

2. **The Appropriate Remedy** being an action for specific performance. *Felger v. Coward*, 35 Cal. 650; *San Felipe Min. Co. v. Belshaw*, 49 Cal. 655. *Contra* in *Pennsylvania*. See *infra*, XII. 2. *Relation of Vendor and Vendee*.

Assignment of Lease.—In *Strong v. Garfield*, 10 Vt. 497, it was held that the assignee of a lease might maintain the action against his assignor to recover the property assigned, where the latter agreed by a separate writing to surrender possession on a certain day; and this in spite of the assignee having contracted in writing to pay a sum of money on a day named before the time fixed for said stipulated surrender, which payment the assignee failed to make.

Judgment Not Enforceable by Ejectment.—Where land is taken for a state canal and the former owner recovers

a personal judgment against the grantee of the state, payment of the same cannot be enforced by ejectment. *North Branch Canal Co. v. Hireen*, 44 Pa. St. 418.

3. *Hamilton v. Overseers of Poor*, 12 Pa. St. 147.

4. *Lazar v. Caston*, 67 Miss. 275.

5. 3 Wait's Act. and Def. 32.

Copyholders, Tenants by Elegit, and Conusees of Statutes-Merchant or Staple.—For the ejectment law as to these various old tenancies and holdings, the reader is referred to *Adams on Ejec.* 63, 69.

6. *Co. Litt.* 129b.; *Hardy v. De Leon*, 5 Tex. 240. See generally *Am. and Eng. Encyc. of Law*, tit. Aliens.

"This is the general rule, but it has its exceptions, as well settled as the rule itself. If the title to land is conferred on an alien by law; if by law, as by statute or treaty, he is enabled to acquire by descent, or purchase, and hold land as a citizen, he may maintain any action in respect to it which a citizen may maintain." *White v. Sabariego*, 23 Tex. 243.

7. *Barges v. Hogg*, 1 Hayw. (N. Car.) 485; *Siemssen v. Bofer*, 6 Cal. 250, and cases *supra*.

Plaintiff in ejectment cannot derive title by descent from an alien living mother. *Walker v. Potomac Ferry Co.*, 3 MacArthur (D. C.) 440.

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ejectment or other real action for its recovery.¹

Felons.—Ejectment may be maintained in England on the demise of a person attainted of felony before office found on behalf of the king.² In this country, generally, the commission of any crime does not affect the title to real estate.

Indians.—An Indian may recover possession of land by ejectment when the title has become vested in him in compliance with the terms of a treaty giving him the right to acquire and own the same.³

3. Assignees of Bankrupt or Insolvent Debtors.—Assignees in insolvency are usually vested with the title to all the estate, both real and personal, of the debtor, *ipso facto* by the fact of their appointment alone, and may maintain ejectment to recover the same, whether they are permanent,⁴ or provisional and preliminary.⁵ They may even eject the bankrupt himself.⁶ And generally the assignee is the only one who can maintain the action, the title of the bankrupt or insolvent being completely divested by his appointment.⁷

1. *M'Creery v. Allender*, 4 Har. & M. (Md.) 409; *Bradstreet v. Oneida County*, 13 Wend. (N. Y.) 546; *Ford v. Harrington*, 16 N. Y. 294; *Overing v. Russell*, 32 Barb. (N. Y.) 263; *Jinkins v. Noel*, 3 Stew. (Ala.) 79; *Norris v. Hoyt*, 18 Cal. 217; *People v. Folsom*, 5 Cal. 373. And see Am. and Eng. Encyc. of Law, tit. Aliens.

For, until office found, no individual can question his rights or title on the ground of alienage or nonresidence, either collaterally in ejectment or in any other way. *Norris v. Hoyt*, 18 Cal. 217.

2. *Doe v. Pritchard*, 5 B. & Ad. 765, 27 E. C. L. 179.

3. *Coleman v. Doe*, 4 Smed. & M. (Miss.) 40.

4. *Beck v. Welsh*, 1 Wils. 276; *Doe v. Britain*, 2 B. & Ald. 93; *Doe v. Abrahams*, 1 Stark. 305, 2 E. C. L. 121; *Doe v. Land*, 3 D. & R. 509, 16 E. C. L. 177.

5. *Doe v. Spencer*, 2 C. & P. 79, 12 E. C. L. 35, 3 Bing. 207, 11 E. C. L. 99; *Doe v. Andrews*, 4 Bing. 348, 13 E. C. L. 466.

In *Barstow v. Adams*, 2 Day (Conn.) 95, the court, after reciting certain clauses of the then late bankrupt law of the United States, proceeds as follows: "From the recited clauses of the bankrupt law, it is unquestionable, that after the execution of the deed of assignment, the bankrupt is entirely divested of his property, and the same is vested in his assignees. The ex-

pressions of the fiftieth section, in the most explicit manner, evince that the whole estate is conveyed by the deed of the commissioners, and that there is no residuary interest in the bankrupt. It results as a necessary legal consequence, that the assignees of a bankrupt may, and that they alone can, maintain ejectment. Theirs is the title; to them the real estate of the bankrupt exclusively belongs; and in the event of an ejectment, they are the persons dispossessed and injured."

In Alabama.—But in Alabama, under statute, it was held that the representative of an insolvent estate could not maintain the action. *Long v. McDougald*, 23 Ala. 413.

6. *Cooper v. Lands*, 14 W. R. 610, 14 L. T. N. S. 287.

7. *Barstow v. Adams*, 2 Day (Conn.) 95.

Thus it has been held that a lessor whose property has been assigned to a provisional assignee, under the insolvent debtor's act, cannot maintain the action against an occupier of land which passed under the assignment, although the provisional assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever been withheld from the lessor. *Doe v. Andrews*, 4 Bing. 348, 13 E. C. L. 466.

A Petitioner in Insolvency may sue in ejectment to get possession of the homestead during the pendency of his application for discharge. *Moore v. Morrow*, 28 Cal. 551.

4. **Under Award of Arbitrators.**—An award under a submission of arbitration will give a good title on which to maintain the action of ejectment,¹ unless the submission to arbitration of titles to land is forbidden by statute.²

5. **Copartners.**—Ejectment for property held by partners should be brought in the name or names of those in whom the legal title is vested.³ But ejectment cannot be maintained by the holder by conveyance or bequest of one partner's share in lands of the firm,

One Who Has Been Discharged as an insolvent cannot, it has been held, bring ejectment for lands previously owned by him, though his trustees have not given bond. *Willis v. Row*, 3 Yeates (Pa.) 520.

But although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law which, as soon as the debts are satisfied, entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name, and, in the absence of proof to the contrary, the court will intend that he produced satisfactory evidence that the debts were paid, particularly after a lapse of fourteen years. *Ross v. McJunkin*, 14 S. & R. (Pa.) 364.

1. *Doe v. Rosser*, 3 East 15; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Cox v. Jagger*, 2 Cow. (N. Y.) 638. And see *Calhoun v. Dunning*, 4 Dall. (Pa.) 120; *Dixon v. Morehead*, Add. (Pa.) 216; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Jackson v. Dysling*, 2 Cal. (N. Y.) 198; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497; *Jackson v. De Long*, 9 Johns. (N. Y.) 43.

"The award cannot have the operation of conveying the land; but there is no reason why the defendant may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented that the award of the arbitrator chosen by themselves should be conclusive as to the right to the land in controversy between them, and this is sufficient to bind them in the action of ejectment." *Doe v. Rosser*, 3 East 15.

When an Award Settles the Boundaries of land, the settlement is sufficient to enable the party to whom the land has been awarded to maintain the action. *Sellick v. Addams*, 15 Johns. (N. Y.) 197.

2. In *Olcott v. Wood*, 14 N. Y. 38,

it was said: "Prior to the Revised Statutes, such claims as existed between these parties might have been submitted and determined by arbitration * * *; but in regard to title to the freehold or inheritance at an early period, it was held that it could not be determined by arbitrament. That rule was deprived of its efficacy by its being decided that though the award would not pass the title, yet it would estop the parties. (*Doe v. Rosser*, 3 East 15; *Sellick v. Addams*, 15 Johns. (N. Y.) 197). The object of the statute seems to have been to restore the old rule of the common law, and, perhaps, to carry out its principle further than the old rule had gone, and at the same time to prevent effectually its evasion. Its policy was to remove from the usually unlearned forum of arbitrators questions of title to estates in land in fee or for life, which, perhaps, more than any other class of questions depended upon principles of technical learning."

3. *Lindley on Part. 422. See infra, XI. Tenants in Common, Joint Tenants, and Coparceners.*

Action by Single Partner.—If the title is vested in a single partner, the action is properly brought in his name alone. *Green v. Baker*, 2 Moore 189.

And it has been held that, as against a mere intruder, one partner of a firm owning real estate, the title to which is vested in all the members thereof, being a tenant in common with the others, has a sufficient interest to enable him to maintain the action and recover possession not only of his own interest but of that of his copartners. *Smith v. Smith*, 80 Cal. 323; *Brady v. Kreuger* (S. Dak. 1896), 66 N. W. Rep. 1083.

Surviving Partner.—And it has also been held that a surviving partner may maintain the action for land owned as partnership property. *Robinson v. Roberts*, 31 Conn. 145.

the remedy being in equity where an accounting may be had.¹

6. Corporations—*a.* IN GENERAL.—Corporations, whether sole² or aggregate, may maintain ejectment for any real estate which they have the capacity to hold.³

b. THE STATE.—The state, being likewise a corporation, has power by action to protect its rights and title in real estate.⁴

c. FOREIGN CORPORATIONS.—By comity, wherever in a state a corporation may hold real estate, it may bring an action of ejectment to protect its rights in the same.⁵

d. MUNICIPAL CORPORATIONS.—Where the legal title in fee to the soil of a public street, alley, or highway is in a municipal corporation, it may maintain ejectment against any one wrongfully and improperly using the same.⁶ And the same is true of land

1. *Clagett v. Kilbourne*, 1 Black (U. S.) 346.

2. The position of the priest of the Mission Dolores being analogous to that of a sole corporation in England, he may, in his character of priest, maintain an ejectment in his own name to recover possession of the lands of the mission which have been reserved. *Santillan v. Moses*, 1 Cal. 92.

3. *Adams on Ejec.* 78; *Martin v. Branch Bank*, 15 Ala. 587. See also *Henley v. Branch Bank*, 16 Ala. 552; *Society, etc. v. Wheeler*, 2 Gall. (U. S.) 105; *New York Dry Dock v. Hicks*, 5 McLean (U. S.) 111.

Corporate Seal.—In ejectment by a corporation the court will presume the demise to have been made under the corporate seal. *University v. Johnston*, 1 Hayw. (N. Car.) 375.

4. *James River, etc., Co. v. Thompson*, 3 Gratt. (Va.) 270.

Trespass to Try Title.—But it has been held that a state cannot be disseised, and therefore cannot maintain the action of trespass to try title. *State v. Arledge*, 1 Bailey (S. Car.) 551. See *Jackson v. Winslow*, 2 Johns. (N. Y.) 80, opinion of Kent, Ch. J.

King.—Doubt is said, by *Adams*, to have been entertained as to whether the king, since he could not be put out of possession, could maintain ejectment. *Adams* suggests that the reasoning applies only where the king is made plaintiff and not lessor of the plaintiff. *Adams on Ejec.* 78. See also the following cases: *Payne's Case*, 2 Leon. 205; *Lee v. Norris*, Cro. Eliz. 331; *Hayne v. Redfern*, 12 East 96.

5. *New York Dry Dock v. Hicks*, 5 McLean (U. S.) 111. Compare *Augusta Bank v. Earle*, 13 Pet. (U. S.) 519.

But in those states where foreign corporations are prohibited by law from acquiring or holding real estate, the rule would be different and ejectment would not lie. See *Leasure v. Union Mut. L. Ins. Co.*, 91 Pa. St. 491.

6. *San Francisco v. Sullivan*, 50 Cal. 603; *Savannah v. Georgia Steam Boat Co.*, R. M. Charl. (Ga.) 342; *California v. Howard*, 78 Mo. 88.

Removal of Obstructions.—Where a city seeks to have piles removed from land claimed by it as a street, on the ground of their being a nuisance, but the defendant claims possession and also the land itself in fee, and possession is admitted by plaintiff's reply, ejectment is the proper remedy. *Covington v. Chesapeake, etc., R. Co.* (Ky. 1892), 20 S. W. Rep. 538.

Trustees of Towns in Kentucky.—The original trustees of towns established by the general law of Kentucky may maintain ejectment to recover public ground, streets, and alleys which, when recovered, will be subject to the use of the citizens and the public. *Augusta v. Perkins*, 3 B. Mon. (Ky.) 443. But see *West Covington v. Freking*, 8 Bush (Ky.) 121.

Lands Dedicated but Not Accepted.—A county cannot bring ejectment for lands which the owners had offered to dedicate for public uses nearly fifty years before, but which had never been accepted by it. *Cass County v. Banks*, 44 Mich. 467.

Turnpike in Control of Private Corporation.—The right to maintain ejectment against persons encroaching upon a public highway usually belongs to the local municipal authorities having

dedicated to public use of any kind or description, as church grounds,¹ or town commons.² Ejectment has also been sustained in some jurisdictions, even where the absolute fee of the property has remained in private parties and the public or municipal corporation had only an easement. Here the right to the possession, use, and control of the land in question is deemed a legal and not a merely equitable right, and is considered paramount to that of the owner of the fee, and not dependent on the fee for its protection.³ In such cases the action has been sustained, even against the owner of the fee.⁴ But the rule is not uniform, for it has been held that a city has only an easement in its streets and alleys,⁵ an interest insufficient to enable it to support ejectment, even though its charter may give it the super-

charge of the road, but this rule is not applicable to the case of a turnpike in control of a private corporation, even though the municipality may have certain prescribed powers over the turnpike which, if possessed over an ordinary highway, would create, by implication, a right to maintain that action. *Chambersburg v. Manko*, 39 N. J. L. 496.

1. *Hannibal v. Draper*, 15 Mo. 634.

2. *Bath Com'rs v. Boyd*, 1 Ired. (N. Car.) 194.

Overseers of the Poor.—Under statute in *Pennsylvania*, overseers of the poor sometimes have capacity to maintain ejectment. Thus where a plaintiff in ejectment, after suit brought, became and died a pauper, such overseers had the right to be substituted as plaintiff in his stead, they, and not the heirs at law, being, under the statute, next in interest to such plaintiff. *Jester v. Overseers of the Poor*, 11 Pa. St. 540.

3. *Chicago v. Wright*, 69 Ill. 318; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13; *Klinkener v. M'Keesport*, 11 Pa. St. 444.

In *Hoboken Land, etc., Co. v. Hoboken*, 36 N. J. L. 544, it was said: "Where the public easement is such that possession, exclusive of any interference by the owner of the fee, is essential for its improvement, regulation, and enjoyment, the only appropriate action to obtain the possession is ejectment. To deny this form of relief and remit the public to a remedy by indictment for a nuisance would result in subjecting public rights in property to the varying moods of grand juries."

4. *Den v. Dummer*, 20 N. J. L. 86;

Hoboken Land, etc., Co. v. Hoboken, 36 N. J. L. 540.

Principle of Such Rulings.—The difficulty here is avoided by considering the interest of the corporation, subject to the outstanding fee, a legal, not a mere equitable right, which, coupled with the right of possession, gives a valid subsisting interest sufficient to maintain ejectment.

This ruling was made in the case of *Winona v. Huff*, 11 Minn. 119, under a statute which read: "The land intended to be for the streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust, to and for the uses and purposes set forth and expressed or intended." The court says: "It is not the use that passes merely, but the land necessary for the use, and whatever interest is necessary passes to the corporate body—in this instance the plaintiff. In this case the property is placed under the regulation of the plaintiff, to designate the public purposes to which it shall be applied not inconsistent with the dedication, and to take all proper steps to accomplish such purposes. The right to the possession thereof, so far as is necessary to accomplish these objects, is clearly implied. This right, by the terms of the statute, is incident to the interest of the corporation in the land, and is in trust for the purposes of the dedication. It does not arise out of the corporate powers of the plaintiff, although it might exist there also. It is therefore a legal right to the possession, with an interest in the land for the purposes of the trust, that is, the use of the public."

5. *Racine v. Crottsenberg*, 61 Wis. 481.

vision and control over them.¹

7. Devisees and Legatees.—The devisee of a freehold interest in land, or any one claiming under him, may, immediately and without any possession, bring ejectment for the lands devised,² and

1. Grand Rapids v. Whittlesey, 33 Mich. 109.

Ejectment against County or City.—A county or city may rightfully defend an action of ejectment brought by the owner of the fee against it to recover land previously dedicated. *Cincinnati v. White*, 6 Pet. (U. S.) 431. It was argued in this case that the plaintiff showed the legal title to the premises, which was sufficient for a recovery at law, and the remedy of defendant, if any, was in equity. But the court refused to accede to that doctrine. "For," says Thompson, J., "should it be admitted that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment. This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by ejectment."

Land Improperly Taken by Municipalities.—But where land has been wrongfully taken and converted into a public street or road, ejectment will be against the municipal corporation so offending against the rights of private parties. *McCarty v. Clark County*, 101 Mo. 179; *Barry v. Sonoma County*, 43 Cal. 217; *Armstrong v. St. Louis*, 69 Mo. 309; *Anderson v. St. Louis*, 47 Mo. 484; *Hammerslough v. Kansas City*, 57 Mo. 221; *Strong v. Brooklyn*, 68 N. Y. 1. But see *Cowenhoven Convention v. Brooklyn*, 38 Barb. (N. Y.) 9.

In answer to the argument that the action cannot be maintained against the city so trespassing, as the city only claims an easement in the land in controversy and ejectment will not lie for an easement, the court, in *Armstrong v. St. Louis*, 69 Mo. 315, says: "The right to maintain an ejectment against a party in possession does not depend upon the right he claims in the premises, but upon the wrong he has done the claimant, if the true owner. If he has turned him out of possession and holds the premises against him, it does not matter what interest he claims."

2. Adams on Ejec. 71; *Coke on Litt.* 240 (b); *Van Rensselaer v. Hayes*, 5 Den. (N. Y.) 477; *Dunn v. Peterson*, 4 Wash. 170.

Where a testator devises two tracts of land to different persons, and the devisee of the second tract elects to take the first and more valuable by a paramount title, the devisee of the first tract may bring ejectment for the second. *Lewis v. Lewis*, 13 Pa. St. 79.

In Vermont it is held that the devisee of land may maintain ejectment therefor when it is obvious that no action of the probate court, in ordering a division or assigning the land, can become necessary, and there is no pretense that the executor has any lien on the land, or such a length of time has elapsed that his lien will be presumed satisfied. *Abbott v. Pratt*, 16 Vt. 626.

In California devisees or their grantees cannot maintain ejectment for land devised to them until the final discharge of the executor from his trust and a distribution of the estate. *Meeks v. Kirby*, 47 Cal. 168; *McCrea v. Haraszthy*, 51 Cal. 146; *Burgel v. Prisser*, 89 Cal. 70; *Harper v. Strutz*, 53 Cal. 655.

Vacant Land.—The devisee of vacant land has, by operation of law, without entry, such a seisin as will enable him to maintain a writ of entry. *Green v. Chelsea*, 24 Pick. (Mass.) 71.

Land in Another State.—It is not necessary that the executor of a will made in Virginia, which devises land in Kentucky to said executor, should take out letters of administration in Kentucky to enable him to sue in ejectment to recover possession of the land so devised in Kentucky. *Lewis v. M'Farland*, 9 Cranch (U. S.) 151.

Disclaimer.—Where the devisee of an estate refused to take it, claiming to be entitled as heir at law, and would not accept any benefit under the will of the testator, it was held that this was not such a disclaimer as prevented her from afterwards bringing ejectment and relying on her title as devisee. *Doe v. Smyth*, 6 B. & C. 112, 13 E. C. L. 113.

A devisee of an estate may, by deed, without matter of record, disclaim the

he is not required to wait for probate of the will before doing so.¹

8. Dower.—*a.* AT COMMON LAW.—At common law the legal remedies to enforce the assignment of dower were the writ of dower *unde nihil habet* and the writ of right of dower. After judgment was obtained in either of these actions, possession of the interest of the widow, thus assigned to her, was recoverable by her in an action of ejectment.² But the action of ejectment could not be resorted to until dower had been assigned.³

The Widow cannot Join with the Heirs in bringing ejectment for lands of her deceased husband, and, if she does so join, the heirs will not be allowed to recover judgment alone;⁴ nor is the unassigned

estate devised. *Townson v. Tickell*, 3 B. & Ald. 31, 5 E. C. L. 219.

A devise of real estate was made to the four executors of a will to rent the same and distribute the profits. Three of the executors refused the trust. One of said three died; and the other two of said three renounced in writing after the commencement of the suit, but were examined as witnesses and declared that they had from the first refused the trust. It was held that the other executor alone might recover in ejectment. *Jones v. Maffet*, 5 S. & R. (Pa.) 523.

1. *Richards v. Pierce*, 44 Mich. 444.

Legacy of Term of Years.—But in the case of a legacy of a term of years, the legatee must first obtain the assent of the executors to the bequest. *Young v. Holmes*, 1 Stra. 70.

Where, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor as well as against the stranger. *Doe v. Guy*, 3 East 120; *Adams on Ejec.* 71.

As Both Devisees and Heirs.—Where the lessors of the plaintiff are entitled to part of the land as devisees and the rest of the land as heirs of the other devisees, they may recover the whole in ejectment—an undivided part as devisees and the rest as descendants and heirs of those devisees who have died. *Smith v. Moore*, 6 Dana (Ky.) 419.

2. See article DOWER, *ante*, p. 148. See also *infra*, VI. 24. *Widows*.

3. *Doe v. Nutt*, 2 C. & P. 430, 12 E. C. L. 205; *Clowes v. Vanderheyden*, 17 Johns. (N. Y.) 167; *Shields v. Batts*, 5 J. J. Marsh. (Ky.) 12; *Tucker v. Vance*, 2 A. K. Marsh. (Ky.) 458; *Thomas v. Simpson*, 3 Pa. St. 69; *Weiskoph v. Dibble*, 18 Fla. 24; *Galbraith v. Fleming*, 60 Mich. 408; *May v. Rumney*, 1 Mich. 5; *Adams on Ejec.* 65.

"By the common law it is well established that if the widow's claim be in the nature of a dower, an ejectment will not lie before assignment. She is not seised of an undivided third part with the heirs * * *. Ejectment is a possessory action; and it is certain she cannot hold the possession against the heir. She is not seised until assignment of an undivided third part. The widow and heir or heirs are neither tenants in common, joint tenants, nor coparceners," and the court added: "It has been the general understanding in *Pennsylvania* that a widow cannot support ejectment for her thirds, as dower at common law; and that she cannot for her interest under the intestate laws." *Pringle v. Gaw*, 5 S. & R. (Pa.) 536.

What may be Controverted.—In ejectment for dower by the widow, after admeasurement, the validity of her claim to dower, the title of her husband, his seisin, and her marriage, may all be controverted and tried, notwithstanding said admeasurement. *Parks v. Hardey*, 4 Bradf. (N. Y.) 15.

4. *Pringle v. Gaw*, 5 S. & R. (Pa.) 536; *Gourley v. Kinley*, 66 Pa. St. 270.

Pennsylvania.—This has been changed by substitute in *Pennsylvania* to the extent that judgment will not be reversed on account of such improper joinder, but a judgment of nonsuit will be entered as to her, and the other plaintiffs will be allowed to recover. See *Bratton v. Mitchell*, 7 Watts (Pa.) 113.

Action by Heir and Widow—Amendment.—Where ejectment was brought by the heir and the mother, the declaration stating a joint ownership in fee, and the same was amended by the addition of a count averring title in the heir alone, it was held that a new cause of action was not thereby introduced,

dower of the widow a bar to the recovery in ejectment by the heir.¹

6. IN MODERN PRACTICE.—But real actions to recover dower have been abolished in many states, and ejectment has been resorted to in their place. In such cases the action is generally brought before assignment, under statute.²

Divorced Widow.—And the widow, or a wife who has obtained a divorce, may bring ejectment for dower while she is in possession of a portion of the land in which she claims to be endowed.³

Parties Defendant.—The action is not only against the tenant of the freehold, as at common law, but against all persons in possession or claiming an interest in the premises, and all such persons may be joined as defendants.⁴

and that the amendment was of no consequence except to perfect the record, the jury being empowered in such case by statute to find for the heir alone. *McCammon v. Detroit, etc., R. Co.*, 66 Mich. 442.

1. *McCammon v. Detroit, etc., R. Co.*, 66 Mich. 442.

But see *Robinson v. Miller*, 1 B. Mon. (Ky.) 92, where it was held that ejectment would not lie against the widow by the heir, or his alienee, to recover possession of land of which the husband died seised, until dower was assigned.

2. *May v. Rumney*, 1 Mich. 1; *Proctor v. Bigelow*, 38 Mich. 282; *Moody v. Seaman*, 46 Mich. 74; *Burrall v. Bender*, 61 Mich. 608; *Westbrook v. Vanderburgh*, 36 Mich. 34; *Rea v. Rea*, 63 Mich. 257; *Snyder v. Snyder*, 6 Mich. 470; *Jones v. Fox*, 20 W. Va. 370.

Equitable Estate.—But this form of action will not lie to recover dower in an equitable estate of the husband. *Beebe v. Lyle*, 73 Mich. 114; *Van Dyne v. Thayer*, 19 Wend. (N. Y.) 162.

Statutory Authority.—"The authority for bringing an action in ejectment to recover dower rests entirely upon the statutes." *Galbraith v. Fleming*, 60 Mich. 408.

The Substitution of the Action of Ejectment to recover dower, under statute, for the writ of dower, affects only the modes of proceeding and does not alter or modify the right or interest of the widow in the land. She has a mere right of action and is not a tenant in common, and consequently is not bound to prove an actual ouster, or other act amounting to a denial of her

right. *Yeates v. Paddock*, 10 Wend. (N. Y.) 529; *Oothout v. Ledings*, 15 Wend. (N. Y.) 410; *Pringle v. Gaw*, 5 S. & R. (Pa.) 536.

Description of Land must Be Certain enough in the declaration in ejectment to recover unassigned dower to enable the sheriff to deliver possession without reference to anything dehors the writ. *King v. Merritt*, 67 Mich. 194.

3. *Rea v. Rea*, 63 Mich. 257.

4. *Ellicott v. Mosier*, 7 N. Y. 201; *Sherwood v. Vandenburg*, 2 Hill (N. Y.) 303; *Shaver v. McGraw*, 12 Wend. (N. Y.) 558; *Hurd v. Grant*, 3 Wend. (N. Y.) 340; *Lockwood v. Drake*, 1 Mich. 14.

Where the Premises are Not Occupied the action must be brought against some person exercising acts of ownership, or claiming title thereto or some interest therein at the commencement of the suit. *Connolly v. Newton*, 85 Hun (N. Y.) 552.

Where Defendants Are Purchasers at the Administrator's Sale, and also entered into possession under an agreement to pay rent to the widow for the use of her unassigned interest, she cannot maintain ejectment against them without terminating the tenancy. *Gustin v. Burnham*, 34 Mich. 511.

Surplus after Mortgage Sale.—In an action to recover dower in the surplus of the proceeds remaining after the sale of mortgaged premises under foreclosure, the husband's creditors are not proper parties where the defendant holds the surplus as a trustee for all the creditors of all the estate. *Matthews v. Duryee*, 45 Barb. (N. Y.) 69.

Action against Grantees of Husband.—The widow may bring the action against grantees of her husband hold-

c. ASSIGNEE OF DOWER RIGHT.—The right of dower, until duly and legally assigned, is a right vesting in action only—nothing more. We have seen that the widow herself cannot, at common law, before assignment, maintain ejectment for her dower.¹ So the assignee or grantee of this right of dower cannot, before the same has been legally assigned, sue in ejectment to recover it,² or defend an action of ejectment brought against him by the heir, by setting up the assignment from the widow in bar.³ And even where, by statute, the right to sue in ejectment for unassigned dower is enjoyed, it has been held that this statutory right is vested solely in the widow and by necessary implication is not available to her assignee.⁴

9. Grantee or Holder of Rent Charge.—The grantee or holder of a rent charge, who has the power of re-entry if the rent is in arrear, may maintain ejectment for the land⁵ provided he make a proper demand for the rent.⁶ And generally ejectment may be used to enforce the payment of a lien or charge on land where a

ing a mortgage to which the dower is subject, but which has not been foreclosed. *Newton v. Sly*, 15 Mich. 391.

A widow cannot maintain the action for dower in lands purchased under foreclosure of a mortgage on the land at the time of the husband's purchase, and which he assumed to pay, although she was not made a party to the action. *Smith v. Gardner*, 42 Barb. (N. Y.) 356.

1. See *supra*, VI. 8. *a.* *At Common Law.*

2. *Carnall v. Wilson*, 21 Ark. 62; *Galbraith v. Fleming*, 60 Mich. 408.

Equitable Remedy.—Yet equity will, in various ways, recognize such assignments or transfers. *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152; *Wilson v. McLenaghan*, McMull. Eq. (S. Car.) 35; *Maccubbin v. Cromwell*, 2 Har. & G. (Md.) 443.

Trespass to Try Title Sustained.—But an action of trespass to try title brought in the name of the assignor, though, in fact, for the benefit of the assignee, has been sustained. *Lamar v. Scott*, 4 Rich. (S. Car.) 516. So also in the case of a writ of dower. *Robie v. Flanders*, 33 N. H. 524; *Rowe v. Johnson*, 19 Me. 146.

3. *Wallace v. Hall*, 19 Ala. 367; *Barnett v. Meacham* (Ark. 1896), 35 S. W. Rep. 533; *Carnall v. Wilson*, 21 Ark. 62; *Howe v. McGivern*, 25 Wis. 532; *King v. Merritt*, 67 Mich. 194; *McCammon v. Detroit*, etc., R. Co., 66 Mich. 442.

Where a Receiver has been Appointed in supplementary proceedings against

the widow, and has taken an assignment of all her property, he may maintain ejectment for dower to recover an assignment and possession of the dower interest or the gross sum in lieu of dower. *Payne v. Becker*, 87 N. Y. 153, reversing 22 Hun (N. Y.) 28.

4. *Galbraith v. Fleming*, 60 Mich. 408.

It has been held that the grantee of a widow's life estate under the statute of descents may bring ejectment for the possession of the same, notwithstanding the possible appointment of an administrator who may be empowered to sell the land to pay debts. *Finch v. Rhodes*, 49 Mich. 33.

5. *Jemott v. Cowley*, 1 Saund. 112, 1 Lev. 170; *Hassell v. Gouthwaite*, Willes 500. But see *Kenege v. Elliot*, 9 Watts (Pa.) 258.

6. This was held on common-law principles in *McCormick v. Connell*, 6 S. & R. (Pa.) 151, where the court says: "There must be a demand of the precise rent due, on the very day on which it becomes due, on the most notorious place on the land, and a demand must in fact be made on the land, although there should be no person on the land ready to pay it."

But in *Doe v. Horsley*, 1 Ad. & El. 766, 28 E. C. L. 201, it was held that no demand of an annuity which was in arrear and was charged on land was necessary in order that the right of entry for nonpayment should accrue. See also *Chawner v. Boulter*, 1 N. & P. 650.

right of re-entry exists on default¹ as an annuity charged on land.²

10. Guardians. (See also *infra*, VI. 13. *Infants*.)—It may be stated generally that any person who has the lands of infants intrusted to him, or any control over such lands with power to make leases, may maintain in his own name the action of ejectment.³ In this country guardians are appointed under statute in the various states and their powers and duties regulated thereby.⁴ Where a guardian having no authority to lease his ward's lands, such as one for nurture or by nature, does so, the infant may maintain ejectment by his next friend to recover possession of them,⁵ but where

1. *Galbraith v. Fenton*, 3 S. & R. (Pa.) 359.

It was held, however, in *Craven v. Bleakney*, 9 Watts (Pa.) 19, that ejectment would not lie to enforce a provision for the maintenance and support of a testator's widow, charged upon real estate devised, the remedy being in the Orphans' Court.

2. *Doe v. Horsley*, 1 Ad. & El. 766, 28 E. C. L. 201; *Chawner v. Boulter*, 1 N. & P. 650. See *Doe v. Bromley*, 6 D. & R. 292, 16 E. C. L. 260.

Legacy.—As to ejectment to recover a legacy charged on land, see *Gause v. Wiley*, 4 S. & R. (Pa.) 509.

3. *Magruder v. Peter*, 4 Gill & J. (Md.) 330; *Hughes' Minors' Appeal*, 53 Pa. St. 500; *Holmes v. Seely*, 17 Wend. (N. Y.) 75; *Brooks v. Brooks*, 3 Ired. (N. Car.) 393.

Guardians by Nature and for Nurture.—Thus guardians by nature and for nurture, having only the care of the person and education of the infant, with no control over his lands, and no power to make leases thereof, could not maintain the action. *Adams on Ejec.* 66; *Ratcliffes' Case*, 3 Coke 37; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463. See also *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; *Combs v. Jackson*, 2 Wend. (N. Y.) 153; *Anderson v. Darby*, 1 Nott & M. (S. Car.) 369; *May v. Calder*, 2 Mass. 55.

Guardians in Socage and Testamentary Guardians.—On the other hand, testamentary guardians under the Stat. of 12 Car. II., c. 24 and guardians in socage may maintain the action, the former having in his custody the lands, tenements, and hereditaments of the infant to the use of the infant, and the latter having the legal custody of such lands, and being entitled to the profits thereof for his own benefit. *Adams on Ejec.* 66; *Bedell v. Constable*, Vaugh. 177; *Roe v. Hodgson*, 2 Wils.

129; *Rex v. Oakley*, 10 East 491; *Holmes v. Seely*, 17 Wend. (N. Y.) 75; *Jackson v. De Walts*, 7 Johns. (N. Y.) 157; *More v. Deyoe*, 22 Hun (N. Y.) 216; *Beecher v. Crouse*, 19 Wend. (N. Y.) 306; *Seaton v. Davis*, 1 Thomp. & C. (N. Y.) 91; *Bartholemew v. Lyon*, 3 Thomp. & C. (N. Y.) 774; *Truss v. Old*, 6 Rand. (Va.) 556. See *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66. A mother, as guardian in socage, may maintain ejectment for her children's lands. *Cagger v. Lansing*, 64 N. Y. 417.

What Guardian must Prove.—In all cases where a plaintiff in ejectment relies on a lease made by a guardian, it is necessary for him to prove at the trial the legal appointment of the guardian, and that the ward was under age when the lease was made. *Kraft v. Wickey*, 4 Gill & J. (Md.) 332.

4. In *Michigan* it has, however, been held that although a guardian in that state has, under statute, the power of leasing it and receiving the profits thereof, he cannot maintain ejectment to recover the land of the ward. The action must be brought in the name of the ward himself. *Kinney v. Harrett*, 46 Mich. 87.

In *Illinois* it is also held that a guardian cannot maintain ejectment in his own name for the land of his ward. He has, under the statute, no such interest in his ward's land as a guardian in socage had at common law. *Muller v. Benner*, 69 Ill. 108.

5. *Hefl v. McGill*, 3 Pa. St. 256.

Though it has been held in *Ohio* that a *prochein ami* could not make a demise to sustain an action of ejectment, as he is neither attorney nor guardian. *Massie v. Long*, 2 Ohio 287.

Ejectment lies on behalf of a minor child to recover possession of the homestead improperly conveyed away by his mother. *Rogers v. Mayes*, 84 Mo. 520.

the guardian, under statute, or by common law, is vested with and controls the estate of his ward, the action should only be brought in his name.¹

11. **Heirs.** (See also *infra*, VI. 16. *Personal Representatives*.)—*a.* IN GENERAL.—The heirs at law of an intestate might, as a general rule, at common law, maintain ejectment for the possession of ancestral lands,² the presumption of law being that the heirs are in possession after the death of their ancestor,³ and it has been held that this may be done even where the ancestor died out of possession of the land in question.⁴ So the action may be maintained by the heir of a devisee, though the testator had no title but that of actual possession.⁵ The heirs of a surviving trustee may maintain the action if the suit is not adverse to the interests of the *cestuis que trustent*.⁶ And the heirs of the grantor of land in fee subject to a rent charge, with right of re-entry for nonpayment of rent, may likewise do so.⁷

b. ACTION AGAINST WIDOW.—An heir at law may also recover in ejectment against a widow in possession of the land of her deceased husband in which she has a right of dower, provided said land has not been assigned to her as dower, and is not attached to the mansion, or, if so attached, that suit is brought after quarantine,⁸ but such recovery by the heir at

1. *Seaton v. Davis*, 1 Thomp. & C. (N. Y.) 91. See *Beecher v. Crouse*, 19 Wend. (N. Y.) 306; *Adams on Ejec.* 67.

Contrary Dictum.—This, at least, would seem to be the proper rule, but the contrary has been asserted as a dictum in a comparatively recent case in Canada. *Doe v. McLeod*, 8 U. C. Q. B. 344.

2. *Carruthers v. Bailey*, 3 Ga. 105; *Maltonner v. Dimmick*, 4 Barb. (N. Y.) 566; *Brant v. Livermore*, 10 Johns. (N. Y.) 358; *Uhrich v. Beck*, 13 Pa. St. 639; *Doe v. Mace*, 7 Blackf. (Ind.) 2; *Robinoe v. Doe*, 6 Blackf. (Ind.) 85; *Keyes v. Gore*, 42 Ohio St. 211.

In *Arkansas* the heir of a patentee may have ejectment even although the agent makes the entry in the name of his ancestor, but after his death. *McClairn v. Wicker*, 8 Ark. 192.

In *Missouri* a pretermitted heir may maintain the action for a share of the land of which his father died seised. *McCracken v. McCracken*, 67 Mo. 590.

Where land is Not Paid for by Ancestor, and the heirs at law sue in ejectment as such to recover the same, equity will force them to discharge the vendor's lien for the purchase-money, the ancestor having died insolvent and there

being no representation on his estate. *McDougald v. Williford*, 14 Ga. 665.

3. *Tapscott v. Cobbs*, 11 Gratt. (Va.) 172; *Fosgate v. Herkimer Mfg., etc., Co.*, 9 Barb. (N. Y.) 287.

Decree in Chancery Partition Suit.—Heirs at law of a defendant in a chancery partition suit which has not been revived against them after the death of their ancestor will not be prevented by the decree in the partition suit from maintaining ejectment for their undivided interests. *De Mill v. Port Huron Dry Dock Co.*, 30 Mich. 38.

The Issue of Tenant in Tail who are aliens in fee may maintain ejectment after the decease of their ancestor without an actual entry. *Den v. Robinson*, 5 N. J. L. 793.

4. *Webster v. Webster*, 53 Pa. St. 161. See *Mason v. Walker*, 14 Me. 163.

5. *Asher v. Whitlock*, L. R. 1 Q. B. 1.

Remainder in Copyhold.—An heir on whom a contingent remainder in copyhold has devolved may bring ejectment before admittance. *Baverstock v. Rolfe*, 3 N. & P. 648.

6. *Crunkelton v. Evert*, 3 Yéates (Pa.) 570.

7. *Cruger v. McLaury*, 41 N. Y. 219.

8. *Moore v. Gilliam*, 5 Munf. (Va.)

law is subject to the widow's title.¹

c. FRAUDULENT DEEDS OF EXECUTORS.—And it has been held that ejectment will lie by heirs to avoid fraudulent deeds of their lands given by the executors of their ancestor.²

d. RESPECTIVE RIGHTS OF HEIRS AND PERSONAL REPRESENTATIVES.—The question of the respective rights of the heirs and the administrators to the lands of the intestate, and their respective powers of maintaining ejectment therefor, is, of course, to a large extent governed by statutes in the various states.³

12. **Husband and Wife**—*a.* AT COMMON LAW.—By the common law a husband had an estate for his own life in the lands of his wife,⁴ and the general rule, therefore, is that a husband may

346. *Contra*, *Gourley v. Kinley*, 66 Pa. St. 270.

Action against Assignee of Widow.—The heirs at law may maintain ejectment for the mansion-house against third persons who claim under the widow, before the assignment of her dower. *Wallis v. Doe*, 2 Smed. & M. (Miss.) 220.

1. *Chapman v. Armistead*, 4 Munf. (Va.) 382.

After Death of Widow.—The action will also lie in favor of the heirs after the death of the widow for lands assigned to her as dower. *Brown v. Colson*, 41 Ga. 42.

2. *Den v. McKnight*, 11 N. J. L. 385; *Den v. Hammel*, 18 N. J. L. 73. But see *Den v. Newark Indian Rubber Co.*, 24 N. J. L. 467.

3. Reference may be made also to the section *infra*, VI. 16. *Personal Representatives*.

California.—In this state neither heirs nor devisees may maintain ejectment for lands of their ancestor or intestate until the final discharge of the executor or administrator from his trust, and a distribution of his estate. *Meeks v. Kirby*, 47 Cal. 168; *McCrea v. Haraszthy*, 51 Cal. 146; *Burgel v. Prisser*, 89 Cal. 70; *Harper v. Strutz*, 53 Cal. 655. But the heirs have nevertheless a right of entry on the lands of their ancestors, subject only to the statutory right of the administrator, and where there is no administrator, the heirs may bring ejectment, *Updegraff v. Trask*, 18 Cal. 458, even without entry after the death of the ancestor. *Soto v. Kroder*, 19 Cal. 87.

Florida.—In this state it is held under statute that when administration has been granted and the estate

of the decedent is still unsettled and the administrator not discharged, the heirs cannot have ejectment to recover real estate of the decedent, this right being in the administrator alone. *Doyle v. Wade*, 23 Fla. 90.

Georgia.—In this state the action seems open to either. *Carruthers v. Bailey*, 3 Ga. 105.

Michigan.—Here the heir may recover in ejectment his undivided interest where the administrator shows no authority from the probate court to take possession of the realty. *Warren v. Tobey*, 32 Mich. 45. Or he may recover against third persons where possession has not been taken or demanded by the personal representatives. *Marvin v. Schilling*, 12 Mich. 356. See also *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336; *De Mill v. Port Huron Dry Dock Co.*, 30 Mich. 38; *Covert v. Morrison*, 49 Mich. 133.

In Missouri the heir cannot sustain ejectment against a lessee holding under a lease from an executor made under the order of the probate court. *Eoff v. Thompkins*, 66 Mo. 225.

In Vermont it seems that the heir, as such, cannot generally maintain ejectment before division or settlement of the decedent's estate. *Hubbard v. Ricart*, 3 Vt. 207; *Boardman v. Bartlett*, 6 Vt. 631, though he may do so if no administrator has been appointed. *Buck v. Squires*, 22 Vt. 484; *Austin v. Bailey*, 37 Vt. 219.

4. "By the marriage the husband does not become absolute proprietor of the wife's inheritance—he gains therein an inheritance, however, during her life—he may receive the profits and, if not in the possession, he may gain possession by entering upon the land; he may

demise such an interest in his wife's land as will support an ejectment.¹ And, of course, this rule applies with still greater force where the property is owned by both husband and wife, as tenants by entireties.² So a grantee of the husband owning a life estate *jure uxoris* may maintain the action.³ But a joint demise is allowed under some authorities,⁴ and insisted on by others,⁵ though ejectment on a joint demise by husband and wife cannot be sustained where the title is in the husband alone.⁶

b. MODERN LEGISLATION.—Modern legislation has given the wife a more and more complete control over her own property; and in some states, under statute, she may maintain ejectment

leave the land and, for the purpose of trying the title in an action of ejectment, it is sufficient to lay the demise in his name without joining that of his wife." *M'Clain v. Gregg*, 2 A. K. Marsh. (Ky.) 454.

1. *Chambers v. Handley*, 3 J. J. Marsh. (Ky.) 98; *Tucker v. Vance*, 2 A. K. Marsh. (Ky.) 458; *Griffith v. Huston*, 7 J. J. Marsh. (Ky.) 388; *Cooper v. Ord*, 60 Mo. 420; *Flesh v. Lindsay*, 115 Mo. 1; *Gregg v. Tesson*, 1 Black (U. S.) 150. See *Clark v. Clark*, 20 Ohio St. 128.

Where the husband brings ejectment, relying as a muniment of title on a deed to his wife which conveys to her the demanded premises as her separate property, and no equitable defense is set up, neither party can make inquiry for the purpose of controlling or defeating the legal effect of the deed. *Swain v. Duane*, 48 Cal. 358.

Limitations.—Where the husband, if suing alone, is barred by limitations, he will also be barred if the action is brought on the joint demise of himself and his wife; for the husband being entitled to the freehold, and the wife and her heirs to the reversion, the former only has the right of entry. The whole object of the statute of limitations is accomplished when it is made to save the wife such rights as she has in the lands, and this is done by affording her, while her estate is in reversion, reversionary remedies, and when her right of entry arises, the possessory remedy by ejectment. *Thompson v. Green*, 4 Ohio St. 216; *Neal v. Robertson*, 2 Dana (Ky.) 87. But see *contra*, *Watson v. Watson*, 10 Conn. 77.

A rule relating to this point is thus clearly stated in *Williams v. Lanier*, Busb. (N. Car.) 30, by Pearson, J.: "The rule is, where the wife must be

joined, the statute does not bar; for it is her cause of action and survives to her. Where the husband must sue alone, or may, at his election, join the wife, the statute does bar; for it is his cause of action and does not survive to the wife."

Husband and Wife Living Apart.—A husband whose wife is living apart from him by reason of his ill-treatment has been held not to be able to recover her land upon the legal title. *Rorer v. O'Brien*, 10 Pa. St. 212.

2. *Jackson v. Leek*, 19 Wend. (N. Y.) 339; *Jackson v. McConnell*, 19 Wend. (N. Y.) 175.

3. *M'Clain v. Gregg*, 2 A. K. Marsh. (Ky.) 454.

4. *Chambers v. Handley*, 3 J. J. Marsh. (Ky.) 98; *Thompson v. Green*, 4 Ohio St. 216; *Neal v. Robertson*, 2 Dana (Ky.) 87.

5. *Bratton v. Mitchell*, 7 Watts (Pa.) 113; *Atkinson v. Rittenhouse*, 5 Pa. St. 103. See *Weller v. Baker*, 2 Wils. 424. And in *Watson v. Watson*, 10 Conn. 77, it was said: "There are many cases where she may or may not join; but in ejectment for her land she must join."

In ejectment husband and wife must join, and an averment that they were seised of the premises is supported by proof of title in the wife, and in the husband in her right. *Hammick v. Bronson*, 5 Day (Conn.) 297; *Kelsey v. Hammer*, 18 Conn. 316; *Watson v. Watson*, 10 Conn. 88.

Survival of Action.—Where pending an ejection by husband and wife to recover land, the title to which was in the wife, the husband dies, the action survives to the wife, and upon her death to her heirs and devisees. *King v. Little*, 77 N. Car. 138.

6. *Tucker v. Vance*, 2 A. K. Marsh. (Ky.) 458.

for her real estate without joining her husband in the action.¹ In some cases a wife has been allowed to maintain ejectment against her husband, who is living separate from her, and who has, against her will, taken and retained possession of her real estate.² And the action has also been sustained by the husband against the wife.³

13. Infants. (See also *supra*, VI. 10. *Guardians.*)—An infant who has conveyed lands during minority may maintain ejectment for them on coming of age.⁴ But it appears that this cannot be

1. *Darby v. Callaghan*, 16 N. Y. 71; *Clark v. Clark*, 20 Ohio St. 128.

The Marriage of Female Lessor of the plaintiff, after the date of the demise in her name, does not affect the right of the plaintiff to recover, though it is proper that it be suggested on the record. If the date of the demise is after the marriage, there can be no recovery. *Gregory v. Ford*, 5 B. Mon. (Ky.) 480.

In *California* it is held that where the husband says to his wife: "Everything you make is yours," and she goes into business and purchases real estate with the money she makes in such business, and there is nothing to show that the husband has made any claim to the same, the real estate so purchased is the separate property of the wife, for which she may have ejectment without joining her husband. *Von Glahn v. Brennan*, 81 Cal. 261.

Ejectment against Vendee of Husband and Wife.—But the wife cannot maintain ejectment against the vendee to recover lands, her statutory separate estate, which she and her husband had conveyed previously, even though part of the purchase money was paid with the debt of the husband. *Snyder v. Glover*, 75 Ala. 379.

Effect of Decree of Divorce.—A decree of divorce from bed and board, allowing wife the use of a house and lot as alimony, vests in her a legal right to enter and use the same, on which she may maintain ejectment. *Lefevre v. Murdock*, *Wright* (Ohio) 205.

2. *McKendry v. McKendry*, 131 Pa. St. 24; *Wood v. Wood*, 18 Hun (N. Y.) 350, 83 N. Y. 575.

3. Thus a recovery may be had against a married woman who has entered into the common-consent rule (even though it appears that the lessor of the plaintiff is the husband of the woman) although her husband is not

joined in the pleadings. *Burke v. Chamberlain*, 22 Md. 298.

4. *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Bool v. Mix*, 17 Wend. (N. Y.) 119. See also *Barclay v. Howell*, 6 Pet. (U. S.) 499.

Feme Covert.—And it makes no difference that at the time of the conveyance the infant was also a feme covert. *Bool v. Mix*, 17 Wend. (N. Y.) 119.

Where the Infant is Married, a guardian is not necessary if the land is not her separate property. In actions at law to recover it, her husband should sue and she should be joined, especially if she has a fee and was ousted before coverture; or if neither of them during coverture have had actual or constructive possession. In case they sue together, no guardian or prochein ami is necessary although she be an infant. The husband appoints an attorney for both. If the suit is for her separate property she must have a next friend, whether she claims a legal or an equitable estate. *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233.

Second Conveyance after Attaining Majority.—Where one who had conveyed land during minority conveyed the same land to another on coming of age, the latter grantee can maintain ejectment against an occupant deriving title from the former grantee. *Haynes v. Bennett*, 53 Mich. 15.

What Necessary—Intention to Disaffirm.—But before he can do this he must enter upon the land and execute a second deed to a third person, or do some other equally notorious act indicating his intention to disaffirm his conveyance, or the action will fail. *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Clawson v. Doe*, 5 Blackf. (Ind.) 300; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150. But see *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539.

done in such a case before the infant arrives at majority,¹ though the rule is different where the land has been leased without authority by the infant's guardian.²

14. Lunatics.—Ejectment for lands of a lunatic must be maintained in his own name. His committee acts merely under the direction of a court of chancery, and has no estate either in his lands or in his personal property.³

15. Owners of Land Improperly Taken under Condemnation Proceedings.—See *post*, article EMINENT DOMAIN.

16. Personal Representatives. (See also *supra*, VI. 11. *Heirs.*)—*a.* RULE AT COMMON LAW.—Executors and administrators have not, of course, at common law sufficient title or right of possession to the freehold lands of their testator to enable them to maintain ejectment for the same,⁴ although where the testator or intestate has only a mere term for years, or an estate from year to

Notice to Quit.—Where a life tenant, whose children have an estate in remainder, died, and the executors of the life tenant managed the estate for the children and received rent from a tenant in possession before the death of life tenant, it was held that their acts did not bind the infant children, who might maintain ejectment for the property without notice to quit or demand of possession. *Doe v. Roberts*, 16 M. & W. 778.

1. Bool v. Mix, 17 Wend. (N. Y.) 119; *Andrews v. Townshend* (Super. Ct.), 16 N. Y. St. Rep. 876.

And see *Rogers v. Mayes*, 84 Mo. 520, where it was held that ejectment would lie on behalf of a minor child to recover possession of a homestead improperly conveyed away by the mother.

2. Heft v. McGill, 3 Pa. St. 256. See *supra*, VI. 10. *Guardians.*

3. Petrie v. Shoemaker, 24 Wend. (N. Y.) 85; *Burnet v. Bookstaver*, 10 Hun (N. Y.) 481; *Lane v. Schermerhorn*, 1 Hill (N. Y.) 97; *Allen v. Ranson*, 44 Mo. 263; *Brooks v. Brooks*, 3 Ired. (N. Car.) 389; *Adams on Eject.* 91. See also *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Drury v. Fitch*, Hutt. 16; *Cocks v. Darson*, Hob. 215; *Knipe v. Palmer*, 2 Wils. 130.

Reason of Rule.—The reason is that the demise in ejectment must be made by the person who has the estate and could enter to make the lease; for, originally, the lease was made on the premises, and yet the question on the trial is as to his right to enter and there make the lease. But the committee of a lunatic had not the right of entry as an estate in the land, nor

any interest therein, nor any power over it, except as the mere bailiff of the sovereign, acting under the directions and control of the chancellor and dischargeable at his pleasure. And even if the chancellor made an order under which the committee leased, the legal title did not pass. The judge, delivering the opinion, refers to the Stat. 43 Geo. III., c. 75, giving the chancellor power to order committees to make leases, but maintains that this does not alter the rule as to ejectment, as "nobody supposes that a power to lease enables one who has the power to bring ejectment for the land." *Brooks v. Brooks*, 3 Ired. (N. Car.) 392.

Receiver.—But it seems that a receiver of a lunatic's property, appointed by chancery, with a general authority to let lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit and to bring ejectment therefor. *Doe v. Read*, 12 East 57.

4. Adams on Eject. 71.

Burdyne v. Mackey, 7 Mo. 374; *Chipman v. Sawyer*, 1 Tyler (Vt.) 83. See also *Stone v. Griffin*, 3 Vt. 400. Thus it was held in *Brown v. Strickland*, 32 Me. 174, that administrators *de bonis non* cannot in that capacity maintain any real action.

Land Subject to Annual Rent.—The executors of a testator who has granted land in fee, subject to an annual rent, cannot maintain ejectment for the non-payment of such rent, though it has been held otherwise of a lease for years. *Van Rensselaer v. Hayes*, 5 Den. (N. Y.) 477.

year, the action is maintainable by his personal representatives.¹ And it is not material whether the ouster be after or before the death of the intestate.² Such was the general rule at common law; but in many cases personal representatives have now, either under the will of the decedent, or by statute, a sufficient interest in decedent's lands to enable them to sustain ejectment.³

b. UNDER A WILL.—Thus executors, when empowered by will to sell the testator's real estate, are held in some jurisdictions capable of maintaining ejectment for the same;⁴ but the rule is by

1. *Slade's Case*, 4 Coke 95; *Doe v. Porter*, 3 T. R. 13; *Doe v. Bradbury*, 2 D. & R. 706, 16 E. C. L. 115; *Moreton's Case*, Vent. 30; *Doe v. Wheeler*, 15 M. & W. 623; *Roe v. Summerset*, 2 W. Bl. 692; *Duchane v. Goodtitle*, 1 Blackf. (Ind.) 117; *Van Rensselaer v. Hayes*, 5 Den. (N. Y.) 477.

Demise Laid before Probate.—It has been held in *England* that an executrix may maintain ejectment to recover a term of years of her testator on a demise laid before probate. *Roe v. Summerset*, 2 W. Bl. 692.

Land Converted into Personalty.—Where testator's sale of land during his life worked a conversion thereof into personality, his executor has the right to be substituted as plaintiff in an action of equitable ejectment brought by his heirs against his vendee. *Bender v. Luckenbach*, 162 Pa. St. 18.

Where Executrix has Assented to a bequest of leasehold property, ejectment cannot be maintained by her against the legatee, where such assent is proved. *Cole v. Cole*, 1 Har. & J. (Md.) 572.

2. *Adams on Ejec.* 70.

An assignment by an executor of a lease for lives is void if the premises are at the time of such assignment in the actual possession of the persons claiming adversely, and the assignee cannot maintain ejectment therefor. *Mosher v. Yost*, 33 Barb. (N. Y.) 277.

Estates Pur Autre Vie.—Personal representatives may recover in ejectment lands which the deceased held for the life of another under the statute 29 Car. II., c. 3, § 12, which appropriated such estates to said personal representatives for payment of debts, where there was no special occupant. *Mosher v. Yost*, 33 Barb. (N. Y.) 277.

But this statute did not extend to copyholds, and therefore one who had been admitted tenant upon a claim as administrator *de bonis non* to the grantee

of a copyhold *pur autre vie* was not permitted to maintain ejectment. *Adams on Ejec.* 71; *Zouch v. Forse*, 7 East 186.

3. **Nonresidence of Heirs.**—In one case it was held that the heirs of a mortgagee, or, in case of their nonresidence, the executor or administrator of the mortgagee, might have ejectment for the mortgaged premises against the mortgagor, or his underlessee, who became such without the privilege of the mortgagee, subsequent to the mortgage, and this without demand of possession. *Doe v. Mace*, 7 Blackf. (Ind.) 2.

4. *Chew v. Chew*, 28 Pa. St. 17; *Landon v. Townshend* (Supreme Ct.), 38 N. Y. St. Rep. 714, 14 N. Y. Supp. 522, affirmed in 129 N. Y. 166. See also *Lewis v. M'Farland*, 9 Cranch (U. S.) 151; *McAlpine v. Daniel*, 101 N. Car. 550.

"Although an executor, by virtue of his authority as executor alone, has no power over a fee simple estate, yet he may, by a special provision in the will of the testator, be authorized to enter on such estate and to lease or otherwise dispose of it. Therefore, the position that an executor cannot maintain ejectment for a fee simple estate is not in all cases correct." *Duchane v. Goodtitle*, 1 Blackf. (Ind.) 117.

Where a testator directs his real estate to be sold and bequeaths the residue of the proceeds, after payment of his debts, to his widow, whom he appoints executrix, she may have ejectment to recover possession of the land. *Carpenter v. Cameron*, 7 Watts (Pa.) 51.

An executor impliedly in possession of realty on account of the management and sale thereof with which he is charged may have recourse to ejectment to obtain possession of such realty; and so may an administrator *de bonis non* who, under the code, has all the rights and powers of an execu-

no means uniform on this point, several decisions holding the contrary.¹

c. UNDER STATUTE.—In like manner ejectment may be maintained by the personal representatives for lands of their testator or intestate, where the statute gives them an exclusive right to the possession of their decedent's lands, and of the rents and profits of the same, until administration of the estate is finally accomplished.² In some jurisdictions it is held that the administrator

tor. *Smathers v. Moody*, 112 N. Car. 791.

No One Designated to Execute Power.—Where a will orders land to be sold without designating any one to execute the power, the executors may maintain ejectment for it without authority from the Orphans' Court. *Kirk v. Carr*, 54 Pa. St. 285.

1. *Rogers v. Marker*, 12 Heisk. (Tenn.) 645; *Smith v. Chase*, 90 Hun (N. Y.) 99; *Cohea v. Jamison*, 68 Miss. 510.

Where the owner of land devised it to his wife for life and then to his children, giving his executors power to sell such portions as they might deem advantageous, it was held that the executors did not have a legal estate, and could not maintain the action against a trespasser. *Fredericks v. Cisco*, 72 Md. 393.

It has also been held that the executor could not maintain ejectment against the devisees of the testator for life until after the term of the devise, even although he has power after such term to sell or dispose of the property in question. *Thompson v. Schenck*, 16 Ind. 194.

2. **Alabama.**—*Landford v. Dunklin*, 71 Ala. 594; *McRae v. McDonald*, 57 Ala. 423; *Wells v. Elliott*, 68 Ala. 183; *Brewton v. Watson*, 67 Ala. 121. And it does not matter whether the estate is solvent or insolvent. *Masterson v. Girard*, 10 Ala. 60. See also *Golding v. Golding*, 24 Ala. 129; *Russell v. Erwin*, 41 Ala. 292. But until the personal representative asserts the powers over the real estate of the decedent with which he is clothed by statute, the devisee or heir is entitled to maintain the action. *Hall v. Hall*, 47 Ala. 290. And where it is shown that there are no debts existing against the decedent, or that those which are outstanding are barred by limitations, the personal representatives cannot recover against the alienee of the heir or devisee. *Lee v.*

Downey, 68 Ala. 98. But strangers who hold adversely to the heir or devisee cannot defend against the personal representatives on the ground that there are no such debts. *Morgan v. Casey*, 73 Ala. 222. Personal representatives who have possession and have paid debts of the intestate out of their own means can defend the action against the heir or devisee. *McCullough v. Wise*, 57 Ala. 623.

Arkansas.—The statute in this state gives the administrator possession of the real estate of the decedent and he may maintain ejectment for the same against the heir at law or any other person in possession, except the widow or her tenant, occupying the mansion-house and farm attached before the assignment of dower. *Carnall v. Wilson*, 21 Ark. 62; *Chowning v. Stanfield*, 49 Ark. 87; *Menifee v. Menifee*, 8 Ark. 48, *overruling Morrill v. Menifee*, 5 Ark. 629, and *Hill v. Mitchell*, 5 Ark. 608.

"The administrator's right to the possession of lands as assets for the purpose of administration is exclusive of that of the heirs, and he can maintain ejectment to gain the possession, but he is not concerned with the title, except in so far as it affects his possessory right, and he is not authorized to represent the heirs or to stand for them when the title is in question. They are indispensable parties in a controversy where relief is asked which will affect the title." Hence where ejectment is brought by an administrator, and defendant makes his answer a cross-complaint praying to be invested with the legal title, and, the cause being transferred to equity, a decree is issued declaring the defendant the owner of the land and quieting his title thereto, said decree is invalid against the heirs who were not parties to the proceeding. *Chowning v. Stanfield*, 49 Ark. 87; *Sisk v. Almon*, 34 Ark. 391; *Theurer v. Brogan*, 41 Ark. 88.

alone may maintain the action, at least until the estate is finally and completely settled.¹

Coexecutors.—It has also been held that two of three coexecutors might recover on a joint demise.²

17. Purchasers at Execution Sales.—Purchasers at execution sales become seised or possessed of the interest of the judgment debtor in the property in question,³ and can maintain an action of ejectment against him to recover the same,⁴ provided, of course, the

California.—*Curtis v. Herrick*, 14 Cal. 117; *Meeks v. Hahn*, 20 Cal. 621; *Curtis v. Sutter*, 15 Cal. 259; *Soto v. Kroder*, 19 Cal. 87.

If letters of administration are regularly granted and the probate court acquires jurisdiction over an estate, although there may occur a vacancy in the office of executor or administrator, the heir or devisee cannot maintain ejectment during such vacancy as long as the administration shall remain unclosed. *Chapman v. Hollister*, 42 Cal. 462.

Florida.—*Ashmead v. Wilson*, 22 Fla. 255.

Georgia.—Prior to the Georgia code it was not absolutely settled whether or not an administrator could recover in ejectment against an heir at law without first obtaining an order of sale from the court of ordinary. Under the code it is the better practice, though not indispensable, to obtain such an order. *Head v. Driver*, 79 Ga. 179; *Holcombe v. Austell*, 19 Ga. 604.

In this state the fact that the personal representatives may have ejectment for land of their decedent for the payment of debts and to distribute the same in the manner pointed out by statute, does not prevent the heirs also from maintaining ejectment against a mere stranger. *Carruthers v. Bailey*, 3 Ga. 105.

An executor may bring ejectment for his testator's lands but his right to recover depends upon his will and that must be produced as a part of his title. *Sorrell v. Ham*, 9 Ga. 55; *Horn v. Johnson*, 87 Ga. 448; *Mays v. Killen*, 56 Ga. 527.

Michigan.—*Kline v. Moulton*, 11 Mich. 370. See *Cook v. Bertram*, 86 Mich. 356.

Nebraska.—*Carson v. Dundas*, 39 Neb. 503.

Wisconsin.—An administrator has no interest in, or right to the possession of, the realty of his intestate after the

estate has been practically settled up and the debts have been paid; nor can an administrator maintain ejectment under a guardian's sale to test the validity of his deed. *Flood v. Pilgrim*, 32 Wis. 376.

1. Thus in *Florida* it is held, under statute, that where administration has been granted and the estate is still unsettled and the administrator not discharged, the heirs cannot bring ejectment for the recovery of the real estate of the decedent. Such right is in the administrator alone. *Doyle v. Wade*, 23 Fla. 90. See also *Meeks v. Hahn*, 20 Cal. 621; *Curtis v. Sutter*, 15 Cal. 259; *Soto v. Kroder*, 19 Cal. 87.

2. In *Doe v. Wheeler*, 15 M. & W. 623, Rolfe, B., said: "It is generally said that there are only three descriptions of persons who have a joint interest, namely, joint tenants, tenants in common, and coparceners; but when we look closely, there are four, that is, coexecutors also, who have some of the incidents of all the others."

3. *Jackson v. Jones*, 9 Cow. (N. Y.) 182.

Doe v. Mitchell, 6 Ala. 70, where it was held that the defendant debtor became a *quasi* tenant to the purchaser, and would be deemed to continue in that character until actual disseisin or disclaimer on his part.

The same doctrine is also held in *Jackson v. Scott*, 18 Johns. (N. Y.) 94; *Jackson v. Sternbergh*, 1 Johns. Cas. (N. Y.) 153; *Avent v. Read*, 2 Port. (Ala.) 482.

Contra.—In *Snowdon v. McKinney*, 7 B. Mon. (Ky.) 258, it was held that the defendant debtor did not have the character of tenant and was therefore not entitled to notice to quit.

4. *Doe v. Mitchell*, 6 Ala. 70; *Hayes v. Bernard*, 38 Ill. 297; *Snowdon v. McKinney*, 7 B. Mon. (Ky.) 258; *Dehart v. Lewis* (Ky. 1890), 14 S. W. Rep. 531; *Hamilton v. Jack*, 1 Sneed (Tenn.) 81; *Martin v. Pepall*, 6 R. I.

process is not void,¹ and the judgment debtor is the owner of such a valid legal² estate as is the subject of sale under legal process.³

Against Stranger.—They may in like manner bring the action against a stranger whom the judgment debtor himself would have had a right to eject.⁴

Against Mortgagor.—So a purchaser of lands sold on execution against a mortgagor may maintain the action against said mortgagor,⁵ or against a purchaser from him,⁶ or against his disseisor.⁷

18. Receivers.—Receivers cannot in general bring ejectment for lands in their charge without first obtaining the court's leave to do so.⁸

19. Remaindermen.—Remaindermen cannot bring ejectment during the continuance of the particular estate,⁹ but may do so after its termination,¹⁰ on proof of the fact that it has determined.¹¹ See also article LIFE TENANTS AND REMAINDERMEN.

20. Reversioners—*a.* IN GENERAL.—Reversioners may maintain the action of ejectment against heirs of the life tenant who hold over after the death of their ancestor.¹²

92; *Nims v. Sabine*, 44 How. Pr. (N. Y. Supreme Ct.) 252; *Leport v. Todd*, 32 N. J. L. 124.

1. As when a sheriff undertakes to sell a life estate, which he cannot do. *Snively v. Wagner*, 3 Pa. St. 275.

2. *Carson v. Boudinot*, 2 Wash. (U. S.) 33.

Where defendant debtor, although he paid the purchase-money for the property attempted to be levied on, took the conveyance of the same in the name of his son, a purchaser of the land under such attempted sale does not obtain such a title as will support an action of ejectment. *You v. Flinn*, 34 Ala. 409.

3. *Cook v. Webb*, 18 Ala. 810.

4. *Jackson v. Town*, 4 Cow. (N. Y.) 599. See also *Tweedy v. Pickett*, 1 Day (Conn.) 109; *Mason v. Lord*, 40 N. Y. 476; *Nims v. Sabine*, 44 How. Pr. (N. Y. Supreme Ct.) 252. Where the debtor in execution was in possession several years before the writ issued and before judgment, and defendant in ejectment held under him as tenant, it was held that defendant was estopped to show title out of the debtor, the right of the judgment debtor having passed to the purchaser. *Jackson v. Jones*, 9 Cow. (N. Y.) 182.

Right of Purchaser to Sue in Name of Heirs.—A purchaser at sheriff's sale, under an execution against the estate of a decedent which has descended to his heirs, cannot use their names without their consent in an action to re-

cover the land. *Frizzle v. Veach*, 1 Dana (Ky.) 211.

5. *Martin v. Shelton*, 2 B. Mon. (Ky.) 63.

6. *Hart v. Blackington*, Wright (Ohio) 386.

7. *Clute v. Voris*, 31 Barb. (N. Y.) 511.

Purchasers at Tax Sales stand on the same footing as purchasers at execution sales. *Thompson v. Burhans*, 61 Barb. (N. Y.) 260.

"The purchaser of lands sold for taxes has no other remedy at common law to recover possession than an action of ejectment." *Ex p. Webb*, 58 Ala. 109.

8. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60; *Wynne v. Newborough*, 1 Ves. Jr. 165, 3 Bro. C. C. 88; *Conyers v. Crosbie*, 6 Ir. Eq. R. 657; *Moak v. Coats*, 33 Barb. (N. Y.) 498. See also article RECEIVERS.

9. *McMichael v. Craig*, 105 Ala. 382. And see *Beckham v. Maples*, 95 Ga. 773.

10. Parties may take by way of remainder, though not technical parties, but strangers to the deed; and upon the title derived by such a conveyance may, after the death of the life tenant, maintain ejectment for the property so conveyed. *Phelps v. Phelps*, 17 Md. 120.

11. *Kirk v. Bowling*, 20 Neb. 260.

12. *Nims v. Sabine*, 44 How. Pr. (N. Y. Supreme Ct.) 252.

Waste by Life Tenant.—But they cannot maintain the action to recover pos-

b. BREACH OF CONDITION SUBSEQUENT IN DEED.—Ejectment is also the proper remedy by the grantor of property against the grantee for breach of condition subsequent in the deed.¹ The most frequent instances occur in the case of deeds containing conditions that they shall become null and void if intoxicating liquors are manufactured and sold on the premises, or if the premises are used for the purpose of carrying on any offensive trade or occupation, and the like.²

Entry or Demand.—The action in such cases may be maintained upon proof of the breach merely, without any actual entry or previous demand.³ In cases of this kind all of the original

session of the land in which they have a reversionary interest on the ground that the owner of the life estate has forfeited his interest by the commission of waste. *Patrick v. Sherwood*, 4 Blatchf. (U. S.) 112; *Robinson v. Miller*, 2 B. Mon. (Ky.) 292.

1. *Ruch v. Rock Island*, 97 U. S. 693; *Horner v. Chicago, etc., R. Co.*, 38 Wis. 165; *Ludlow v. New York, etc., R. Co.*, 12 Barb. (N. Y.) 440; *Bear v. Whisler*, 7 Watts (Pa.) 144; *Ringrose v. Ringrose*, 170 Pa. St. 593; *Sperry v. Pond*, 5 Ohio 387, pt. II.; *Nicoll v. New York, etc., R. Co.*, 12 N. Y. 121; *Warner v. Bennett*, 31 Conn. 478; *Gillis v. Bailey*, 17 N. H. 18; *Jackson v. Topping*, 1 Wend. (N. Y.) 388; *Jackson v. Crysler*, 1 Johns. Cas. (N. Y.) 125; *Bogie v. Bogie*, 41 Wis. 209.

Mere Contract.—But where the owner of land agreed in writing to give a railroad company a perpetual right of way through the same for a certain sum, with a provision in the contract that when the road should be completed the company should fence the same, it was held that this was not a condition precedent or subsequent on which the right to enjoy the easement was to depend, but a mere continuing contract between adjoining proprietors, and that, after the completion of the road, the owner of the land could not, upon failure of the company to put up the fence, eject the company from the land. *Hornback v. Cincinnati, etc., R. Co.*, 20 Ohio St. 81.

2. *Plumb v. Tubbs*, 41 N. Y. 442; *O'Brien v. Wetherell*, 14 Kan. 616; *Doe v. Keeling*, 1 M. & S. 95. See also *Gibert v. Peteler*, 38 N. Y. 165.

A leading case on the subject is that of *Cowell v. Springs Co.*, 100 U. S. 55, where the court, speaking through Mr. Justice Field, says: "We have no doubt that the condition in the deed to

the defendant here is valid, and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises." *Compare Gray v. Blanchard*, 8 Pick. (Mass.) 284.

"The action is ejectment, and relates to the possession only of the land. Assuming that the defendants had taken possession and occupied the premises for other purposes, or to an extent greater than that provided in the contract, * * * the form of action would be a suitable remedy." *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397.

Estate Dedicated to Charitable Uses.—But there is a difference, where the intention is to dedicate real estate to charitable uses, between a conveyance on condition and a conveyance in trust. In the first case the grantor may maintain ejectment on proof of condition broken; in the second he cannot, the remedy being against the trustees. *Barr v. Weld*, 24 Pa. St. 84.

3. *Ruch v. Rock Island*, 97 U. S. 693; *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Ellis v. Kyger*, 90 Mo. 600; *Plumb v. Tubbs*, 41 N. Y. 442; *Ritchie v. Kansas, etc., R. Co.*, 55 Kan. 36; *Sioux City, etc., R. Co. v. Davis*, 49 Minn. 308. See also *Bias v. Horsley*, 3 N. & M. 567; *O'Brien v. Wagner*, 94 Mo. 93.

Rule at Common Law.—At common law no freehold or fee simple estate, granted on condition subsequent, and not followed by a limitation over to a third person, was forfeited *ipso facto* by a breach of the condition. There was necessary an actual entry or what is equivalent thereto, by the grantor or his heirs, after the breach to revest the estate. (This rule did not apply to an estate for years or an incorporeal

grantors, or their heirs, must join in the action.¹

c. ASSIGNEES OF REVERSION.—At common law a breach of condition subsequent in a deed could not be taken advantage of by a stranger, or by an assignee of the reversion, or of the right itself, or by any one, in fact, but the grantor or his heirs.² This is the rule to-day in this country in the courts of the *United States*, and probably in those of most of the states.³ But the enactment of the Stat. 32 Henry VIII., c. 34, changed the common law in *England* on this point, and ejectment may be brought in that country by grantees or assignees of a reversion upon breach of condition in the original deed from the grantor.⁴ This statute has been re-enacted in some of our states,⁵ while in others the rule has been abandoned without the aid of legislation.⁶

hereditament, as they were not created by livery of seisin, and the estate re-vested without entry immediately on the happening of the breach. 4 Kent Com. 128.)

As stated, however, an entry was necessary in the case of freehold estates. But the consent rule in the action of ejectment, by which the confession of lease, entry, and ouster was made, estopped the tenant from relying upon a failure to enter as a bar to the action to recover possession on breach of condition. Hence the rule stated in *Ruch v. Rock Island*, 97 U. S. 693, that a breach of condition only vests in the grantor or his heirs a right of action which cannot be transferred to a stranger, but which they, without an actual entry or a previous demand, can enforce by a suit for the land. See *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Ruch v. Rock Island*, 97 U. S. 693; *Guild v. Richards*, 16 Gray (Mass.) 309; *Plumb v. Tubbs*, 41 N. Y. 442.

1. *Cook v. St. Paul's Church*, 5 Hun (N. Y.) 293.

2. *Adams on Ejec.* 72.

Where Heir Not Named.—Where the grantor has the right to enter for condition broken, his heir, though not expressly named, may avail himself of the covenant after the death of his ancestor. *Jackson v. Topping*, 1 Wend. (N. Y.) 388.

3. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Ruch v. Rock Island*, 97 U. S. 693; *Sheets v. Selden*, 2 Wall. (U. S.) 177; *Kenner v. American Contract Co.*, 9 Bush (Ky.) 202; *Guild v. Richards*, 16 Gray (Mass.) 309; *Hooper v. Cummings*, 45 Me. 359; *Underhill v. Saratoga, etc.*, R. Co., 20 Barb. (N.

Y.) 455; *Nicoll v. New York, etc.*, R. Co., 12 N. Y. 121; *Fonda v. Sage*, 46 Barb. (N. Y.) 109; *Dewey v. Williams*, 40 N. H. 222; *Towle v. Remsen*, 70 N. Y. 303; *Southard v. Central R. Co.*, 26 N. J. L. 21. But see *McKissick v. Pickle*, 16 Pa. St. 140.

4. *Adams on Ejec.* 72.

Leases under Seal.—The operation of this statute, however, is confined to leases under seal. *Sheets v. Selden*, 2 Wall. (U. S.) 177.

Collateral Covenants.—The statute does not extend to collateral covenants, but only to covenants that touch and concern the thing demised. *Spencer's Case*, 1 Smith's Lead. Cas. 68. Thus where a lease contained a proviso for re-entry in case the lessee, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the premises demised, should at any time during the term be convicted of any offense against the game laws, and the occupier was so convicted, it was held that the assignee of the reversion could not bring ejectment. *Stevens v. Copp*, L. R. 4 Exch. 20, 38 L. J. Exch. 31.

5. *Gen. Stat. Conn.*, § 1053.

6. **Rule in Pennsylvania.**—Thus in Pennsylvania it is held that, though in the case of a condition in law none but the grantor or his heirs can enter for condition broken, yet the doctrine of maintenance not prevailing in that state, there is no policy of the law which forbids the reservation of a right of entry to the assigns of the grantor. Therefore, in the case of such reservation, a purchaser of a grantor's conditional interest in the premises, at a sheriff's sale, is within the terms of such a reservation, and if a forfeiture

21. Tenants for Years, Life, Tail, or Fee—*a*. GENERAL RULE STATED.—Any one entitled to the possession of land may maintain the action of ejectment. Therefore, tenants for years,¹ for life,

exist he may take advantage of it, though his purchase was before the condition was broken. *McKissick v. Pickle*, 16 Pa. St. 140.

Grant of Land Subject to Annual Rent.

—Thus where land is granted in fee with a reservation of an annual rent, and a right of re-entry on payment of the same, it has been held that not only the grantor and his heirs, but his assignee or devisee may maintain the action on breach of that condition, the decision being sometimes based on statute and sometimes not. *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Tyler v. Heidorn*, 46 Barb. (N. Y.) 439; *Galbraith v. Fenton*, 3 S. & R. (Pa.) 359; *Moore v. Wingate*, 53 Mo. 398; *Farley v. Craig*, 11 N. J. L. 262; *Bias v. Horsley*, 3 N. & M. 567; *Hooper v. Cooke*, 2 Jur. N. S. 527, 25 L. J. Ch. 467.

But not the executor of the grantor, save in the case of a term of years. *Van Rensselaer v. Hayes*, 5 Den. (N. Y.) 477.

And one in such case who claims as one of several children, heirs of the owner of a rent charge, with condition of re-entry upon premises leased in fee, may, on breach, maintain ejectment for his undivided share in the same. *Cruger v. McLaury*, 41 N. Y. 219.

Where a testator devises land to his son in fee on condition that his daughters shall have the use and occupation of a room in his dwelling-house and be supported during their single lives, and there be a breach of the condition, the daughters may maintain ejectment for the recovery of the shares of the farm to which they would have been entitled as children of their father. *Hogebloom v. Hall*, 24 Wend. (N. Y.) 146.

1. *Karns v. Tanner*, 66 Pa. St. 297.

Lessor, Lessee, Underlessee.—In a lease from a lessee to an underlessee, it was provided that if the underlessee were guilty of a breach of covenant, the lessee and lessor might enter. It was held, by the court reading *and as or*, that on a breach of covenant by the underlessee, ejectment might be maintained by lessee alone. *Bedford v. White*, 4 Bing. 276, 13 E. C. L. 432.

In *Olendorf v. Cook*, 1 Lans. (N. Y.) 37, it was argued that since ejectment could only lie for corporeal hereditaments it would not lie for a lease for years. A very potent mistake, confusing the actual quality of a thing with the nature of the estate that may be had in that thing in a given case. The court says: "The counsel seems to suppose that the action to recover possession of land is controlled by the nature or quality of the estate, and as a term for years is a chattel interest, personal estate, and goes to the administrator as a chattel interest, that the tenant or owner of the term cannot maintain ejectment. This is a mistake. Ejectment at common law lay to recover possession of the land held under a lease for years, whatever was the duration of the term. * * * The action will not lie for an incorporeal thing. It must be something corporeal. In the present case the action was to recover possession of land, a store."

Necessity of Entry.—Adams remarks: "It has been said by a learned writer, *Cru. Dig.* 248, and see 4 Bac. Ab. 183, that a tenant for years cannot, before entry, maintain an action of trespass or ejectment, because those acts complain of a violation of the possession and therefore cannot be maintained by any person who has not had an actual possession; but this reasoning does not seem applicable to the modern principles of the remedy by ejectment." Adams on Ejec. 59, citing *Goodright v. Cator*, Doug. 478.

The Effect of Fraud in Lease.—The mere fact that an assignment of a lease has been procured by fraudulent representations will not nullify it so as to prevent the assignee from suing in ejectment to recover the same. The remedy of the aggrieved party is in equity. *Stewart v. Aston*, 8 Ir. C. E. 35.

Where a lease is obtained by means of false representations by the lessee that he intends to carry on a certain lawful trade therein, and after the latter has gained possession, he then turns the premises into a brothel, and the lessor, thereupon, forcibly expels him, it is held that the lessee may maintain ejectment, the misrepresentation and illegal use of the premises

and in tail,¹ as well as the owners of the fee, may bring ejectment.²

b. TENANTS AT SUFFERANCE.—A tenant at sufferance who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment.³

c. TENANTS AT WILL.—As to a tenant at will, it seems he may maintain the action against a mere intruder,⁴ but the better opinion is that he has not sufficient interest in the land to eject his lessor,⁵ although the contrary has been held in *Indiana*.⁶

22. Tenants by Curtesy. (See also article CURTESY, vol. 5, p. 698.)—A tenant by the curtesy may maintain ejectment for the recovery of lands of which he has such estate, not only after the death of the wife,⁷ but he may sue alone, immediately on his becoming tenant by the curtesy initiate.⁸

23. Trustees and Cestui Que Trust.—As a general rule, in order to enable a claimant to maintain the action of ejectment, he must be clothed with the legal title to the land. It follows from this rule that where the trust is not executed by the statute of uses the legal estate vests in the trustee and he is the proper person to maintain the action. This branch of the subject is more or less involved with other rules as to parties to actions concerning property held in trust, and will be fully treated of in the article TRUSTS AND TRUSTEES.

24. Widows. (See also *supra*, VI. 8. *Dower*.)—A widow to whom

not being sufficient (at law) to avoid the lease. *Feret v. Hill*, 15 C. B. 207, 80 E. C. L. 207, 2 C. L. R. 1366.

1. A life estate is sufficient either to maintain or to resist the action. *Bryan v. Wear*, 4 Mo. 106; *Beal v. Harmon*, 38 Mo. 435.

2. *Adams on Ejec.* 59; *Carroll v. Norwood*, 5 Har. & J. (Md.) 173.

3. *Doe v. Murrell*, 8 C. & P. 134, 34 E. C. L. 327.

Mortgagee and Mortgagor.—Where ejectment, after default, is brought by a mortgagee against his mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the premises mortgaged, the latter is not tenant at will to the former, but at most tenant by sufferance only, and may be treated either as tenant or trespasser at the election of the mortgagee. *Doe v. Maisey*, 8 B. & C. 767, 15 E. C. L. 335.

4. *Stone v. Grubbam*, 1 Rolle 3; *Haythorn v. Margerem*, 7 N. J. Eq. 324. Compare *Richardson v. Thornton*, 7 Jones (N. Car.) 458; *Love v. Edmonston*, 1 Ired. (N. Car.) 152.

5. See *Reckhow v. Schanck*, 43 N. Y. 448.

Vendee under Executory Contract of Sale.—The obligee in a bond to make title to land, who takes possession under a parol agreement giving him permission to occupy the premises until the money becomes due, is but a tenant at will to obligor, and cannot maintain ejectment or trespass against the latter or one taking title from him. *Richardson v. Thornton*, 7 Jones (N. Car.) 458; *Love v. Edmondston*, 1 Ired. (N. Car.) 152.

Though in such case he can maintain the action against an intruder. *Haythorn v. Margerem*, 7 N. J. Eq. 324.

6. *Buntin v. Doe*, 1 Blackf. (Ind.) 26.

7. *Prescott v. Jones*, 29 Ga. 58. And see *Lecatt v. Merchants' Ins. Co.*, 16 Ala. 177, 50 Am. Dec. 169.

8. *Wilson v. Arentz*, 70 N. Car. 670. And see *Shortall v. Hinckley*, 31 Ill. 219. Compare *Williams v. Lanier*, Busb. (N. Car.) 30.

In New York, in an action under the code to recover real property corresponding to the former action of ejectment, where a wife owns the fee, and the husband becomes tenant by the curtesy initiate, the husband and wife may join in the action. *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9.

property was conveyed during coverture may maintain ejectment for its recovery after her husband's death, without reference to any administration upon his estate.¹ A widow also having the right to remain in possession of the mansion-house and messuages of her deceased husband until the assignment of dower may, on being evicted therefrom, recover the same in ejectment.²

25. Miscellaneous.—A warrant and survey of land and the payment of the purchase price has been held to give the purchaser a legal right of entry sufficient to maintain ejectment.³ In *Arkansas*, under statute, a certificate of entry of public land and the payment of the purchase price is a sufficient legal title for the support of an ejectment.⁴

Principal and Agent.—Where an agent has fraudulently attempted to convey land of his principal for a mere nominal consideration, the deed may be treated as a mere nullity and the property recovered in ejectment.⁵

Township Trustees of school lands may, in the name of their president, maintain the action.⁶

1. *Hart v. Robertson*, 21 Cal. 346.

So a woman whose estate has been wrongfully aliened by her husband during coverture may maintain ejectment after his death to recover the same without giving any notice to the tenant to quit. *Miller v. Shackelford*, 4 Dana (Ky.) 264.

2. *Stokes v. McAllister*, 2 Mo. 163; *Miller v. Talley*, 48 Mo. 503; *Roberts v. Nelson*, 86 Mo. 21.

But in *Aiken v. Aiken*, 12 Oregon 203, it was held that ejectment would not lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death without liability for rent.

For Free Bench.—Where there existed a custom in the manor that the widow should enjoy, during widowhood, the whole or part of the customary lands of which her husband died seised, as of free bench, she might, after challenging her right and praying to be admitted, maintain ejectment without admittance even against the lord, because it is an excrescence which, by the custom and the law, grows out of the estate. The law is thus stated by Adams. He also cites the two cases of *Goodwin v. Longhurst*, Cro. Eliz. 535; *Doe v. Bellamy*, 2 M. & S. 87, the application of which it is not easy to see. *Adams on Ejec.* 65.

But if the claim of the widow be in the nature of dower, an ejectment will not lie before the same has been assigned. *Doe v. Nutt*, 2 C. & P. 430,

12 E. C. L. 205; *Chapman v. Sharp*, 2 Show. 184; *Pringle v. Gaw*, 5 S. & R. (Pa.) 536; *Bratton v. Mitchell*, 7 Watts (Pa.) 113. See also *Jackson v. Randall*, 5 Cow. (N. Y.) 168; *Jackson v. Waltermire*, 5 Cow. (N. Y.) 299; *Jackson v. Hixon*, 17 Johns. (N. Y.) 123; *Jordan v. Stone*, Hutt. 18; *Howard v. Bartlett*, Hob. 181; *Patch v. Keeler*, 27 Vt. 252.

3. *Winter v. Jones*, 10 Ga. 190; *Heron v. Dater*, 120 U. S. 464.

A Grantee from the Commonwealth may maintain ejectment without actual entry on the land. *Innes v. Crawford*, 2 Bibb (Ky.) 412.

4. *Gaines v. Hale*, 16 Ark. 9; *Lytle v. State*, 17 Ark. 641; *Hooper v. Scheimer*, 23 How. (U. S.) 235. And so of a certificate of pre-emption. *Rector v. Gaines*, 19 Ark. 70; *Manny v. Smith*, 10 Wis. 509.

5. *Meade v. Brothers*, 28 Wis. 689. **Fraudulent Purchase by Agent.**—So where an agent has fraudulently purchased property in an indirect way for an inadequate sum, the vendor may recover the same in ejectment on payment of the purchase money. *Rankin v. Porter*, 7 Watts (Pa.) 387.

6. *Windham v. Chisholm*, 35 Miss. 531.

The Board of Education of San Francisco may, under the statutes defining its rights and powers, maintain ejectment for a school lot. *Board of Education v. Donahue*, 53 Cal. 190.

Commissioners of the Land Office in

Adverse Possession.—Where a deed is made of lands which at the time are in the adverse possession, ejectment lies only in the name of the grant or in such deed. It cannot be maintained in the name of the grantee.¹

VII. WHO CANNOT MAINTAIN THE ACTION—Persons in Possession.—Since ejectment is an action to recover the possession of land, it follows that the plaintiff cannot recover in this way land of which he is in actual possession at the time, even though defendant claims title to the land.²

Execution Debtor.—A mere tender of the purchase money and offer to redeem land sold on execution, and conveyed by deed to the purchaser, does not revest the title in the execution debtor so as to enable him to maintain ejectment.³

Tenant Ejected.—Where a tenant ejected in proper landlord and tenant proceedings, which are afterwards reversed on appeal, brings ejectment to recover his term, he cannot succeed if his term has expired before filing suit.⁴

VIII. WHO MAY BE SUED—1. **In General.**—Ejectment being a possessory action, it is necessary in the first place to make the actual occupant of the premises demanded (if they are actually occupied) a defendant.⁵

2. **Where Premises are Actually Occupied**—*a.* **GENERAL RULE.**—And where the premises are actually occupied, it has been held

New York may maintain ejectment to remove one holding over after notice to quit given by them. *Candee v. Hayward*, 37 N. Y. 653.

1. *Coogler v. Rogers*, 25 Fla. 853.

2. *Kribbs v. Downing*, 25 Pa. St. 399; *Taylor v. Crane*, 15 How. Pr. (N. Y. Supreme Ct.) 358; *Carmichael v. Argard*, 52 Wis. 607; *Buchanan v. Streper*, 35 Leg. Int. (Pa.) 274. But see *Buchanan v. Hazzard*, 95 Pa. St. 240.

A plaintiff in ejectment who, pending the action, takes possession of the premises, cannot further maintain it; but such fact must be alleged by the defendant in some proper form, as by a plea to that effect since the last continuance. *Johnson v. Swain*, Busb. (N. Car.) 335.

3. His right to redeem must be enforced in equity. *Paris v. Burger*, 4 Humph. (Tenn.) 325; *Usher v. Pride*, 15 Gratt. (Va.) 190.

4. *Horner v. Marietta*, 135 Pa. St. 418.

Other Examples.—A grantee of a landlord cannot maintain ejectment against the tenant of the landlord on account of tenant's refusal to pay him rent, unless tenant was informed of the sale before the rent was demanded. *O'Connor v. Kelly*, 41 Cal. 432.

Selectmen of a town cannot maintain ejectment for lands granted to the Society for the Propagation of the Gospel in Foreign Parts. *Colchester v. Hill*, Brayt. (Vt.) 65.

5. *California*.—*Klink v. Cohen*, 13 Cal. 623.

Michigan.—*Lockwood v. Drake*, 1 Mich. 14; *Clark v. Hall*, 19 Mich. 356; *Crane v. Seitz*, 30 Mich. 453.

Mississippi.—*Wallis v. Doe*, 2 Smed. & M. (Miss.) 220.

Missouri.—*Sutton v. Casseleggi*, 77 Mo. 407; *Charter Oak L. Ins. Co. v. Cummings*, 90 Mo. 267; *Callahan v. Davis*, 90 Mo. 78.

New York.—*People v. Ambrecht*, 11 Abb. Pr. (N. Y. Supreme Ct.) 97.

Wisconsin.—*Burchard v. Roberts*, 70 Wis. 111.

United States.—*Hyde v. Folger*, 4 McLean (U. S.) 255.

In *Lucas v. Johnson*, 8 Barb. (N. Y.) 244, it is said that "it is immaterial who claims to be the owner if there be an actual occupant." And it is no defense to the actual occupant that his possession is only fiduciary and for the benefit of others. *Bonner v. Greenlee*, 6 Ala. 411.

not only that the occupant is the sole necessary party defendant,¹ but that he is the only proper party defendant;² for the action cannot be sustained against a person who is not proved to be in possession by himself, or his servant, when the action is commenced,³ unless the defendant is proved to have admitted himself before suit brought to be in possession of the land, and has entered himself as a defendant with a view of trying the title.⁴

Thus the plaintiff cannot, by electing to be disseised, make a party who merely claims the land, without entry on it, a trespasser or disseisor, and maintain ejectment against him.⁵

6. PERSONAL OCCUPANCY UNNECESSARY.—While ejectment must be brought against the party in possession, actual occupancy or residence has been held not necessary to constitute such possession,⁶ any subjection of the property to the will or dominion of the party being sufficient.⁷

1. *Hanson v. Armstrong*, 22 Ill. 442; *Theurer v. Brogan*, 41 Ark. 88.

"Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises." *Garner v. Marshall*, 9 Cal. 268.

Plaintiff Not Compelled to Make Others.—The tenant in possession is the only necessary party to ejectment, and although he may set up that there are tenants in common with him, and ask that they be made parties, the plaintiff is not compelled to bring them in. *Raymond v. Morrison*, 9 Wash. 156; *Simms v. Richardson*, 32 Ark. 304.

Person Claiming Interest.—A person not in possession, though claiming an interest in the premises, is not a necessary party to an ejectment. *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

2. *Schuyler v. Marsh*, 37 Barb. (N. Y.) 350; *Bledsoe v. Simms*, 53 Mo. 305; *Morris v. Beebe*, 54 Ala. 300; *Smith v. Gayle*, 58 Ala. 600; *Hawkins v. Reichert*, 28 Cal. 534; *Dutton v. Warschauer*, 21 Cal. 609. See also *Fosgate v. Herkimer Mfg., etc., Co.*, 12 N. Y. 580, 12 Barb. (N. Y.) 352; *People v. New York*, 28 Barb. (N. Y.) 240.

3. *Lyle v. Rollins*, 25 Cal. 437; *Owen v. Fowler*, 24 Cal. 192; *Mahoney v. Middleton*, 41 Cal. 41; *Albertson v. Reding*, 2 Murph. (N. Car.) 283; *Atwell v. McLure*, 4 Jones (N. Car.) 371; *Allen v. Dunlap*, 42 Barb. (N. Y.) 585.

Even although such person has given a lease of it, and it is occupied by his

lessee. *Champlain, etc., R. Co. v. Valentine*, 19 Barb. (N. Y.) 484.

4. *Mordecai v. Oliver*, 3 Hawks (N. Car.) 479.

Under the Virginia Code, ejectment may be properly brought against persons who have made surveys and entries on any part of the land in question and are setting up claims to it although not occupying same at the time the action is brought. *Harvey v. Tyler*, 2 Wall. (U. S.) 329.

5. *McDowell v. King*, 4 Dana (Ky.) 67; *Grundy v. Hadfield*, 16 R. I. 579. See also *Long v. Louisville, etc., R. Co.*, 89 Ky. 544.

Claimants under Recorded Tax Titles.—Yet it has been held in *Michigan* that the action may be brought against one who, though out of possession, has notified the real owner that he claims the premises under a recorded tax title. *Anderson v. Courtright*, 47 Mich. 161; *Hill v. Kricke*, 11 Wis. 442. See also *Hoyt v. Southard*, 58 Mich. 432; *Heinmiller v. Hatheway*, 60 Mich. 391; *Goodman v. Nester*, 64 Mich. 662; *Murray v. Hudson*, 65 Mich. 670.

6. *Phillips v. Phillips*, 107 Mo. 360; *Polack v. Mansfield*, 44 Cal. 36.

7. Thus in *Bell v. Foxen*, 14 Sawy. (U. S.) 499, 42 Fed. Rep. 755, it was said by Ross, J.: "The actual personal presence of defendants on the land at the time of the institution of the action is not necessary to its maintenance. Any subjection of the property to the will and dominion of the party is sufficient. *Quicksilver Min. Co. v. Hicks*, 4 Sawy. (U. S.) 688; *Garner v. Marshall*, 9 Cal. 268. Acts by which a claim

c. **SERVANTS AND EMPLOYEES.**—Thus where a mere servant or employee of the beneficial occupier of the premises, who claims for himself no interest therein nor any right to their possession, is in temporary possession thereof, he cannot be made a defendant in ejectment¹ unless he assumes the character of tenant.² And where the employer is in possession of premises through a mere servant and is not himself amenable to process, the rule in such case cannot be applied, and the employee becomes the proper party defendant.³

d. **OFFICERS AND AGENTS OF THE UNITED STATES.**—This doctrine is applied in the case of an officer or agent of the United

to the possession hostile to the true owner is asserted and maintained, and by which he is excluded from the enjoyment of the property, fairly subject the party committing them to the action."

1. *Doe v. Staunton*, 1 Chit. Rep. 119, 18 E. C. L. 46, 2 B. & Ald. 371; *Gulliver v. Swift*, 2 Kenyon 511.

The Person in Possession. within the meaning of the rule before stated, is the person who withholds the possession from the plaintiff. In *Polack v. Mansfield*, 44 Cal. 36, it was said: "Such a person may not indeed be in the actual personal occupancy; he may not reside thereon, and may not have even personally entered thereon, and yet he may be in possession through the agency of mere servants and employees acting under his direction and control; and, as such person in possession, he may properly be made defendant in an action to recover the possession."

Church Edifices will be considered to be in the actual occupancy of the religious societies or corporations using them to the exclusion of other corporations or individuals, and ejectment should be brought not against the trustee or other officers of the church, but against the corporation itself. * *Lucas v. Johnson*, 8 Barb. (N. Y.) 244.

Clergyman.—Thus a clergyman who preaches on Sunday, or any other day in the week, in a church edifice, under the direction and employment of a religious corporation, is not liable to an action of ejectment and to be mulcted in costs at the suit of a person claiming the title against the corporation. *Chiniquy v. Chicago*, 41 Ill. 148.

Actual Occupancy Unnecessary.—Where in ejectment it appeared that defendant used the land for pasture and farming, that a dwelling-house thereon

was occupied by his housekeeper and cook, and that he had rented a portion of the land to a third person, it was held that the action was properly brought against him, and that it was unnecessary in such case to show personal occupancy. *Phillips v. Phillips*, 107 Mo. 360.

Rule in New York.—The rule is somewhat differently stated in a leading case in this state. Where land for which ejectment is brought is actually occupied and possessed, though by a mere servant who claims no beneficial interest therein and labors entirely for his employer, the action must nevertheless be brought against the servant, not the employer, because the former is the actual occupant. But where the servant is merely sent by his master to work on the premises, they not being occupied, it is the master and not the servant that exercises acts of ownership over them, and the action must be brought against the former. *Shaver v. M'Graw*, 12 Wend. (N. Y.) 558. See *Doe v. Stradling*, 2 Stark. 187, 3 E. C. L. 370.

2. *Doe v. Staunton*, 1 Chit. Rep. 119, 18 E. C. L. 46, 2 B. & Ald. 371.

Mere Lodger.—But ejectment does not lie against a mere lodger or boarder with the party in possession. *Jones v. Webber*, 1 D. Chip. (Vt.) 215.

3. In *Polack v. Mansfield*, 44 Cal. 36, it is said: "But the rule which thus exempts the mere servant or employee of another from an action presupposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case therefore where the employer is for any reason not amenable to an action, the rule referred to has no application,

States who is wrongly in possession of land belonging to another.¹

c. MISCELLANEOUS RULES.—It is necessary also to make all persons who are in possession at the commencement of the suit, defendants in the action, and one in possession not so made a defendant will not be bound by a judgment and cannot be dispossessed by a writ of restitution.²

Landlord and Tenant.—The action cannot be maintained against the landlord when the premises are in the possession of his tenant,³ yet the doctrine is not infrequently laid down that a party claiming and defending the title of the tenant in possession is properly joined with the latter as a defendant.⁴

and the employee or servant becomes, *ex necessitate*, the proper party defendant, since he is the only party who can be subjected to suit at all."

1. Polack *v.* Mansfield, 44 Cal. 36; King *v.* La Grange, 61 Cal. 221; McConnell *v.* Wilcox, 2 Ill. 344; Meigs *v.* McClung, 9 Cranch (U. S.) 11. See also Grisar *v.* McDowell, 6 Wall. (U. S.) 363.

But see People *v.* Ambrecht, 11 Abb. Pr. (N. Y. Supreme Ct.) 97, where it was held that a soldier of the United States in charge of the property in question, and acting under the commands of a superior officer, is not an "actual occupant" in the sense of the statute which requires ejectment to be brought against the actual occupant. And so it has been held that a railroad company using the streets for its tracks in the ordinary way, without claiming any interest in or title to them beyond the actual enjoyment thereof for the purpose mentioned, is not an "actual occupant" within the meaning of the same statute. Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54.

2. Fogarty *v.* Sparks, 22 Cal. 142; Tarkington *v.* Link, 27 Neb. 826; Hessel *v.* Fritz, 124 Pa. St. 229. Yet it has been held that where the code provides that if property is actually occupied, "the occupant thereof must be made defendant," it is not necessary that all of the occupants be made defendants. Hennessy *v.* Paulsen, 12 Misc. Rep. (N. Y. Super. Ct.) 384, 147 N. Y. 255.

Question for Jury.—The question as to who is the actual occupant of the land is a question of fact for the determination of the jury, Martin *v.* Rector, 101 N. Y. 77, as likewise is the question whether defendant in ejectment is a mere employee of the beneficial occupier, or his tenant. Doe

v. Staunton, 1 Chit. Rep. 119, 18 E. C. L. 46, 2 B. & Ald. 371.

3. Shaw *v.* Tracy, 95 Mo. 531; Grundy *v.* Hadfield, 16 R. I. 579.

If the landlord is made a party defendant the court will, on motion, order a nonsuit as to him. Dimick *v.* Deringer, 32 Cal. 488.

Tenant from Month to Month.—But where the defendant in ejectment admitted, when the premises were demanded from him, that he was in possession of the same, but refused to surrender them, it was held not necessary that a tenant from month to month, to whom he had rented the property, be made a party to the action. Napa *v.* Howland, 87 Cal. 84.

4. Abeel *v.* Van Gilder, 36 N. Y. 513. See also Patch *v.* Keeler, 28 Vt. 332; Finnegan *v.* Carraher, 47 N. Y. 493; More *v.* Deyoe, 22 Hun (N. Y.) 217; Harkey *v.* Houston, 65 N. Car. 137; Millandon *v.* Ranney, 18 La. Ann. 196.

Rule in Vermont.—"The object of the action of ejectment, as adopted and in use in this state, is not merely to recover the possession, but to settle the title and establish the right of property, as well as to recover the possession. To this end and to prevent a repetition of action, the judgment, instead of leaving the title and right of property unsettled, and the same question liable to be retried by successive suits, as at common law, is made conclusive as to all the parties. Looking to the purpose and effect of the action as thus defined and regulated, it would seem that, as a general rule of practice naturally resulting therefrom, independent of any special legislative enactment on the subject, any person, under whom the tenant in possession may, legally speaking, be said to hold, whatever may be the nature or character of the tenancy, should be liable to be made

3. Where Premises are Not Actually Occupied.—Where the premises in dispute are not actually occupied, the action should be brought against any one exercising acts of ownership over them,¹ or, where no such acts of ownership are exercised, against any person claiming title to them, or some interest therein, adversely to the plaintiff, at the commencement of the suit.²

4. Administrators.—In *Pennsylvania* equitable ejectment should not be brought against administrators to compel specific performance of a contract of their decedent for the sale of real estate, but should be against the holders of the legal title.³

5. Corporations.—The old doctrine, always admitted to be questionable, that ejectment will not lie against a corporation aggregate, has long since been exploded.⁴

6. Husband and Wife.—The law regulating who should be made defendants to an action of ejectment brought for land owned by a wife, or by a husband, or by both husband and wife, is far from being well settled.

a. WHERE TITLE IS IN WIFE.—The general rule being that the action should be brought only against the party in possession, it has been held that the possession of the wife is the possession of the husband, and that therefore ejectment need only be brought against the latter, even although the title is in the wife.⁵ But the general rule in cases where both husband and wife

a party to the action." *Marvin v. Denison*, 20 Vt. 662.

1. *Taylor v. Crane*, 15 How. Pr. (N. Y. Supreme Ct.) 358; *Hyde v. Folger*, 4 McLean (U. S.) 255; *Chilson v. Buttolph*, 12 Vt. 231.

"It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as enclosure, cultivation, and the like." *Garner v. Marshall*, 9 Cal. 268.

2. *Taylor v. Crane*, 15 How. Pr. (N. Y. Supreme Ct.) 358; *Lucas v. Johnson*, 8 Barb. (N. Y.) 244; *Edwards v. Farmers F. Ins., etc., Co.*, 21 Wend. (N. Y.) 467; *Becker v. Howard*, 47 How. Pr. (N. Y. Supreme Ct.) 423, 66 N. Y. 5. See also *Carter v. Hunt*, 40 Barb. (N. Y.) 93.

Where premises are not actually occupied the action may be brought against any one claiming title at the commencement of the suit, though his claim has only been manifested by words, but it is otherwise of an idle declaration by defendant that he owns the premises, not amounting to a serious claim of title. *Banyer v. Empie*, 5 Hill (N. Y.) 48; *Garner v. Marshall*,

9 Cal. 268; *Abeel v. Van Gelder*, 36 N. Y. 513; *Lucas v. Johnson*, 8 Barb. (N. Y.) 244.

And where premises are unoccupied and parties who claim title thereto are named as defendants, they are not permitted to complain that others should have been made defendants instead of themselves, if, when applied to on the subject, they omitted to set the plaintiff right. *Edwards v. Farmers F. Ins., etc., Co.*, 21 Wend. (N. Y.) 467.

Claimants under Recorded Tax Deeds.

—Where a party puts a tax deed on record, he sets up such a title to the land as is sufficient to enable one who claims the same land to make him a defendant in ejectment, though the holder of the tax deed may not have entered into possession of the property. *Hill v. Kricke*, 11 Wis. 442; *Anderson v. Courtright*, 47 Mich. 161.

3. *Thompson v. Adams*, 55 Pa. St. 479.

4. *Dater v. Troy Turnpike, etc., Co.*, 2 Hill (N. Y.) 629; *Lucas v. Johnson*, 8 Barb. (N. Y.) 244.

5. *Bledsoe v. Simms*, 53 Mo. 305. And see *Martin v. Pepall*, 6 R. I. 92.

Where Wife's Title Confers No Separate Estate.—At least, the doctrine stated in

occupy the premises, the title to which is in the wife, is to make them both parties defendant,¹ though in some jurisdictions it seems that the husband would be improperly joined.²

b. WHERE TITLE IS IN HUSBAND.—The possession of land claimed by the husband in his own right, though occupied by both, is in law the possession of the husband, and the wife is improperly joined in an action of ejectment to recover the same.³

c. HOMESTEADS.—Where the action involves the homestead rights of a wife, she is a necessary party defendant.⁴

7. Infants. (See also article INFANTS.)—An action of ejectment may be maintained against an infant wrongfully in possession of land,⁵ but he must appear and plead by guardian or the judgment will be erroneous.⁶

8. Receivers. (See also article RECEIVERS.)—Where a receiver is in possession of premises, he cannot be made a defendant in ejectment for the same without leave of the court first had and obtained.⁷

the text is correct where the deed to the wife vests the title in her but confers no separate estate. Nor can she make herself a proper party defendant by claiming a separate estate in her answer. *Wilson v. Garaghty*, 70 Mo. 517. And see *Connecticut Mut. L. Ins. Co. v. Jones*, 8 Fed. Rep. 303.

1. *Haddy v. Tobias*, 85 Mich. 326; *Bushong v. Rector*, 32 W. Va. 311; *Hodson v. Van Fossen*, 26 Mich. 68. See *Garrett v. Lehman*, 61 Ala. 391. Where the action rests on a title obtained under a decree of foreclosure against a man and his wife, and the wife remains in possession, claiming the title in her own right, she should be made a defendant in ejectment, and it should be found whether she were so brought into the foreclosure suit as to be bound by the decree therein. *Sayles v. Curtis*, 45 Mich. 279.

2. *Danihee v. Hyatt*, 81 Hun (N. Y.) 238; *Porter v. McGrath*, 41 N. Y. Super. Ct. 84; *Setwart v. Patrick*, 68 N. Y. 450; *Huber v. Bletzer* (Supreme Ct.), 19 N. Y. Supp. 506. See *Arbuckle v. Walker*, 63 Vt. 34.

After Judgment has been Given against the Husband no action is pending and the wife cannot be let in as a party defendant on the ground that the land is hers. *Meadows v. Goff*, 90 Ky. 540.

3. *Rose v. Bell*, 38 Barb. (N. Y.) 25; *Johnson v. Donaldson*, 17 R. I. 190. See also *Connecticut Mut. L. Ins. Co. v. Jones*, 8 Fed. Rep. 303.

But Where the Husband Is Insane and confined in an asylum, and the wife is

the active party who withholds possession of the premises, ejectment is properly brought against her. *Bensieck v. Cook*, 110 Mo. 173.

4. *Sessions v. Sherwood*, 78 Mich. 234; *Hodson v. Van Fossen*, 26 Mich. 68; *Cleaver v. Bigelow*, 61 Mich. 47; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Kalkes v. Storms*, 93 Mich. 480; *Haddy v. Tobias*, 85 Mich. 326.

Purchase Money Mortgage.—In ejectment on the foreclosure of a mortgage against the mortgagor for premises claimed and occupied by him as a homestead, the wife is a necessary party defendant, notwithstanding the fact that the mortgage was for the purchase money. *Gibbs v. O'Neil*, 85 Mich. 633.

5. *McCoon v. Smith*, 3 Hill (N. Y.) 147.

What Infant may Set Up.—But the infant may show title in himself, even although he acknowledged holding under the plaintiff, and gave his note for the rent. *McCoon v. Smith*, 3 Hill (N. Y.) 147.

6. *Marshall v. Wing*, 50 Me. 62.

Where the Guardian Is in Possession, the action should be brought against him, not the infant. *Spitts v. Wells*, 18 Mo. 468.

7. "There may be inconvenience in that [asking leave of court], but the inconvenience the other way is enormous. If it is necessary to ask leave, the court must have credit for never refusing it where it ought to be

9. **Remaindermen.**—Ejectment will not lie against a remainderman during the continuance of the particular estate.¹

10. **Miscellaneous.**—A tenant by the curtesy cannot be sued in ejectment by those deriving title from his deceased wife.² But ejectment has been sustained against a party claiming under instruments fraudulent on their face.³ The action will also lie against a party claiming to operate oil wells on a part of a tract of land under a void lease, even though the plaintiffs may be in possession of the residue of the tract.⁴

IX. WHO MAY BE LET IN TO DEFEND—1. Historically.—The tenant in possession being the party *prima facie* interested is, of course, the party to be served; but it frequently happens that the lands really belong to some third person out of possession to whom such service can convey no information of the proceedings against his property, and who at common law had no remedy against his tenant if the latter failed to give him notice of them. Indeed, it was held that the landlord, even if he did receive notice, could not defend unless the tenant consented to become codefendant with him, and no means existed to compel the tenant to appear and be made codefendant.⁵ The tenants, from negligence, or fraud, frequently omitted to appear themselves, or to give the landlords the necessary notice, and judgment was consequently given against the casual ejector, and the possession of the premises delivered.⁶

granted; and, if so, very great purposes of convenience may be answered by putting the party to ask it." *Angel v. Smith*, 9 Ves. Jr. 335.

1. *Shaver v. McGraw*, 12 Wend. (N. Y.) 558.

2. *Miller v. Bledsoe*, 61 Mo. 96.

And a widow remaining in possession after an abortive proceeding for partition cannot be proceeded against in ejectment by the collateral heirs. They must proceed in the Orphans' Court. *Seider v. Seider*, 5 Whart. (Pa.) 208.

3. *McKay v. Williams*, 67 Mich. 547.

4. *Buchanan v. Hazzard*, 95 Pa. St. 240.

Rights of Riparian Owner.—The action can also be had by a riparian owner against one who, without right, has driven piles in front of plaintiff's land, and done other things indicative of ownership, to the exclusion of the plaintiff from the use of the stream. *Cole v. Wells*, 49 Mich. 450.

Where a city erected on land of the government, without permission, a sewer, and certain masonry which projected somewhat into an adjoining river, a subsequent owner of the land cannot maintain ejectment against the

city when the latter has not fenced in the property, and exercises no acts of ownership or control over it. *Harlington v. Port Huron*, 86 Mich. 46.

5. *Adams on Ejec.* 254, 255; *Goodright v. Wright*, 1 Stra. 830; *Morris v. Beebe*, 54 Ala. 300. But see *Fair-claim v. Sham-title*, 3 Burr. 1301; *Lamb v. Archer*, Comb. 208.

6. *Adams on Ejec.* 255.

Remedy of Landlord.—Of course, in such cases, the real owner was not entirely without remedy, although all that were open to him were very incomplete. Judgments were sometimes set aside on affidavits of circumstances of this nature. *Adams on Ejec.* 255; *Anonymous*, 12 Mod. 211; *Doe v. Roe*, 4 Burr. 1996; *Stribling v. Prettyman*, 57 Ill. 371. And see *Elmendorf v. Wood*, 9 Johns. (N. Y.) 257; *Hough v. Hammond*, 36 Tex. 657; *Jackson v. Stiles*, 4 Johns. (N. Y.) 493; *Waters v. Harrison*, 4 Bibb (Ky.) 87; *Mullarky v. Roe*, 3 P. & D. 316; *Lowe v. Emerson*, 48 Ill. 160; *Oetgen v. Ross*, 47 Ill. 142.

And of course the landlord, or real owner, could always bring another ejectment. *Fair-claim v. Sham-title*, 3 Burr. 1290; *Carter v. Scaggs*, 38 Mo. 302.

To remedy this grave evil the statute of 11 Geo. II., c. 19, was passed, securing to landlords the right to be notified of an ejectment brought against their tenants, and the right to make themselves defendants by joining with the tenants in possession, and providing a penalty for tenants who refused or neglected to give such notice to their landlords.¹ Similar statutes have been enacted in some states of this country.² In others the British statute is still in force.³

2. Meaning of Term "Landlord."—The term "landlord" in the English statute has been held to include all persons claiming title to the premises, which title is connected to and consistent with the possession of the occupier;⁴ and it is not necessary even that they should previously have exercised any act of ownership over

A judgment in ejectment is no bar to a second action for the same property between the same parties, whether the titles and defenses are the same or not, and there is no limit to the same providing equitable defenses are not interposed and relied upon, thereby converting the whole proceeding into an equitable one, and making the whole adjudication binding. Resort must be had to a bill of peace for relief against repeated ejectments. *Spencer v. O'Neill*, 100 Mo. 49; *Sutton v. Dameron*, 100 Mo. 141; *Avery v. Fitzgerald*, 94 Mo. 207; *St. Louis v. Schulenburg*, etc., *Lumber Co.*, 98 Mo. 613.

A Tenant in Possession upon whom notice in ejectment is served is no party to the suit after others are made defendants in the place of the casual ejector. *Campbell v. Smith*, 2 A. K. Marsh. (Ky.) 118.

He is not a party until admitted as such by order of the court, and is therefore not liable for costs until this is done. *Myers v. Smith*, 5 B. Mon. (Ky.) 280.

1. The Thirteenth Section of this statute is as follows: "That it shall and may be lawful for the court in which an ejectment is brought, to suffer the landlord or landlords to make him, her, or themselves, defendant or defendants, by joining with the tenant or tenants, to whom such declarations in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse, or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords of any part of the lands, tenements, or hereditaments, for which such ejectment was brought,

shall desire to appear by himself or themselves, and consent to enter into the like rule, that by the course of the court the tenant in possession in case he or she had appeared, ought to have done; then the court, where such ejectment shall be brought, shall and may permit such landlord or landlords so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein." See *Crocker v. Fothergill*, 2 B. & Ald. 652.

But in order that the clause prescribing the penalty may be operative, the ejectment must be inconsistent with the landlord's title, as in the case of a tenant to a mortgagor who fails to give notice of an ejectment that has been brought by a mortgagee to enforce an attornment. *Buckley v. Buckley*, 1 T. R. 647.

2. *Falkner v. Jones*, 12 Ala. 165; *Oetgen v. Ross*, 47 Ill. 142; *Lowe v. Emerson*, 48 Ill. 160; *Thompson v. Schuyler*, 7 Ill. 271; *Sherry v. Denn*, 8 Blackf. (Ind.) 542.

Under the Oregon Code a landlord has no right to apply to be substituted as defendant in place of the party who is in actual possession and sued, until the latter, by his answer made and filed in court, declares "that he is in possession only as the tenant of another, naming him, and his place of residence." *Fitch v. Cornell*, 1 Sawy. (U. S.) 156.

3. *Minke v. McNamee*, 30 Md. 294.

A full discussion of the rule in regard to landlords, under a statute of this kind, is to be found in the case of *Oetgen v. Ross*, 47 Ill. 145.

4. Fair-claim v. Sham-title, 3 Burr. 1290; *Lovelock v. Dancaster*, 3 T. R. 783, 4 T. R. 122; *Adams on Ejec.* 258.

the lands.¹ This is now the established rule of construction, not only in England,² but in this country also.³

3. General Principles.—The technical relation of landlord and tenant need not exist,⁴ but a privity of interest must be shown between the tenant in possession and the party asking to be admitted to defend,⁵ and no one claiming the premises under an

1. Adams on Ejec. 259; Falkner v. Jones, 12 Ala. 165.

A Devisee in Trust who has never been in possession may be admitted a defendant, though it seems a *cestui que trust* will not. Lovelock v. Dancaster, 4 T. R. 122.

Heir Never in Possession.—And likewise an heir who has never been in possession has been permitted to defend, where his father, under whom he claimed, had died just before, having previously obtained the same rule. Doe v. Roe, cited in Lovelock v. Dancaster, 3 T. R. 783, note b.

2. Doe v. Roe, cited in Lovelock v. Dancaster, 3 T. R. 783, note b; Doe v. Cooper, 8 T. R. 645; Driver v. Lawrence, 2 W. Bl. 1259. See also Doe v. Smythe, 4 M. & S. 347.

3. *Arkansas.*—Theurer v. Brogan, 41 Ark. 191.

Illinois.—Williams v. Brunton, 8 Ill. 600.

Kentucky.—Dougherty v. Estill, 1 Bibb (Ky.) 128; Buford v. Gaines, 6 J. J. Marsh. (Ky.) 34.

Maryland.—Minke v. McNamee, 30 Md. 294.

Missouri.—Hill v. Atterbury, 88 Mo. 114.

New Jersey.—Den v. Shupe, 13 N. J. L. 66.

New York.—Jackson v. M'Evoy, 1 Cai. (N. Y.) 151; Jackson v. Stiles, 11 Johns. (N. Y.) 407; Doe v. Creed, 5 Bing. 327, 15 E. C. L. 459; Probasco v. Jackson, 1 Wend. (N. Y.) 316; Jackson v. Stiles, 6 Cow. (N. Y.) 589.

Pennsylvania.—Emlen v. Hoops, 3 S. & R. (Pa.) 130.

Virginia.—Herbert v. Alexander, 2 Call (Va.) 498; Mitchell v. Baratta, 17 Gratt. (Va.) 445. See also Colgrove v. Koonce, 76 N. Car. 363; McConnel v. Johnson, 3 Ill. 522. Compare Jackson v. Stiles, 10 Johns. (N. Y.) 67; Sherry v. Denn, 8 Blackf. (Ind.) 542.

"The rule, briefly stated in all the books, is that in ejectment every person is considered as a landlord, entitling him to defend whose title is connected to and consistent with the

possession of the occupier." Stribling v. Prettyman, 57 Ill. 371.

Widow Remaining in Mansion-House.—The possession of a widow remaining in the mansion of her husband until her dower is allotted is consistent with the possession of the heirs, and in an action of ejectment brought against her they have a right to defend. Porter v. Robinson, 3 A. K. Marsh. (Ky.) 253.

Title Subsequently Acquired.—One who claims to be landlord of a defendant in ejectment cannot, as matter of right, and against plaintiff's objection, be admitted a codefendant where it appears to the court that all the title he has was acquired subsequently to the bringing of the action. Ralston v. Doe, 36 Ga. 611. Thus a purchaser of land subject to an action of ejectment will not be made a party to the action. Pennsylvania Canal Co. v. Central Iron Works, 7 Phila. (Pa.) 662. See also McFadden v. Wallace, 38 Cal. 51.

4. Falkner v. Jones, 12 Ala. 165. But see Minke v. McNamee, 30 Md. 294.

Tenant Guilty of Forcible Detainer.—In ejectment a landlord proving that the tenant entered on the land under him will be permitted to defend the action, although the tenant has been found guilty of a forcible detainer against the landlord. M'Clelland v. Sprigg, 3 Bibb (Ky.) 266.

Where Landlord and Tenant Unite in defending an ejectment, it is sufficient for the plaintiff to prove the tenant to have been in possession at the time of the commencement of the suit, and his possession is deemed to be the possession of his landlord. Jackson v. Harrow, 11 Johns. (N. Y.) 434.

5. Den v. Shuke, 13 N. J. L. 66.

Reception of Rents.—A privity of interest, not the reception, is the true test as to who may be admitted to defend. Wisner v. Wilcocks, Col. & C. Cas. (N. Y.) 62; Jackson v. Babcock, 17 Johns. (N. Y.) 112; Probasco v. Jackson, 1 Wend. (N. Y.) 316.

Equitable Title.—The possessor of a mere equitable title, who is not sued,

adverse title will be allowed the privilege.¹ The whole question is largely within the discretion of the court.²

Good Faith.—Where an application to be admitted to defend

cannot be admitted as a defendant. *Rench v. Doe*, 2 Blackf. (Ind.) 309.

The Vendor of Defendant who has no reversionary interest cannot be admitted as party defendant. *Linderman v. Berg*, 12 Pa. St. 301.

Conductor of Divine Service.—A parson claiming the right to enter and perform divine service has not a sufficient title to be admitted a defendant. *Martin v. Davis*, 2 Stra. 914. But see *Hillingsworth v. Brewster*, 1 Salk. 256.

1. *Boyer v. Smith*, 5 Watts (Pa.) 55; *Bell v. Caldwell*, 107 Pa. St. 46; *Cope v. Brotzman*, 1 C. P. Rep. (Pa.) 19; *Jackson v. Flint*, 2 Cow. (N. Y.) 594; *Doe v. Rhys*, 2 Y. & J. 88. See also *Rollins v. Rollins*, 76 N. Car. 264; *Files v. Watt*, 28 Ark. 151.

In *M'Clay v. Benedict*, 1 Rawle (Pa.) 424, it was said: "Under the construction of the Stat. 11 Geo. II., which is similar to our act, it is not a matter of course that a person should be made codefendant. In practice, on application to the court, it is frequently refused. For where a person claims in opposition to the title to the defendant, he can in no light be considered as landlord, and it would be unjust to the tenant that he should be made codefendant, as their defenses might interfere with each other. So also the very question in dispute between the parties may be whether the person claiming to be made a codefendant is entitled to be landlord or not." And see also *Jackson v. Flint*, 2 Cow. (N. Y.) 594.

Improper Admission of Defendant.—Where a third person, holding a title adverse to and inconsistent with the title of the tenant in possession, has been improperly admitted to defend, entering into the consent rule, the court will discharge the rule with costs. *Doe v. Rhys*, 2 Y. & J. 88; *Adams on Eject.* 260.

If, however, application for the discharge of such consent rule is neglected, and the party continue on the record as defendant, such party will not be allowed to set up such inconsistent title as a defense at the trial. *Adams on Eject.* 260; *Doe v. Smythe*, 4 M. & S. 347. And see *Doe v. Litherland*, 4 Ad. & El. 784, 31 E. C. L. 179.

2. *Stafford v. Wheeler*, 93 Pa. St. 462.

"This does not depend on any statutory provisions, but upon rules of court, adopted and practiced upon from the commencement of the remedy by ejectment, and upon the exercise of that discretion by the court, which, it cannot be doubted, it has a right to exercise in controlling the preparation for trial of an ejectment, which is a mere fiction for the trial of titles to the possession of land." *Buford v. Gaines*, 6 J. J. Marsh. (Ky.) 34.

What must be Shown to Court.—Before any one is admitted as a defendant, it must be shown to the satisfaction of the court, by affidavit or otherwise, that the relation of landlord and tenant exists between the parties, or that the title of the party applying for admission to defend is connected to and consistent with the possession of the occupier. *Den v. Lanning*, 11 N. J. L. 185; *Den v. Shupe*, 13 N. J. L. 66; *Buford v. Gaines*, 6 J. J. Marsh. (Ky.) 34; *Jackson v. Stiles*, 6 Cow. (N. Y.) 594; *Godfrey v. Townsend*, 8 How. Pr. (N. Y. Supreme Ct.) 398; *Jackson v. Stiles*, 1 Cow. (N. Y.) 134. See also *Lytle v. Burgin*, 82 N. Car. 301.

"Where a third person applies to be made a defendant, it is necessary for him to show, by affidavit or other competent evidence, that he is the landlord or other proper person." *Den v. Lanning*, 11 N. J. L. 185.

Vacant Lands.—It seems that where ejectment is brought for vacant lands, any person claiming title may be admitted as a party defendant. *Saltonstall v. White*, Col. & C. Cas. (N. Y.) 86, 1 Johns. Cas. (N. Y.) 221.

Person Many Years in Possession.—It also appears to have been held that a person who has been many years in possession, by himself or his tenant, has good reason for asking to be let in to defend. *Waters v. Harrison*, 4 Bibb (Ky.) 87; *Buford v. Gaines*, 6 J. J. Marsh. (Ky.) 34.

Lessor Claiming No More than Interest of Tenant.—Where the lessor of the plaintiff claims no more than the interest of the tenant, the landlord is not entitled to be admitted to defend. *Stiles v. Jackson*, 1 Wend. (N. Y.) 103.

appears a mere trick to put off the trial, the court will not grant the rule.¹

Landlord Alone.—The landlord will not be permitted to defend alone, unless the tenant first neglects or refuses to appear, and this must be first shown by affidavit,² and it has been held that the plaintiff's consent is also necessary.³

After Judgment against Tenant.—A landlord will not be admitted as a defendant after judgment has been given against his tenant.⁴

Landlord Defending in Tenant's Name.—The landlord may, with the tenant's consent, defend in the tenant's name; and need not ask to be admitted himself in order to make his title admissible in evidence,⁵ but the proper practice is to make himself a party to the record.⁶

4. Infants.—Infants are entitled to defend as landlords by their guardians.⁷

5. Husband and Wife.—The right of a husband or wife, as defined at common law, to be let in to defend an ejectment for lands claimed or owned by either is, under modern married women's acts, of little consequence.⁸

1. Fenwick's Case, 1 Salk. 257.

It is a sufficient reason for overruling a motion to admit persons as defendants that it does not appear that they desire to be admitted. Sherry v. Denn, 8 Blackf. (Ind.) 542.

2. Jackson v. Stiles, 1 Cow. (N. Y.) 134.

Where the landlord defends the action without the defendant tenant, who does not appear, it is necessary to prove the defendant, or his tenant, in possession of the premises. Den v. Snowhill, 13 N. J. L. 23.

3. Emlen v. Hoops, 3 S. & R. (Pa.) 130; Beardsley v. Torrey, 4 Wash. (U. S.) 286; Merritt v. Thompson, 13 Ill. 716.

The landlord has the right to defend, but no other person without the consent of the plaintiff. Wise v. Wheeler, 6 Ired. (N. Car.) 196. And see Ralston v. Doe, 36 Ga. 611.

4. Losee v. McFarland, 86 Pa. St. 33.

Defense by Agents.—So persons cannot be admitted as defendants after their agent, whom they permitted to defend for them, has been admitted and confessed a judgment. Bonta v. Clay, 5 Litt. (Ky.) 129.

5. Oetgen v. Ross, 47 Ill. 142.

Thus where a landlord defends in the name of an illiterate tenant who gives a *retraxit* of the plea and *cognovit* of the action, the court will direct the judgment to be set aside. Doe v. Franklin, 7 Taunt. 9, 2 E. C. L. 9.

In California it seems to be held that the landlord, where his title is drawn in question, should defend the action in the name of the tenant, and not in his own name. Dimick v. Deringer, 32 Cal. 488; Dutton v. Warschauer, 21 Cal. 609.

6. Clayton v. Alshouse, 2 Dall. (Pa.) 150.

Where the landlord is admitted, the name of the tenant will not be stricken out. Rittenhouse v. Feters, 9 W. N. C. (Pa.) 221.

The landlord admitted to defend with or instead of the tenant can make no defense which the tenant could not insist on in his defense. Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 539.

7. Probasco v. Jackson, 1 Wend. (N. Y.) 316.

8. The husband will, it seems, be admitted as a party defendant to an ejectment brought by a third person for lands claimed by the husband in right of his wife. Den v. Steward, 3 N. J. L. 486. And it has been decided that a wife may also be allowed to defend an ejectment brought by plaintiff whose claim arises from a pretended marriage with her, which marriage she disputes. Fenwick v. Gravenor, 7 Mod. 70.

In New York it was held that married women who are trustees to wind up the affairs of a corporation cannot be let in to defend an ejectment in the place of a tenant, unless their hus-

6. **Mortgagor and Mortgagee.**—In ejectment against a mortgagor in possession, the mortgagee, or his assignee, if entitled to a right of entry, will be admitted to defend.¹

7. **Tenants in Common, Joint Tenants, and Coparceners.**—In order that joint tenants, coparceners, or tenants in common may be admitted to defend, they must at least show that they are interested in the result of the suit.²

X. JOINDER OF CAUSES AND PARTIES—1. **Joinder of Causes**—*a*. **GENERAL RULE STATED.**—A plaintiff cannot bring one action of ejectment for several distinct parcels or tracts of land in possession of several defendants, each claiming for himself;³ but he may bring one action against several trespassers on his single, separate, and distinct tenement or parcel of land,⁴ if his title as

bands are also joined. *People v. Webster*, 10 Wend. (N. Y.) 554.

1. *Jackson v. Babcock*, 17 Johns. (N. Y.) 112; *Noble v. Coleman*, 16 Ala. 77; *Wisner v. Wilcocks*, Col. & C. Cas. (N. Y.) 62; *Doe v. Cooper*, 8 T. R. 645. Unless the lessor of the plaintiff will discharge the mortgage. *Den v. Fen*, 6 N. J. L. 478. But the mortgagee, must be interested in the result of the suit. *Doe v. Roe*, 6 Bing. 613, 19 E. C. L. 178, 4 M. & P. 437.

2. *Minke v. McNamee*, 30 Md. 294.

A tenant in common asking to be admitted to defend must, at least, swear that he claims as tenant in common. That he believes the action will involve a question between tenants in common is not enough. *Jackson v. Stiles*, 2 Cow. (N. Y.) 585.

It seems that one claiming in opposition to the title of tenant in possession is not entitled to be admitted a codefendant with the landlord of the tenant, even though he claims as tenant in common with such landlord, who is willing and requests to have him joined as a defendant. *Jackson v. Flint*, 2 Cow. (N. Y.) 594.

In an action to recover land a third person who claims a joint ownership with defendant may, on affidavit showing this fact, be admitted to defend the suit. *Lytle v. Burgin*, 82 N. Car. 301.

3. *Greer v. Mezes*, 24 How. (U. S.) 277; *Bell v. Foxen*, 14 Sawy. (U. S.) 499, 42 Fed. Rep. 755; *Walsh v. Varney*, 38 Mich. 73; *Wood v. McGuire*, 17 Ga. 303.

One Defendant in Possession of Separate Tracts.—But a plaintiff may have one action of ejectment for several distinct tracts, claimed under separate

titles, if he has been unlawfully ejected from all of them by the same defendant. *Den v. Snowhill*, 13 N. J. L. 23.

4. *Greer v. Mezes*, 24 How. (U. S.) 277; *Bell v. Foxen*, 14 Sawy. (U. S.) 499, 42 Fed. Rep. 755; *Camden v. Haskill*, 3 Rand. (Va.) 462. See *Stuart v. Coalter*, 4 Rand. (Va.) 74.

The Leading Case on this subject is that of *Greer v. Mezes*, 24 How. (U. S.) 277, in which Grier, J., delivering the opinion of the court, said: "In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and, by doing so, he necessarily disclaims any title to the residue of the land described in the declaration; and if on the trial he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation. If he pleads nothing but the general issue, and is found in possession of any

to all the defendants is the same;¹ and the defendants may sever and defend under their respective titles, and demand separate verdicts.²

But the Rule is Not Uniform, some cases holding that where tenants occupy separate parcels of land under a common landlord they should be sued separately.³

Apartments in Same Building.—Several tenants occupying different apartments in the same building may be sued jointly in ejectment.⁴

b. CONSOLIDATION OF CAUSES.—The court will order a consolidation of several actions of ejectment where there is the same question and defense in all the cases.⁵

2. Joinder of Plaintiffs.—In ejectment for breach of condition subsequent, all of the original grantors or their heirs must join.⁶ But several parties claiming distinct interest under distinct titles

part of the land demanded, he is considered as taking defense for the whole. How can he call on the plaintiffs to prove how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain."

1. *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; *Jackson v. Woods*, 5 Johns. (N. Y.) 278; *Love v. Wilbourn*, 5 Ired. (N. Car.) 344; *Medham v. Branson*, 5 Ired. (N. Car.) 426. See also *Grimstone v. Burghers*, Barn. 176; *Smith v. Crabb*, 2 Stra. 1149.

In California, under statute, a complaint in ejectment may include different parcels of land, where they are covered by the same title and the action equally affects all parties. *Beard v. Federy*, 3 Wall. (U. S.) 478. See *McGarvey v. Little*, 15 Cal. 27.

2. *White v. Pickering*, 12 S. & R. (Pa.) 435; *Ellis v. Jeans*, 7 Cal. 409; *Smith v. Shackelford*, 9 Dana (Ky.) 455; *Jackson v. Scoville*, 5 Wend. (N. Y.) 96.

In *Rowland v. Ladiga*, 21 Ala. 9, it was held that where land was unlawfully held by several tenants ejectment would lie against them jointly or separately, at the election of the plaintiff. If sued jointly, they might protect themselves against a joint judgment for damages by showing the extent of the possession of each.

The Nonjoinder as a Defendant of one

who occupies a distinct portion of the premises only limits the recovery by excluding that portion. *Hendricks v. Rasson*, 42 Mich. 104.

3. If, however, they are sued jointly and judgment is recovered against them, the error will be immaterial if the judgment does not give substantial damages. *Sutton v. Casseleggi*, 77 Mo. 397. See also *Van Rensselaer v. Hayes*, 5 Den. (N. Y.) 477; *McCaskle v. Amarine*, 12 Ala. 17.

Defendant Forced to Elect.—So it has been held that, where it appears on the trial of an ejectment against several defendants that they occupy distinct parcels of the premises in question in severalty, the plaintiff must elect against whom he will proceed, and the other defendants are entitled to a verdict in their favor. *Fosgate v. Herkimer Mfg., etc., Co.*, 9 Barb. (N. Y.) 287; *Dillaye v. Wilson*, 43 Barb. (N. Y.) 261; *Keene v. Barnes*, 29 Mo. 377.

4. *Pearce v. Colden*, 8 Barb. (N. Y.) 522; *Marshall v. Wood*, 5 Vt. 250; *Pearce v. Ferris*, 10 N. Y. 280.

5. *Den v. Kimble*, 9 N. J. L. 335. And see generally article CONSOLIDATION OF ACTIONS, vol. 4, p. 673.

But it has been held that where separate actions are brought by several parties they cannot be required to unite them in one under that provision of an ejectment act which provides, *inter alia*, that several persons may be named as plaintiffs jointly in one count; but where the parties treat the action as one, and go to trial without objection, the objection is waived. *Hardin v. Kirk*, 49 Ill. 153.

6. *Cook v. St. Paul's Church*, 67 N. Y. 594, 5 Hun (N. Y.) 293.

cannot join as plaintiffs.¹ It has been held that two of three coexecutors may recover on a joint demise.²

3. Joinder of Defendants.—Persons whose rights are only collaterally affected by an action of ejectment need not be made parties to the same.³ A grantor with warranty of title is properly joined as a defendant in ejectment against his grantee;⁴ and a grantee who leaves his grantor in possession may be joined in ejectment against the grantor.⁵

In Ejectment by a Mortgagee, if the action is against a third party, it is not necessary to make the legal representatives of the deceased mortgagor, or the mortgagor himself, if living, a defendant in the action, though it would no doubt be proper to do so.⁶

Person out of Possession.—Neither the landlord, nor any other person out of possession of the premises demanded, can be joined as a codefendant in ejectment without his consent, and if so joined will be entitled to a nonsuit.⁷

1. *People v. New York*, 10 Abb. Pr. (N. Y. Supreme Ct.) 111, reversing 8 Abb. Pr. (N. Y.) 7; *Hubbell v. Lerch*, 58 N. Y. 237, 62 Barb. (N. Y.) 295. See *St. John v. Pierce*, 22 Barb. (N. Y.) 362, 4 Abb. App. Dec. (N. Y.) 140.

The Widow of an intestate cannot join with the heirs in ejectment for the land of her deceased husband. *Keyes v. Gore*, 42 Ohio St. 211; *Dwyer v. Wright*, 14 Pa. Co. Ct. Rep. 406.

Minor Children are not necessary parties plaintiff to an ejectment brought by their mother to recover the homestead, though it is proper to join them. *Showers v. Robinson*, 43 Mich. 502.

2. In *Doe v. Wheeler*, 15 M. & W. 623, Rolfe, B., said: "It is generally said there are only three descriptions of persons who have a joint interest, namely, joint tenants, tenants in common, and coparceners; but when we look closely, there are four, that is, coexecutors also, who have some of the incidents of all the others."

Joinder of Executor and Devisees Improper.—An executor, suing in his representative capacity, and the devisees under the will cannot join as plaintiffs in a real action in the nature of ejectment. *Tarver v. Smith*, 38 Ala. 135.

3. *Du Pont v. Davis*, 35 Wis. 631.

State.—Thus the state is not a proper party to an ejectment merely because the land in controversy is claimed under a grant from the state. *Fowler v. Lindsey*, 3 Dall. (U. S.) 411.

Undivided Interest in Mining Claim.—In an ejectment to recover an undi-

vided interest in a mining claim, it is not necessary to make parties to the suit those in possession of such claim, holding other undivided interests, and claiming no right to the interest sued for, but only those persons who interfere with the plaintiff's rights. *Waring v. Crow*, 11 Cal. 366.

4. *Hamilton v. Chicago, etc.*, R. Co., 124 Ill. 235; *Redwine v. Brown*, 10 Ga. 311.

5. *Patch v. Keeler*, 27 Vt. 252.

Election as to Making Defendants.—It seems that in some cases a plaintiff has his election as to making defendants, as in the case of those who have contracted to purchase unoccupied land, and are exercising acts of ownership over it. *Edwards v. Farmers F. Ins., etc., Co.*, 21 Wend. (N. Y.) 467.

6. *Bartlett v. Borden*, 13 Bush (Ky.) 45; *Simms v. Richardson*, 32 Ark. 304.

Assignee of Mortgage.—But it has been held that the assignee of the mortgage may be joined. *Warner v. Pate*, 5 Vt. 166.

7. *Pulen v. Reynolds*, 22 How. Pr. (N. Y. Supreme Ct.) 353; *Hussman v. Wilke*, 50 Cal. 250. But see *contra*, *Oakland Gas Light Co. v. Dameron*, 67 Cal. 663.

But where it is required by statute that ejectment shall be brought both against landlord and tenant, it was held that a plaintiff is not obliged to join a landlord with a tenant in possession who holds by parol lease, or by written lease unrecorded, unless it can be proved that the plaintiff had knowledge of the existence of such lease.

Death of Codefendant.—Where a codefendant, made so after commencement of the suit, dies, the plaintiff may proceed against the surviving defendants without making the representatives of the deceased parties to the cause.¹

Objection for Improper Joinder.—If there is an improper joinder of parties, the objection should be taken by demurrer, or answer.²

XI. TENANTS IN COMMON, JOINT TENANTS, AND COPARCENERS. (See also *supra*, IX. 7. *Tenants in Common, Joint Tenants, and Coparceners.*)—**1. Actions against Third Persons—*a.* IN GENERAL—JOINDER OF PARTIES PLAINTIFF.**—Tenants in common, joint tenants, and coparceners can all maintain ejectment, but the rules as to their joinder or severance in the action are not uniform. The general rule is that joint tenants and coparceners must join in real actions, as their interests are joint, while tenants in common must sever, their title or interest being several, and there being no privity of estate between them.³

(1) *Tenants in Common.*—At common law it was held that tenants in common could not make a joint lease to support ejectment,⁴ and the rule is not unknown in this country.⁵ But in *England* this has been modified by statute,⁶ and with us it is

Wallace v. Farnsworth, 2 Tyler (Vt.) 294.

And where defendant, upon being served with a notice demanding possession of the property, admitted his having possession but refused to surrender the premises, it was held not to be necessary that a tenant from month to month, to whom he had rented the property, should be made party defendant with him. *Napa v. Howland*, 87 Cal. 84.

Corporation and Managing Agent.—

Where a corporation and its managing agent are both made defendants in ejectment, and the court finds that the corporation has had possession of the property through said agent and has a legal defense to the action, the possession of the said agent cannot be disturbed. *Lawrence v. Ballou*, 50 Cal. 258.

1. *Henderson v. Hackney*, 13 Ga. 282.

2. *Fosgate v. Herkimer Mfg., etc., Co.*, 12 N. Y. 580, 12 Barb. (N. Y.) 352.

Where One of Several Defendants Disclaims in his answer all right in the premises, but also denies the allegations of the complaint, averring further that "he was and still is lawfully seised and in possession" of the land demanded, he is a proper party and cannot have the action dismissed as to himself. *Pioche v. Paul*, 22 Cal. 105.

3. *Mobley v. Bruner*, 59 Pa. St. 481; *Corbin v. Cannon*, 31 Miss. 570.

4. *Heatherly v. Weston*, 2 Wils. 232; *Barrow v. Navee*, 2 Yerg. (Tenn.) 227; *Hasbrouck v. Bunce*, 62 N. Y. 479.

5. *Woodson v. Scott*, 1 Dana (Ky.) 470; *Wathen v. English*, 1 Mo. 746; *Innis v. Crawford*, 4 Bibb (Ky.) 241; *Mobley v. Bruner*, 59 Pa. St. 481; *Taylor v. Perkins*, 1 A. K. Marsh. (Ky.) 253; *Doe v. Buford*, 1 Dana (Ky.) 483; *Steinmetz v. Nixon*, 3 Yeates (Pa.) 285.

Irregularity Waived.—But if tenants in common do join as plaintiffs in ejectment, defendant will waive the irregularity by pleading over. *Minter v. Durham*, 13 Oregon 470. See also *Bonner v. Greenlee*, 6 Ala. 411.

Joint and Several Demise.—There is nothing impracticable in fact, or absurd in law, in joint and several demises of the same land; and a declaration stating that lessors jointly and severally demised is supported by proof of a tenancy in common. *Courtney v. Shropshire*, 3 Litt. (Ky.) 267. But if the declaration sets out a joint demise, and in making out title it appears that the lessors of the plaintiff were tenants in common, there can be no recovery. *White v. Pickering*, 12 S. & R. (Pa.) 435.

6. See sections 169 and 180, Com. L. Proc., Act of 1852; *Elliss v. Elliss*, El.

generally the case that the rule has never obtained at all,¹ or, as in England, has been changed by statute.²

Generally Sue Separately.—Tenants in common, nevertheless, generally sue separately in ejectment for their undivided interests,³ and they cannot in any case be made to join,⁴ but the weight of authority on this point is probably the other way, and, in the absence of statute, it would seem to be more in accordance with good reason to permit a tenant in common to recover against a stranger only his undivided interest in the property for which

Bl. & El. 81, 96 E. C. L. 81, 4 Jur. N. S. 1181, 27 L. J. Q. B. 316.

1. *Poole v. Fleeger*, 11 Pet. (U. S.) 212; *Robinson v. Roberts*, 31 Conn. 145; *Roberts v. Pharis*, 8 Yerg. (Tenn.) 447; *Barrow v. Navee*, 2 Yerg. (Tenn.) 227; *Robinoe v. Doe*, 6 Blackf. (Ind.) 85; *Doe v. Butler*, 3 Wend. (N. Y.) 149; *Hoyle v. Stowe*, 2 Dev. (N. Car.) 318; *Doe v. Potts*, 1 Hawks (N. Car.) 469. See discussions of this question in *Alford v. Dewin*, 1 Nev. 207; *Cruger v. McLaury*, 41 N. Y. 219, and *Jackson v. Bradt*, 2 Cai. (N. Y.) 174, wherein Kent, J., reaches the conclusion that tenants in common may make a joint demise in ejectment.

In New York it is held that where title to lands is in several tenants in common, a joint action cannot be maintained by two or more, less than the whole number. All must join in one action to recover the whole premises, or a separate action must be brought by each to recover his share. *Hasbrouck v. Bunce*, 62 N. Y. 475; *Cook v. St. Paul's Church*, 5 Hun (N. Y.) 293. See also *Mattis v. Boggs*, 19 Neb. 698. But see, apparently *contra*, *Whittle v. Artis*, 55 Fed. Rep. 919.

2. *Hicks v. Rogers*, 4 Cranch (U. S.) 165; *Corbin v. Cannon*, 31 Miss. 570; *West Chicago Park Com'rs v. Coleman*, 108 Ill. 591; *Dube v. Smith*, 1 Mo. 313; *Wathen v. English*, 1 Mo. 746; *Wheat v. Morris*, 21 D. C. 11.

3. *Hillhouse v. Mix*, 1 Root (Conn.) 247; *Smith v. Starkweather*, 5 Day (Conn.) 207; *Cruger v. McLaury*, 41 (N. Y.) 219; *Davis v. Whitesides*, 1 Bibb (Ky.) 513; *Todd v. M'Gee*, 2 Bibb (Ky.) 350; *Chambers v. Handley*, 3 J. J. Marsh. (Ky.) 98; *Ward v. Harrison*, 3 Bibb (Ky.) 305; *Scott v. Bealle*, 1 A. K. Marsh. (Ky.) 70; *Dowd v. Gilchrist*, 1 Jones (N. Car.) 353; *Hatch v. Thompson*, 3 Dev. (N. Car.) 411; *Holdfast v. Shepard*, 6 Ired. (N.

Car.) 361; *Croft v. Rains*, 10 Tex. 523; *Hooper v. Hall*, 30 Tex. 154.

4. *Craig v. Taylor*, 6 B. Mon. (Ky.) 457, wherein Marshall, J., said: "We do not, however, know of any rule of practice by which tenants in common, electing to sue separately in ejectment, can be compelled to consolidate their actions, or to commence a new one founded on the demise of each." See also *Carson v. Smart*, 12 Ired. (N. Car.) 369; *Tarver v. Smith*, 38 Ala. 135; *Holdfast v. Shepard*, 6 Ired. (N. Car.) 361; *Bronson v. Paynter*, 4 Dev. & B. (N. Car.) 393; *Winthop v. Grimes*, *Wright* (Ohio) 330.

One Tenant Recovering Entire Premises.—In some states one tenant in common may recover in ejectment the demanded premises entire, as against all parties except his cotenants and parties holding under them; but judgment will be in subordination to the rights of his cotenants.

California.—*Hardy v. Johnson*, 1 Wall. (U. S.) 371; *Hart v. Robertson*, 21 Cal. 346; *Collier v. Corbett*, 15 Cal. 183; *Treat v. Reilly*, 35 Cal. 129. And see *Allen v. Gibson*, 4 Rand. (Va.) 468.

Connecticut.—*Phillips v. Medbury*, 7 Conn. 572.

A Surviving Partner of a Firm may, in Connecticut, sue in ejectment and recover land owned by the firm as partnership property. *Robinson v. Roberts*, 31 Conn. 145. And see *Bush v. Bradley*, 4 Day (Conn.) 298; *Barratt v. French*, 1 Conn. 354.

Minnesota.—*Sherin v. Larson*, 28 Minn. 523.

Nevada.—*Sharon v. Davidson*, 4 Nev. 416.

Oregon.—*Dolph v. Barney*, 5 Oregon 191. And in this state one tenant in common may defend for his cotenant. *McCown v. Hannah*, 3 Oregon 302.

Vermont.—*Johnson v. Tilden*, 5 Vt. 426. And see *Hibbard v. Foster*, 24 Vt. 542.

the action of ejectment has been brought.¹

The General Rule, therefore, may be stated to be that tenants in common may join in ejectment and recover the whole property demanded, so held by them in common, or they may sue separately, and recover each one only his own interest.²

(2) *Joint Tenants*.—It is a general rule that joint tenants must join in ejectment,³ but in modern practice this rule has been greatly modified and the doctrine sometimes entirely disregarded.⁴

(3) *Coparceners*.—Coparceners should also join in the action.⁵ But it has also been held that one of several parceners might maintain ejectment on her separate demise.⁶

b. JOINDER OF PARTIES DEFENDANT.—One action of ejectment may be maintained against all the cotenants of the property demanded,⁷ or, where possession alone is sought, one cotenant alone may be sued, without joining his fellows.⁸

2. *Actions between Themselves*—*a. POSSESSION OF ONE POSSESSION OF ALL*.—It is a principle of the common law that the possession of one joint tenant, coparcener, or tenant in common, is *prima facie* the possession of his companions also.⁹ Hence, it follows that the possession of one can never be considered adverse to the title of the other, unless attended by circumstances showing clearly an adverse intent;¹⁰ or, in other words, whenever one such

Washington.—Allen *v.* Higgins, 9 Wash. 446.

1. *Illinois*.—Strean *v.* Lloyd, 128 Ill. 495.

Massachusetts.—Dewey *v.* Brown, 2 Pick. (Mass.) 387.

Missouri.—Gray *v.* Givens, 26 Mo. 291.

Montana.—Keefe *v.* Doreland, 16 Mont. 16.

Nebraska.—Johnson *v.* Hardy, 43 Neb. 368; Mattis *v.* Boggs, 19 Neb. 698, overruling Crook *v.* Vandervoort, 13 Neb. 505.

Pennsylvania.—Dawson *v.* Mills, 32 Pa. St. 302.

Virginia.—Marshall *v.* Palmer, 91 Va. 344; Nye *v.* Lovitt (Va. 1896), 24 S. E. Rep. 345.

A plaintiff in ejectment who parts with his title to his cotenant pending the action cannot recover the land for the use of the vendee, neither can the complainant recover on the title thus conveyed to him. Mobley *v.* Bruner, 59 Pa. St. 481.

2. Mattis *v.* Boggs, 19 Neb. 698; Kirk *v.* Bowling, 20 Neb. 260; Dawson *v.* Mills, 32 Pa. St. 302; Jackson *v.* Bradt, 2 Cal. (N. Y.) 169.

3. Milne *v.* Cummings, 4 Yeates (Pa.) 577.

In *Massachusetts* one joint tenant cannot alone maintain a writ of entry to foreclose a mortgage. Webster *v.* Vandeverter, 6 Gray (Mass.) 428.

4. Doe *v.* Fenn, 3 Campb. 190.

5. Thus where a power of re-entry for breach of a covenant is reserved in a lease, and the reversion descends to coparceners, one alone cannot maintain ejectment. Doe *v.* Lewis, 5 Ad. & El. 277, 31 E. C. L. 333.

6. Jackson *v.* Sample, 1 Johns. Cas. (N. Y.) 231. So where a copyhold estate descended to all the sons and daughters equally of the tenant last seised, it was held that one of the parceners might maintain ejectment on his single demise for his own share. Roe *v.* Lonsdale, 12 East 39.

7. McCown *v.* Hannah, 3 Oregon 302.
8. Raymond *v.* Morrison, 9 Wash. 156.

9. Ford *v.* Grey, 1 Salk. 285; Smales *v.* Dale, Hob. 120; Doe *v.* Keen, 7 T. R. 386; Barrett *v.* French, 1 Conn. 364; Bryan *v.* Atwater, 5 Day (Conn.) 181; Carothers *v.* Dunning, 3 S. & R. (Pa.) 381; Avery *v.* Hall, 50 Vt. 11; Vance *v.* Schroyer, 77 Ind. 501; Hammond *v.* Morrison, 33 Md. 95.

10. And it is not to be doubted that such circumstances may exist. In

tenant is in possession his fellow is in possession also, and an actual ouster must be proved to rebut this presumption.¹

b. EJECTMENT FOR OUSTER.—The rule may now be stated to be that a joint tenant, coparcener, or tenant in common, may maintain an action against his companion, but only on proof of an actual ouster,² or of such acts in denial of his right as will amount to a disseisin, or establish an adverse possession on the part of the wrongdoers,³ or of acts from which an ouster may be inferred.⁴

Proof of Ouster.—The proof of such actual ouster ought to be of the most satisfactory nature.⁵

M'Clung v. Ross, 5 Wheat. (U. S.) 124, Ch. J. Marshall, speaking for the court, said: "That one tenant in common may oust his cotenant and hold in severalty is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." See also *Clark v. Vaughan*, 3 Conn. 191.

1. Adams on Ejec. 54; Carothers *v.* Dunning, 3 S. & R. (Pa.) 385; Van Bibber *v.* Frazier, 17 Md. 436.

In *Vance v. Schroyer*, 77 Ind. 501, the court says: "The possession of one cotenant is the possession of all, and there can be no right of action between them, or those holding under them, to recover possession, unless the tenant in actual occupancy has denied the right of his cotenant, or done something equivalent to such denial, or amounting to an ouster of the cotenant."

2. *Alabama.*—Jones *v.* Perkins, 1 Stew. (Ala.) 512; Foster *v.* Foster, 2 Stew. (Ala.) 356.

Indiana.—Frakes *v.* Elliott, 102 Ind. 47; Vance *v.* Schroyer, 77 Ind. 501; Bethell *v.* McCool, 46 Ind. 303; Myers *v.* Jackson, 135 Ind. 136.

Missouri.—Jordan *v.* Surghnor, 107 Mo. 520; Falconer *v.* Roberts, 88 Mo. 574; Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414.

New York.—Taylor *v.* Crane, 15 How. Pr. (N. Y. Supreme Ct.) 358; North Greig *v.* Johnson, 66 Barb. (N. Y.) 119; Whiteman *v.* Hyland (Supreme Ct.) 40 N. Y. St. Rep. 575; Clason *v.* Rankin, 1 Duer (N. Y.) 337.

North Carolina.—Johnson *v.* Swain, Busb. (N. Car.) 335; Thomas *v.* Garvan, 4 Dev. (N. Car.) 223; Hargrove *v.* Powell, 2 Dev. & B. (N. Car.) 97; Hal-

ford *v.* Tetherow, 2 Jones (N. Car.) 393.

Ohio.—White *v.* Sayre, 2 Ohio 110; Penrod *v.* Danner, 19 Ohio 218.

Pennsylvania.—Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

Vermont.—Evarts *v.* Dunton, Brayt. (Vt.) 67; Johnson *v.* Tilden, 5 Vt. 426;

Dodge *v.* Page, 49 Vt. 137, 50 Vt. 39.

Virginia.—Doe *v.* Hill, 10 Leigh (Va.) 477.

Washington.—Mabie *v.* Whittaker, 10 Wash. 656.

United States.—Barnitz *v.* Casey, 7 Cranch (U. S.) 456; Clay *v.* Field, 115 U. S. 260; Goldsmith *v.* Smith, 21 Fed. Rep. 611.

3. Pitcher *v.* Mitchell, 3 Moore 229; Cross *v.* Robinson, 21 Conn. 385; Norris *v.* Sullivan, 47 Conn. 477; Lawton *v.* Adams, 29 Ga. 273; Chiles *v.* Conley, 9 Dana (Ky.) 388; Gower *v.* Quinlan, 40 Mich. 572; Forder *v.* Davis, 38 Mo. 107; Edwards *v.* Bishop, 4 N. Y. 61; Keller *v.* Auble, 58 Pa. St. 410; Carpenter *v.* Thayer, 15 Vt. 552. And see Ricard *v.* Williams, 7 Wheat. (U. S.) 59.

4. Den *v.* Bordine, 20 N. J. L. 394. See Shepard *v.* Ryers, 15 Johns. (N. Y.) 501.

5. Adam *v.* Ames Iron Co., 24 Conn. 235.

In *Hammond v. Morrison*, 33 Md. 95, it is said: "It is true that the possession of one tenant in common is, in contemplation of law, the possession of all his cotenants, unless there be an ouster of them, and in that event only can one tenant in common maintain an action of ejectment against his cotenants. The ouster need not be accompanied by positive force, but must be established by acts or declarations brought home to the knowledge of the cotenant." See also *Van Bibber v. Frazier*, 17 Md. 436.

Ouster by Force—Knowledge.—But it is not necessary that the ouster should be accompanied by force,¹ although it must be brought to the knowledge of the cotenant.²

Question for Jury.—Whether there has been an ouster or not is a matter of fact for the finding of the jury,³ and various circumstances may be proved from which the jury will be authorized to infer the same.⁴

XII. VENDOR AND PURCHASER—1. **Generally.**—Ejectment may be maintained by a vendor to recover possession of real estate from a purchaser who has gone into possession, with the permission of the vendor, under a contract of purchase with the terms of which he fails or refuses to comply, the vendor being then at liberty to treat the contract as rescinded,⁵ provided the contract be first

1. *Hammond v. Morrison*, 33 Md. 95; *Harmon v. James*, 7 Smed. & M. (Miss.) 111; *Corbin v. Cannon*, 31 Miss. 570; *Shrawder v. Snyder*, 6 Montg. (Pa.) 66. Where one of several tenants in common in possession claims the exclusive right to possession, under title adverse to his cotenants, there is an ouster on which the latter may have ejectment. *Lundy v. Lundy*, 131 Ill. 138.

2. *Hammond v. Morrison*, 33 Md. 95.

3. *Harmon v. James*, 7 Smed. & M. (Miss.) 111.

Circumstances Showing Ouster.—In ejectment by one claiming to be a cotenant with defendant the latter indorsed these words on the writ: "I accept service of this writ, and acknowledge the same to be legally served on me * * *; and that I am in possession of the land, etc., described in said writ and declaration, claiming the same as my own." It was held that the jury were authorized from this indorsement to infer an ouster before the commencement of the suit. *Giddings v. Canfield*, 4 Conn. 483.

The mere building of a fence around the land by the husband of one tenant in common is not such an exclusion of the cotenants as authorizes ejectment. *Yager v. Larsen*, 22 Wis. 184.

4. *Hargrove v. Powell*, 2 Dev. & B. (N. Car.) 97.

Demand of Possession.—It has been deemed eminently proper and safe, before bringing an action of ejectment against a tenant in common, to test the intent with which the property is held by a formal demand to be let into the enjoyment of the right claimed; and a refusal furnishes that clear evidence of ouster which a demand and refusal

furnish of a conversion in trover." *Newell v. Woodruff*, 30 Conn. 498.

One who depends on merits in the action by his cotenant, and denies the latter's title, cannot set up in bar that there was no ouster or demand of possession before action brought. *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448.

Denial of Ouster.—Where defendant in ejectment shows by affidavit that he is coparcener, joint tenant, or tenant in common, and denies actual ouster, the court will permit him to confess lease and entry only, without confessing ouster. *Doe v. Roe*, 2 Taunt. 397; *Van Bibber v. Frazier*, 17 Md. 436; or to confess ouster of nominal plaintiff in case an actual ouster of plaintiff's lessor by defendant is proved, but not otherwise. *Den v. Bordine*, 20 N. J. L. 394.

The Grantee of a Specific Quantity of Land in a larger tract, thereafter to be segregated, becomes a tenant in common with his grantor, and may maintain ejectment against his cotenant. *Lawrence v. Ballou*, 37 Cal. 518.

Adverse Possession.—A joint tenant, by an open and notorious possession of twenty years adverse to his cotenants, may acquire such a title as will enable him to sustain ejectment against them. *Russell v. Marks*, 3 Metc. (Ky.) 37.

5. *Alabama.*—*Seabury v. Doe*, 22 Ala. 207; *Clements v. Taylor*, 65 Ala. 363.

California.—*Gaven v. Hagen*, 15 Cal. 208; *Hicks v. Lovell*, 64 Cal. 14; *Central Pac. R. Co. v. Mudd*, 59 Cal. 585; *Kerns v. Dean*, 77 Cal. 555; *Connelly v. Hingley*, 82 Cal. 642; *Hannan v. McNickle*, 82 Cal. 122.

legally rescinded by the vendor, by repaying the purchase money already paid, with legal interest thereon, less a fair rental for the premises, and delivering up the notes or bonds given for the balance of the purchase money, or offering to do so. In other words, the vendor must place the vendee in *statu quo*.¹ This at

Georgia.—*Alston v. Wingfield*, 53 Ga. 18; *Day v. Solomon*, 40 Ga. 32.

Illinois.—*Dean v. Comstock*, 32 Ill. 173; *Home Mfg. Co. v. Gough*, 2 Ill. App. 477.

Minnesota.—*Thompson v. Ellenz*, 58 Minn. 301.

Missouri.—*De Bernardi v. McElroy*, 110 Mo. 650; *Avery v. Kansas City, etc., R. Co.*, 113 Mo. 561.

New Jersey.—*Tindall v. Den*, 21 N. J. L. 651; *Thackray v. Den*, 18 N. J. L. 1.

New York.—*Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74.

Pennsylvania.—*Brown v. Devitt*, 131 Pa. St. 455; *Daubert v. Pennsylvania R. Co.*, 155 Pa. St. 178; *Moyer v. Garrett*, 96 Pa. St. 376. See also *Spencer v. Tobey*, 22 Barb. (N. Y.) 260.

United States.—*Burnett v. Caldwell*, 9 Wall. (U. S.) 290.

The Whole Law of this Matter is succinctly stated by Swayne, J., in *Burnett v. Caldwell*, 9 Wall. (U. S.) 290. "The legal principles which must govern the determination of the case are all well settled. If the contract in such cases be silent as to possession by the vendee, he is not entitled to it. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. In such cases the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. The assignee of the vendee is as much bound by the estoppel as the vendee himself. Upon default in payment of any instalment of the purchase money, the possession becomes tortious, and the vendor may at once bring ejectment. Ejectment may sometimes be maintained when covenant for the purchase money could not. In England

it is necessary to give notice to quit before bringing ejectment. In this country, generally, the rule is otherwise."

Where Purchase-money Notes Transferred.—But where a vendor, who has given to vendee his bond for titles and has taken notes in payment of the purchase money, transfers such notes without recourse, he cannot, on his own account, maintain ejectment against the vendee to recover the land. *Tompkins v. Williams*, 19 Ga. 569.

An Assignee of the Contract of Purchase who takes such assignment as security for a debt due him by the assignor cannot, on default of payment of said debt, maintain ejectment against his assignor to recover the lands. *Campbell v. Swan*, 48 Barb. (N. Y.) 109.

A Purchaser of Mortgaged Property under foreclosure sale can maintain ejectment against a vendee of the property under an executory contract of purchase, upon default in the payment of the money due on the said contract. *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

A Second Vendee of the same land may maintain ejectment against a first vendee, in possession under an executory contract of sale, but in default. *Emery v. De Golier*, 117 Pa. St. 153; *Candee v. Haywood*, 34 Barb. (N. Y.) 349.

Ejectment by Trustee against Beneficiary.—Where one purchased and paid for lands for the benefit of another and allowed him to take possession, but still retained the legal title as security for the purchase money, he could enforce the payment of the purchase money by ejectment and a conditional verdict. *Reed v. Murray*, 11 Pa. St. 334.

1. *Bohall v. Diller*, 41 Cal. 532. But see *Hannan v. McNickle*, 82 Cal. 122; *Hoffman v. Remnant*, 72 Cal. 1; *Abbott v. Chase*, 13 Iowa 453.

Reimbursement at Trial.—It has been held sufficient to reimburse any payment made on account of the purchase at the trial. *Moody v. Vandyke*, 4 Binn. (Pa.) 31.

Tender of Deed.—But no previous tender of a deed seems to be considered

least is the general rule.¹

2. Relation of Vendor and Vendee.—The relation of vendor and vendee under such circumstances is not that of landlord and tenant,² but the vendee is considered to be a mere licensee,³ and his holding will not be deemed to be adverse to that of the vendor until he has performed all the conditions of the contract on his part and is entitled to an absolute conveyance.⁴

3. Notice to Quit.—Notice to quit or demand of possession is, therefore, not generally considered in this country necessary to be given the vendee, on default, prior to the bringing of the action.⁵

necessary. *Wright v. Moore*, 21 Wend. (N. Y.) 230.

1. Staley v. Murphy, 47 Ill. 241. In this case it was said: "The ordinary rule is that a party rescinding a contract must place the other party *in statu quo*. * * * The vendor of land seeking to rescind for nonpayment by the vendee should first return, or offer to return, the unpaid notes and purchase money. There are undoubtedly cases where the purchaser has been guilty of gross laches in which the vendor would be justified in reselling to a third person, without first tendering to the first purchaser the money paid, either holding it subject to his order, or until the equities between them, growing out of the contract and its violation by the purchaser, can be adjusted. But while the money paid need not be in every case returned, as preliminary to a rescission of the contract for nonperformance by the vendee, the unpaid negotiable notes must always be either returned or canceled, so that they cannot be negotiated and their payment enforced. * * * The vendor who rescinds must place himself in a position where he cannot enforce the contract as against the vendee. He cannot be permitted to retain the notes with the power of negotiating them to innocent purchasers, and at the same time insist that the contract is terminated, and the rights of the vendee extinguished." See also *Frink v. Thomas*, 20 Oregon 265.

2. Watkins v. Holman, 16 Pet. (U. S.) 54; *McClane v. White*, 5 Minn. 178.

In *Blight v. Rochester*, 7 Wheat. (U. S.) 543, Marshall, C. J., discussed this question, speaking for the court as follows: "The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the

sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound to this by law or by the obligations of good faith is a question depending on all the circumstances of the case, and in deciding it all those circumstances are examinable."

3. Dolittle v. Eddy, 7 Barb. (N. Y.) 74. But see *Jones v. Temple*, 87 Va. 210, where he is called a tenant at will.

Where a vendee goes into possession under an executory contract of purchase and defaults, the vendor may at his election treat him as a tenant and recover for use and occupation, or as a trespasser, and recover possession of the premises by ejectment. *Seabury v. Doe*, 22 Ala. 207.

4. Seabury v. Doe, 22 Ala. 207; *Young v. Irwin*, 2 Hayw. (N. Car.) 9; *Briggs v. Prosser*, 14 Wend. (N. Y.) 227; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74. And see *Benson v. Stewart*, 30 Miss. 49; *Matter of Public Parks*, 73 N. Y. 560.

5. Alabama.—*Seabury v. Doe*, 22 Ala. 207.

California.—*Coates v. Cleaves*, 92 Cal. 427.

Georgia.—*McHan v. Stansell*, 39 Ga. 197; *Day v. Solomon*, 40 Ga. 32.

Illinois.—*Prentice v. Wilson*, 14 Ill. 91; *Dean v. Comstock*, 32 Ill. 173.

The rule in *England*, however, is otherwise,¹ and in this country many decisions are to be found adopting, with more or less qualification, the English rule.² Thus it is sometimes said that notice

Indiana.—*Doe v. Brown*, 7 Blackf. (Ind.) 142.

Kentucky.—*Bedford v. Thomas*, 6 B. Mon. (Ky.) 332.

Minnesota.—*McClane v. White*, 5 Minn. 178.

New York.—*Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Wright v. Moore*, 21 Wend. (N. Y.) 230; *Pierce v. Tuttle*, 53 Barb. (N. Y.) 155; *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *Jackson v. Miller*, 7 Cow. (N. Y.) 747, 6 Wend. (N. Y.) 228; *Whiteside v. Jackson*, 1 Wend. (N. Y.) 418; *Powers v. Ingraham*, 3 Barb. (N. Y.) 576; *Hotaling v. Hotaling*, 47 Barb. (N. Y.) 163; *Candee v. Haywood*, 34 Barb. (N. Y.) 352.

Ohio.—*Baker v. Gittings*, 16 Ohio 485.

Tennessee.—*Den v. Webster*, 10 Yerg. (Tenn.) 513. See also *Spencer v. Tobey*, 22 Barb. (N. Y.) 260; *Moak v. Bryant*, 51 Miss. 560.

United States.—*Gregg v. Von Phul*, 1 Wall. (U. S.) 274.

"As a general principle, where a party acquires the possession of land under an executory contract of purchase, the vendor cannot maintain ejectment against him until he has demanded possession or given him notice to quit. The possession of the purchaser, being lawful in its inception, does not become wrongful until he is called upon to restore it. * * * But the right to retain the possession may be forfeited by the purchaser. If he repudiates the contract under which he obtained the possession, or fails to comply with its terms, the seller is at liberty to treat the contract as rescinded and regain the possession by an action of ejectment. In such case, neither a demand of possession nor a notice to quit is necessary." *Prentice v. Wilson*, 14 Ill. 91.

In *Hotaling v. Hotaling*, 47 Barb. (N. Y.) 167, it was said: "The authorities hold, beyond any question, that when the purchaser of land has made default in the payment of money, under an executory contract, no notice to quit is necessary, nor any demand of the amount due, or of the possession, or ten-

der of a deed, before bringing an action of ejectment." So when lands, after being sold by the state to one party, are resold by the state for the nonpayment of the purchase money, the subsequent purchaser may maintain ejectment for the same without first serving the first purchaser with a notice to quit. *Candee v. Haywood*, 34 Barb. (N. Y.) 349.)

No notice to quit is necessary by proof of a contract of purchase by defendant with a stranger between whom and the lessor of the plaintiff no connection is shown in respect of the title to the property. *Petty v. Graham*, 13 Ala. 568.

1. *Right v. Beard*, 13 East 210; *Doe v. Jackson*, 1 B. & C. 448, 8 E. C. L. 191. But see *Doe v. Boulton*, 6 M. & S. 148.

Agreement Operating as Clause of Re-entry.—But where the executory agreement under which defendant entered provided that if the balance of the purchase money was not paid, he should forfeit the instalments already paid and should not be entitled to an assignment of the lease, it was held that the agreement operated as a clause of re-entry on breach of covenant in a lease and that notice and demand were unnecessary. *Doe v. Sayer*, 3 Campb. 8.

Where one is in possession of premises under an agreement containing this clause, "in case a failure is made in any of the payments, previous to the deed being executed, that the said [vendor] shall be privileged to take possession of the premises," he is not entitled to notice to quit or demand of possession; the lessor of the plaintiff is authorized by the letter of the agreement to take possession, and, having the right of entry, can maintain ejectment, and no notice or demand is necessary. The failure of the payment, like the effluxion of the fixed time of a lease, is sufficient notice. *Den v. McShane*, 13 N. J. L. 35.

2. *Costigan v. Wood*, 5 Cranch (C. C.) 507; *Fears v. Merrill*, 9 Ark. 559; *Twyman v. Hawley*, 24 Gratt. (Va.) 512.

Exchange of Land.—Where parties exchange land and enter into possession under a contract to deed to each other

or demand is not necessary where the vendee has repudiated his contract and converted his possession into a tortious possession,¹ but that a mere failure to pay the instalments of purchase money is not sufficient to produce that condition, and in such case notice or demand is necessary.² It is also sometimes said that a vendee under such circumstances is a tenant at will, or *quasi* tenant at will, and that, at least, a mere demand of possession is necessary before bringing ejectment.³

4. Vendee Not in Default.—But the action cannot be maintained where the vendee is not in default,⁴ and in all cases the burden of proof is on the plaintiff to show such default.⁵

at a particular day, neither can maintain ejectment against the other without notice and an offer to rescind the contract. *Maynard v. Cable*, Wright (Ohio) 18.

1. *Peters v. Allison*, 1 B. Mon. (Ky.) 232. See also *Getty v. Peters*, 82 Mich. 661.

Vendee out of Possession.—Where a vendee has been out of possession for five or six years after default in his payments and then re-enters, his possession is tortious and no demand is necessary before ejectment. *Connolly v. Hingley*, 82 Cal. 642.

2. *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318. And see *Landers v. Beauchamp*, 8 B. Mon. (Ky.) 493; *Harrison v. Hord*, 12 B. Mon. (Ky.) 477.

Where vendee enters into possession under an executory contract of purchase and fails to pay balance of purchase money, although demanded, the vendor cannot sustain ejectment without notice to quit, or notice that the contract is rescinded, or demand of payment and notice of rescinding. *Costigan v. Wood*, 5 Cranch (C. C.) 507.

3. *Jones v. Temple*, 87 Va. 210; *Williamson v. Paxton*, 18 Gratt. (Va.) 475; *Butner v. Chaffin*, Phil. (N. Car.) 497; *Guess v. McCauley*, Phil. (N. Car.) 514; *Dennis v. Warder*, 3 B. Mon. (Ky.) 176; *Stackhouse v. Doe*, 5 Blackf. (Ind.) 570.

Distinction between Notice to Quit and Demand of Possession.—The cases are somewhat confusing on this question of the necessity of notice to quit or demand of possession. The two phrases are generally understood to mean the same thing, but it is clearly seen that many decisions use the former very frequently when they have in mind the common-law six months' notice to quit, or a notice of some other definite time, while the phrase "demand of pos-

session" seems always to have its literal meaning. Some decisions carefully make a distinction in their use of the two terms. Thus in *Venable v. McDonald*, 4 Dana (Ky.) 337, and *Ross v. Van Aulen*, 42 N. J. L. 49, in the case put in the text, a demand of possession is held necessary but not a regular notice to quit.

Where A sold his farm to B, the latter agreeing to pay a certain sum in four annual payments and twenty-five bushels of wheat annually during the lives of A and B, and B entered into possession and made certain payments of money, and also twenty-five bushels received by A as rent, and B failed to keep this up and A brought ejectment, it was held that B was a tenant of A and entitled to notice to quit. *Jackson v. Niven*, 10 Johns. (N. Y.) 335.

4. *Love v. Watkins*, 40 Cal. 547; *Downer v. Richardson*, 9 Vt. 377; *Doe v. Jackson*, 1 B. & C. 448, 8 E. C. L. 191; *Carr v. Carr*, 52 N. Y. 251.

Rule in Alabama.—The rule in this state seems to be different. Here it would appear that the vendee cannot defeat ejectment by the vendor, even though all of the purchase money has been paid, because he has not a legal title. *Collins v. Doe*, 33 Ala. 91; *Nickles v. Haskins*, 15 Ala. 619. And see *Chapman v. Glassell*, 13 Ala. 50; *Trammell v. Simmons*, 17 Ala. 411; *Elmore v. Harris*, 13 Ala. 360; *Sellers v. Hayes*, 17 Ala. 749; *James v. Tait*, 8 Port. (Ala.) 476.

But a vendee in possession under such circumstances, who continues in possession ten years after the payment of the purchase money, acquires a title on which he may maintain or defeat ejectment by or against the vendor. *Taylor v. Dugger*, 66 Ala. 444. See *Tillman v. Spann*, 68 Ala. 102.

5. *Roland v. Fischer*, 30 Ill. 224.

5. Estoppel to Deny Title.—Although the relation between vendor and vendee of land who have contracted together for the sale and the purchase of the same, under which contract vendee has taken possession, is not that of landlord and tenant,¹ yet it is generally held that the vendee is estopped from disputing the title of the vendor, or setting up an outstanding title in a third party to defeat the same, or an adverse title in himself,² unless he can show that in some way he was deceived, or imposed on, in making the agreement.³

6. Action by Vendee.—In *Pennsylvania* the action of ejectment has been resorted to, and may be maintained by the vendee against the vendor to enforce the specific performance of the articles of purchase entered into between them, wherever a court of equity would sustain a bill for that purpose;⁴ but the better rule undoubtedly is that the title of the vendee under an executory contract of sale being equitable only, cannot be regarded in a court of law so as to warrant him in bringing an ejectment.⁵

And, having done so, the vendee can only defend by rebutting the evidence of the plaintiff and establishing a complete performance on his part. *Pierce v. Tuttle*, 53 Barb. (N. Y.) 155.

1. *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Watkins v. Holman*, 16 Pet. (U. S.) 54; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74.

2. *Jackson v. McGinness*, 14 Pa. St. 331; *Coates v. Cleaves*, 92 Cal. 427; *Burnett v. Caldwell*, 9 Wall. (U. S.) 290; *Hill v. Winn*, 60 Ga. 337; *Seabury v. Doe*, 22 Ala. 207; *Heermans v. Schmaltz*, 7 Fed. Rep. 566; *McClanahan v. Barrow*, 27 Miss. 664. See also *Spencer v. Tobey*, 22 Barb. (N. Y.) 260; *Baumgarten v. Smith*, 37 Tex. 439; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Leshner v. Sherwin*, 86 Ill. 420; *Sanford v. Cloud*, 17 Fla. 557.

And the fact that vendee was in possession when the agreement was entered into makes no difference. *Jackson v. Ayers*, 14 Johns. (N. Y.) 224.

3. *Jackson v. Ayers*, 14 Johns. (N. Y.) 224.

In the recent case of *Robertson v. Pickrell*, 109 U. S. 615, Field, J., in delivering the opinion of the court, after first quoting the extract from *Blight's Lessee*, p. 548, referred to above, goes on to say: "To this general statement of the law there is this qualification, that a grantee cannot dispute his grantor's title at the time of conveyance so as to avoid payment of the purchase price of the property; nor can the grantee in a contest with another, whilst

relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is sufficient for his protection and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance."

4. *Hawn v. Norris*, 4 Binn. (Pa.) 77; *Harris v. Bell*, 10 S. & R. (Pa.) 39; *Henderson v. Hays*, 2 Watts (Pa.) 150; *Vincent v. Huff*, 4 S. & R. (Pa.) 301; *Stein v. North*, 3 Yeates (Pa.) 324; *Com. v. Cochran*, 5 Binn. (Pa.) 87; *Tyson v. Passmore*, 2 Pa. St. 122; *Brawdy v. Brawdy*, 7 Pa. St. 158; *Galloway v. Horne*, 2 Del. (Pa.) 515.

And this, it seems, without bringing into court the balance of the purchase money due. *D'Arras v. Keyser*, 26 Pa. St. 249. See *Harris v. Bell*, 10 S. & R. (Pa.) 39; *Wykoff v. Wykoff*, 3 W. & S. (Pa.) 481; *Chase v. Irvin*, 87 Pa. St. 286.

Georgia.—It seems that this may also be done in Georgia on payment of all the purchase money due or unconditional tender of the same. *Doe v. Swift*, 39 Ga. 91.

5. *Trammell v. Simmons*, 17 Ala. 411.

The obligee in a bond to make title to land, who goes into land under a parol agreement that he may occupy the same until the purchase money is

XIII. MORTGAGOR AND MORTGAGEE.—The question of the right to bring the action of ejectment by or against mortgagors and mortgagees depends almost entirely upon questions of substantive law, such as who has the legal title and the right to possession. A treatment of this subject would be out of place in a work on procedure, and the practitioner is referred to the title Mortgages in the Am. and Eng. Encyc. of Law.¹

XIV. THE ACTION BY LANDLORD AGAINST TENANT.—The action of ejectment is also frequently resorted to by landlords on the determination of tenancies to recover possession of the lands demised. But before a landlord can proceed by ejectment against his tenant the lease must be legally terminated. A discussion of ejectment in this connection would therefore turn almost entirely upon the various ways of terminating the lease; this, it is believed, is outside the scope of this article, since it is entirely a part of the substantive law of landlord and tenant, and the reader is referred to the title Landlord and Tenant in the Am. and Eng. Encyc. of Law.

XV. THE DECLARATION—1. In General—*a.* **AT THE COMMON LAW.**—At the common law the action of ejectment was begun by filing a declaration in the name of a fictitious plaintiff against a fictitious defendant, in which the nominal plaintiff alleged that the land sought to be recovered had been leased² to him, for a term of years³

due, is only a tenant at will to obligor, and cannot eject the latter or any one taking title from him. *Richardson v. Thornton*, 7 Jones (N. Car.) 458; *Trammell v. Simmons*, 17 Ala. 411.

1. As to letting a mortgagor or mortgagee in to defend, see *supra*, IX., 6. *Mortgagor and Mortgagee.*

2. **Demise must Be Consistent with Title of Lessor.**—Although this demise is fictitious, it has always been required to be consistent with the title of the plaintiff's lessor. Thus it was held that there could be no recovery where the lessor had no claim to a subsisting title or interest in the premises. *Jackson v. Paul*, 2 Cow. (N. Y.) 503.

Lessor Dead at Date of Lease.—Although the lease is fictitious, the lessor of the plaintiff must have been alive at the date of the demise, *Jones v. Tarver*, 19 Ga. 279; *Bond v. Watson*, 20 Ga. 135; for there can be no recovery on the demise of a dead lessor. *Doe v. Butler*, 3 Wend. (N. Y.) 149; *Watson v. Tindal*, 24 Ga. 494.

Death of Lessor after Suit Brought.—When the lessor dies between the bringing of the suit and the trial, it has been held that costs only can be recovered. *Watson v. Tindal*, 24 Ga. 494; *Doe v. Lewis*, 29 Ga. 45.

Improper Demise Stricken from Declaration.—Where a person has been improperly made a lessor in the declaration, the court will, on motion, strike out the demise. *McConnel v. Johnson*, 3 Ill. 522. Thus where one of the lessors of the plaintiff is dead, the court will permit all the counts in which he is named as lessor to be stricken out. *Jackson v. Ditz*, 1 Johns. Cas. (N. Y.) 392; *Jackson v. Reynolds*, 1 Cai. (N. Y.) 20; *Jackson v. Bankcraft*, 3 Johns. (N. Y.) 259; *Coleman v. Henderson*, 3 Ill. 251; *Greer v. Smith*, 7 Yerg. (Tenn.) 487.

Demise Stricken Out by Consent.—The plaintiff may strike out the name of a lessor with the consent of the defendant on payment of a proportion of the costs. *Jackson v. Stiles*, 5 Cow. (N. Y.) 478.

3. It was usual to lay the demises as far back as the lessor's title will admit, because the judgment in ejectment was and is conclusive evidence of the right of the lessor to all the mesne profits subsequently accruing. *Adams on Ejec.* 212.

Length of Demise.—There is no established rule as to the duration of the fictitious lease, except that it must not elapse before trial and judgment. If a

not yet expired,¹ by the real plaintiff.²

Unauthorized Demises.—The plaintiff should not, however, insert demises in the names of parties without their authority, for the court will, on motion, order such demises to be struck out of the declaration, unless a sufficient indemnity is given³ in the suit that,

lease be stated which runs out before trial and judgment, the judgment will be erroneous. *Lindsey v. Henderson*, 27 Miss. 502.

1. Lease Expiring before Trial.—No recovery can be had under a lease which has expired at the time of the trial in the absence of an amendment. *Roe v. Doe*, 30 Ga. 608.

Title Expiring before Judgment.—If the right or title of the plaintiff expires after the commencement of the suit, but before the trial, he is entitled to a judgment for his damages by reason of the withholding of the premises. *Jackson v. Davenport*, 18 Johns. (N. Y.) 295; *Freedly v. Mitchell*, 2 Pa. St. 100. A statute so providing, however, applies only to cases in which the plaintiff's title has, in fact, expired pending the suit. *Hunt v. O'Neill*, 44 N. J. L. 564. It has no application where the plaintiff conveys his estate to a third person *pendente lite*. In such case the plaintiff is entitled to recover. *Van Rensselaer v. Owen*, 48 Barb. (N. Y.) 61.

2. Failure to Name Lessors.—Where the plaintiff alleged a demise of John G——, attorney in fact for the heirs of James G——, but failed to name the lessors of the plaintiff, the declaration was held insufficient. *Taylor v. Gilkerson*, 4 Bibb (Ky.) 410.

Several Plaintiffs.—The declaration may contain counts in the names of different persons, *Smith v. Dewey*, 15 Wend. (N. Y.) 601; and the plaintiffs may give evidence of their titles to different portions of the premises. *Jackson v. Sidney*, 12 Johns (N. Y.) 185.

Demises in Name of Grantor and Grantee.—Where the plaintiff alleges two demises in his declaration, one in the name of the grantor, and the other in the name of the grantee, he may recover in the name of the grantor, although the conveyance by which the grantee claims is inoperative by an adverse possession, *Jackson v. Leggett*, 7 Wend. (N. Y.) 377; whether the action is brought in the names of fictitious or real parties. *Ely v. Ballantine*, 7 Wend. (N. Y.) 470.

Customary to Allege Several Demises.—It has been customary, when any

doubt has existed as to the holder of the legal title in the premises, to declare upon several separate and distinct demises from the several persons in interest. Any one of these, if proven, would be sufficient to sustain the action. *Surget v. Little*, 24 Miss. 118; *Adams on Ejec.* 211; *Glidden v. Doe*, 10 Ala. 166.

Joint and Several Demise.—If the plaintiff allege a joint and several demise, he will be entitled to recover upon proof of title, either in all the lessors jointly or in any one of them. *Doe v. Dignowitty*, 4 Smed. & M. (Miss.) 57.

Joint Action Docketed as Two Suits.—If what is really a joint action be docketed as two suits, they will not be permitted to be separately pleaded to a consolidation of actions. *Reid v. Dodson*, 1 Overt. (Tenn.) 396.

3. Indemnity Obviates Necessity for Lessor's Consent.—If the use of the name of a lessor be necessary to sustain the plaintiff's case, he may use the name of such lessor, even without his consent, provided he offers indemnity for all loss occasioned thereby. *Fain v. Garthright*, 5 Ga. 6; *English v. Doe*, 7 Ga. 387; *Doe v. White*, 36 Ga. 432.

Foundation for Use of Third Person as Lessor.—Although the plaintiff may use the name of a third person as lessor, he should show, in such case, that he has a *bona fide* subsisting claim to the premises, together with the connection between his title and that of his alleged lessor, or he should show authority from him in whom the paramount title is vested to institute the suit in his name. *Adams v. McDonald*, 29 Ga. 571; *Turner v. Tubersing*, 67 Ga. 161.

Warranty Not Authority for Insertion of Demise.—The plaintiff is not authorized to insert a count upon the demise of his grantor by the warranty of the latter, and a count so inserted may be stricken out. *Doe v. Garrison*, 1 Dana (Ky.) 35.

Specific Charge.—If the defendant desires to raise a question as to any one of the alleged titles, he should do so by asking for a specific charge on that particular demise. Otherwise the

by virtue of the said lease, he had entered upon the land, and that after such entry¹ the nominal defendant had ejected him therefrom.

b. AS MODIFIED BY STATUTE.—One by one the several states have enacted statutes doing away with the technicalities of the common law. The fictions of the ancient practice have been abolished and the action required to be brought by the real claimant against the real defendant.²

2. Filing and Entitling—Filing.—While the declaration is, in itself, a kind of writ or process,³ it is not a process in the sense that it may be filed in vacation.⁴ On the contrary, it should be filed and entered in the records of the court at the term to which the defendant is warned to appear.⁵

judge may pass over that demise in his charge to the jury. *Glidden v. Doe*, 10 Ala. 166.

1. Date of Demise must Be Subsequent to Right of Entry.—The date of the alleged demise has always been held so far material that it must be subsequent to the accrual of the claimant's right of entry; for if the lessor have not a right to enter, he cannot have a right to demise the land. *Adams on Ejectment* 213; *Crawford v. Green*, 1 Harr. (Del.) 464; *Wood v. Morton*, 11 Ill. 547; *Holt v. Rees*, 44 Ill. 30; *Schoonmaker v. Doolittle*, 118 Ill. 605; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414; *Van Alen v. Rogers*, 1 Johns. Cas. (N. Y.) 281; *Coxe v. Joiner*, 3 Bibb (Ky.) 297. And a declaration averring possession upon a certain day will not be supported by a deed or demise dated two or three days later. *Newell v. McLarney*, 49 Mich. 232.

Heirs at Common Law.—At common law an heir could not recover on a demise dated within the lifetime of his ancestor and laid in his own name, for at that time he had no right of possession. Such a defect is cured after issue joined by the statute of jeofails. *Winn v. Cole*, Walk. (Miss.) 119.

Ejectment against Mortgagor.—To recover in ejectment against the mortgagor, the mortgagee must lay the demise at a date subsequent to the accruing of his right of entry by default in payment, and subsequent to a dissolution of the tenancy by notice to quit or otherwise. *Dickenson v. Jackson*, 6 Cow. (N. Y.) 147.

Where Title Acquired by Adverse Possession.—Where the title of the plaintiff has been acquired by adverse possession under claim of title, the

demise should be laid subsequent to the bar of the statute. *Schoonmaker v. Doolittle*, 118 Ill. 605.

2. Application of Statute.—The statutes abolishing the fictions in ejectment are limited in their application to cases where ejectment was previously the proper remedy. They were not intended to apply to the common-law writ of right. *Henry v. Thorpe*, 14 Ala. 103.

Substantial Conformity to Statute Sufficient.—Substantial conformity only to the statute is required. The words of the statute may be dispensed with, provided other language of the same import be used. *Dunn v. Remington*, 9 Neb. 82.

Special Complaints.—Special complaints, unless prohibited, may be proper where the rights of the parties depend wholly upon questions of construction. *Lawe v. Hyde*, 39 Wis. 345.

3. In so far that improper conduct by the tenant at the time of its delivery has been held punishable as a contempt. *Rex v. Unitt*, 1 Stra. 567.

No Additional Process Necessary to Compel Appearance.—The usual declaration and notice are sufficient to bring the defendant into court. No additional process or writ need be issued or served upon him. *Cruise v. Riddle*, 21 Ala. 791.

4. Knapp v. Pults, 3 How. Pr. (N. Y. Supreme Ct.) 53.

5. Sliger v. Grants, 7 T. B. Mon. (Ky.) 406.

Oral Evidence as to Time of Filing.—The plaintiff's attorney may prove the time of filing the original declaration without producing the document itself, provided that no question other than

Entitling.—As in other suits, the title of the court¹ and the venue of the property should be stated.²

Names of the Parties.—The names, too, of the parties litigant should be stated with the usual accuracy, as no judgment can be rendered against one not a party to the suit.³

3. Location and Description of Property—*a. IN GENERAL.*—The lands sought to be recovered by the action of ejectment must be described with reasonable accuracy in the declaration or complaint.⁴

the time of issuing be in dispute. *Den v. Hamilton*, 12 N. J. L. 109.

1. Title a Matter of Form.—The title to the declaration is not an essential requisite. The declaration is good without any title, *Jackson v. Stiles*, 6 Cow. (N. Y.) 597; or when entitled of the wrong term. *Den v. Snowhill*, 13 N. J. L. 23; *Den v. McShane*, 13 N. J. L. 35.

2. Venue Local.—The venue in ejectment is local and confined to the county in which the lands are situated. *Adams on Ejectment* 209; *Draper v. Kirkland*, 1 Head (Tenn.) 260.

Action Brought in Wrong County.—When any local action is brought in the wrong county, the defendant may plead the fact, or demur if it appear on the record, or reserve his objection until the trial. *Blake v. Freeman*, 13 Me. 130.

3. Ford v. Doyle, 37 Cal. 346; *McKinlay v. Tuttle*, 42 Cal. 570.

A Trustee holding the legal title to land need not, in a writ of entry, set forth that he is trustee. *Simpson v. Dix*, 131 Mass. 179.

Residence of Parties.—The situation of the premises controls the jurisdiction of the court in ejectment, and consequently it is unnecessary for the declaration to state the residence of either of the parties. *Doll v. Feller*, 16 Cal. 432.

Nonjoinder — Waiver. — Unless the nonjoinder of the actual occupants of the premises is set up in the answer, the omission may be held to have been waived. *Clason v. Baldwin*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 291.

Misnomer — Plea in Abatement. — A plea in abatement is admissible in ejectment as in other actions. Its only effect, however, is to discharge the defendant's bail. The defendant having disclosed his true name in his plea, must plead in chief by that name, or the court will permit judgment by default

to be taken against him, and he will be turned out of possession. *Dixon v. Cavanaugh*, 1 Overt. (Tenn.) 365.

Relations of Defendants.—It is not necessary that the pleadings in ejectment should show the different conditions and relations of the defendants. *Crane v. Seitz*, 30 Mich. 453.

Husband and Wife.—Although the husband must join in ejectment for the lands of his wife, a general averment of their seisin and possession will be sufficient without specifying that the husband held in his wife's right. *Kelsey v. Hanmer*, 18 Conn. 316; *Watson v. Watson*, 10 Conn. 88.

Declaration in Guardian's Name for Ward's Land.—Objection to a declaration in the name of the guardian for land of a ward should be made by demurrer, but if the declaration fully sets forth the ward's title, the mere misnomer is curable by amendment. *Kinney v. Harrett*, 46 Mich. 87.

Real Parties before the Court.—Even under the ancient practice, the court should take notice of the real parties litigating. *Campbell v. Sproat*, 1 Yeates (Pa.) 20.

Substitution of Real Defendant.—The real defendant may be substituted for the nominal one even after verdict and judgment. *Crawford v. Green*, 1 Harr. (Del.) 464.

4. Bush v. Glover, 47 Ala. 167; *Jenkins v. Noel*, 3 Stew. (Ala.) 60; *Sturdevant v. Murrell*, 8 Port. (Ala.) 317; *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 75 Ala. 516; *Livingston County v. Morris*, 71 Mo. 603; *Russell v. Fee*, 1 Browne (Pa.) 194; *Wallace v. Elder*, 5 S. & R. (Pa.) 143.

The plaintiff cannot recover lands not described in his declaration. *Two-good v. Hoyt*, 42 Mich. 609.

Description in the Præcipe.—If land sued for be sufficiently described in the præcipe, no further description need be filed. *Cahill v. Benn*, 6 Binn. (Pa.)

What Is Reasonable Accuracy.—What is reasonable accuracy will depend largely upon the facts connected with the case. There is no accurate and defined rule in the matter, beyond that the modern tendency has been to relax, rather than increase, the degree of certainty required within the moderate limits which experience has shown to be reasonable and convenient.¹

Should Enable Sheriff to Locate Property.—Generally speaking, the description should be sufficient to enable the sheriff to deliver the possession of the property after judgment.²

99. But if the township be misnamed in the præcipe and writ, it may be taken advantage of under the general issue. *Stimmel v. Miller*, 8 Pa. Co. Ct. Rep. 128.

Land Office Survey.—A description according to the surveys of the United States land office is sufficient. *Hammer v. Eddins*, 3 Stew. (Ala.) 192; *Wade v. Doyle*, 18 Fla. 630; *Pickett v. Planters Bank*, 5 Smed. & M. (Miss.) 470.

1. *Sawyer v. Fitts*, 4 Stew. & P. (Ala.) 365; *Rayburn v. Elrod*, 43 Ala. 700; *Sims v. Thompson*, 30 Ala. 158; *Heifner v. Porter*, 12 Ala. 470; *Parr v. Van Horn*, 38 Ill. 226; *Harrison, etc., Turnpike Co. v. Roberts*, 33 Ind. 246; *Franco v. Allman*, 77 Ind. 417; *Hitchcox v. Rawson*, 14 Gratt. (Va.) 526; *Adams on Eject.* 24. See also article DEFINITENESS AND CERTAINTY IN PLEADING, vol. 6, p. 260.

Mathematical Accuracy Not Required.—Mathematical accuracy in the description is not absolutely essential; and a description should not be rejected merely because it is awkwardly or poorly worded, provided the meaning is reasonably clear. *Winslow v. Cooper*, 104 Ill. 235. Thus a complaint is not insufficient which describes an entire tract of land belonging to the plaintiff and then alleges that the defendant is unlawfully in possession of a part of it, without specifically describing the part intended. *Speight v. Jenkins*, 99 N. Car. 143.

Description by Reputed Name.—A tract of land known by a particular name may be described by such name in the declaration. *Hildreth v. White*, 66 Cal. 549; *Castro v. Gill*, 5 Cal. 40; *Whitney v. Buckman*, 19 Cal. 300; *Fouke v. Kemp*, 5 Har. & J. (Md.) 135.

Mistake in Name.—A slight error in the name of the property sued for will not vitiate the declaration where it is evident what property is meant. The

substitution of "Rupalta" for "Repalta" has been held immaterial error, *Mitchell v. Gover*, 1 Har. & J. (Md.) 507; also "West Route" for "Western Route," *Huddleson v. Reynolds*, 8 Gill (Md.) 332.

Repugnant Words in the declaration may be regarded as surplusage when they do not vitiate its certainty. *Lynn v. Downes*, 1 Yeates (Pa.) 518.

Surplusage.—Where unnecessary and additional terms of description are used in the declaration, such superfluous matter need not be proven. Thus, where the plaintiff declared for certain tracts of land, fully describing them, and then went on to say that they composed the dwelling-plantation of one W., it was held unnecessary to prove the latter allegation. *Medley v. Williams*, 7 Gill & J. (Md.) 61.

2. *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; *Clark v. Clark*, 7 Vt. 190; *Sawyer v. Fitts*, 4 Stew. & P. (Ala.) 365.

Description must Be Sufficient in Itself.—The description in the declaration must be sufficient in itself without reference to other descriptions to be found elsewhere. *Atwood v. Atwood*, 22 Pick. (Mass.) 283; *Willey v. Nichols*, 59 Me. 253; *Bragg v. White*, 66 Me. 157. It need not, however, be so certain as to enable the sheriff to identify the premises exactly, without having been informed of what to deliver possession, the custom being for the sheriff to deliver possession of the premises recovered according to the directions of the claimant. *Adams on Ejectment* 24; *Seward v. Jackson*, 8 Cow. (N. Y.) 427.

In Words of Title Deeds.—The declaration need not describe the property sued for in the precise words of title deeds introduced in evidence of plaintiff's title, unless it undertakes to set out the description used in the deeds. *Hovey v. Smith*, 22 Mich. 170.

Should Give the State and County.—The description should name the state and county within which the premises lie, either directly¹ or by reference.²

Description must Identify.—The purpose of the description is to identify the property. If the identification is complete, the description is sufficiently certain.³

Declaration Corresponding with Deed.—The description must substantially correspond with that in a deed introduced as evidence, at least sufficiently to establish the identity of the land. *Ashmead v. Wilson*, 22 Fla. 255.

Variance.—A material variance between the description of the property in the declaration and that produced at the trial will be fatal to the action. Thus a declaration for ten acres off the east side of the southeast quarter will not permit the introduction of evidence of title to ten acres off southeast side of the described quarter. *Buchanan v. Whitham*, 36 Ind. 257. But the substitution of "range 22 west" for "range 22 east" was held not a fatal variance in *Du Pont v. Davis*, 30 Wis. 170.

1. *Minkhart v. Hankler*, 19 Ill. 47; *Leary v. Langsdale*, 35 Ind. 74.

Location in a Town.—It is sufficient to locate the property sued for in a certain town within the county, without alleging that the land is within the county in which the suit is brought. *Martin v. Martin*, 51 Me. 366; *Moulton v. Trafton*, 64 Me. 218; *Cole v. Segraves*, 88 Cal. 103.

Land in Two Counties.—In the absence of statute, land lying in different counties cannot be recovered in the same action. There must be a separate entry and a separate action in each county. *Sowder v. McMillan*, 4 Dana (Ky.) 458.

Separate Tracts of Land.—Ejectment may be for separate and distinct parcels of land. In such a case the action must be brought against each separate holding. *Walsh v. Varney*, 38 Mich. 73; the cause of action must be separately stated; must affect all the parties to the suit, and must not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

2. Specifying the county as "in said county," referring to the designation in the title of the suit, is sufficient. *Doll v. Feller*, 16 Cal. 432.

3. *Alabama.*—*Jenkins v. Noel*, 3 Stew.

(Ala.) 60; *Sturdevant v. Murrell*, 8 Port. (Ala.) 317.

California.—*Sherman v. McCarthy*, 57 Cal. 507; *Hihn v. Mangelberg*, 89 Cal. 268; *Doll v. Feller*, 16 Cal. 432; *Whitney v. Buckman*, 19 Cal. 300.

Connecticut.—*Talbot v. Wheeler*, 4 Day (Conn.) 455; *Apthorp v. Backus*, *Kirby* (Conn.) 414.

Indiana.—*Cunningham v. McCollum*, 98 Ind. 38; *Sphung v. Moore*, 120 Ind. 352.

Maine.—*Baker v. Bessey*, 73 Me. 472.

Maryland.—*Budd v. Brooke*, 3 Gill (Md.) 198; *Tyson v. Shueey*, 5 Md. 540; *Clary v. Kimmell*, 18 Md. 246.

Massachusetts.—*Riley v. Smith*, 9 Allen (Mass.) 370; *Howard v. College of the Holy Cross*, 116 Mass. 117.

Michigan.—*Seeley v. Howard*, 23 Mich. 11.

Minnesota.—*May v. First Div. St. Paul*, etc., R. Co., 26 Minn. 74.

Pennsylvania.—*Hawn v. Norris*, 4 Binn. (Pa.) 77; *Lyons v. Miller*, 4 S. & R. (Pa.) 279; *Thomas v. Culp*, 4 S. & R. (Pa.) 271; *Griffeth v. Dobson*, 3 P. & W. (Pa.) 228; *Tryon v. Carlin*, 5 Watts (Pa.) 371.

Thus a description of one of the boundary lines as running due west to the source of a designated creek is not insufficient on its face. *Carpentier v. Grant*, 21 Cal. 140. And a declaration for "a certain lot of land lying in the town of Roncverte in the county aforesaid, being the piece of land near the railroad depot in said town, upon which the said defendant has erected a pumphouse and appliances for the purpose of supplying its engines with water," has been held good on demurrer. *Carter v. Chesapeake*, etc., R. Co., 26 W. Va. 644.

Identity Proven by Parol.—Where the description of the land in the deed introduced as evidence appears to differ from that of the pleadings, it may be proven by parol that the same land is described in both proof and pleadings. *Ashmead v. Wilson*, 22 Fla. 255.

Testimony of Surveyor to Description.—Where a surveyor testified that a point

Identification must Be Full and Complete.—The identification must be full and complete, for if the description is vague or uncertain the defect will be fatal to the declaration.¹

b. WHERE PART OF A LARGER TRACT IS SUED FOR.—Special care should be taken in describing and locating the premises when a part only of a larger tract is sued for.²

described as 208 chains, 20 links east of the corner to townships one and two north, ranges four and five west, Mount Diablo meridian, was sufficiently definite for identification, the description was held sufficiently certain. *Sherman v. McCarthy*, 57 Cal. 507.

Description by Number.—A description by number is sufficient in a city having a known system of notation, *Flanigen v. Philadelphia*, 51 Pa. St. 491; or as marked on a certain existing plan, whether the plan be recorded or not. *Kennebec Purchase v. Lowell*, 2 Me. 149.

Undivided Lots.—A declaration describing the premises sued for as a lot of a certain number, in a town, the lands of which had been surveyed into lots and numbered, but never legally divided, was held sufficiently explicit. *Coit v. Wells*, 2 Vt. 318.

Description by Metes and Bounds—Statute.—Where the statute requires a description of the property by metes and bounds, the description by metes and bounds is required only so far as they may be necessary to identify the property. *Doll v. Feller*, 16 Cal. 432; *Whitney v. Buckman*, 19 Cal. 300.

Description by Courses and Distances.—Where the description by courses and distances is at variance with the general description contained in the same declaration, the former must control. *Haggin v. Lorenz*, 15 Mont. 309.

Claims Confined to Courses and Distances.—It is true as a general principle that the lines of a tract of land originally run by courses and distances without calls must be confined to the courses and distances stated, and cannot be extended beyond them. *Girard v. Hughes*, 1 Gill & J. (Md.) 249; *Rogers v. Raborg*, 2 Gill & J. (Md.) 54; *Thomas v. Godfrey*, 3 Gill & J. (Md.) 142. If the plaintiff describe the property by courses and distances without naming any monument except the point begun at, and without reference to any survey or to the lines of the lot, he can only recover according to the direction

of the magnetic needle at the time of suit brought. *Brooks v. Tyler*, 2 Vt. 348.

1. *Unversaw v. Myers*, 37 Ind. 487; *Jolly v. Ghering*, 40 Ind. 139; *Ramsey v. O'Leary*, 61 Me. 366; *Lane v. Abbott*, 23 Neb. 489; *Lazar v. Caston*, 67 Miss. 275; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; *Davis v. Judge*, 44 Vt. 500; *Clark v. Clark*, 7 Vt. 190; *Raymond v. Longworth*, 14 How. (U. S.) 76; *Denise v. Ruggles*, 16 How. (U. S.) 242; *Smith v. Price* (Ky. 1888), 7 S. W. Rep. 918.

May Be Fatal after Judgment.—A failure to describe with sufficient certainty the land sued for may be fatal even after judgment by default. *Haggin v. Lorenz*, 15 Mont. 309.

Formal Defects Cured by Judgment.—Mere formal defects in the declaration will be cured by a verdict, or by a judgment by default and writ of inquiry executed. *Higgins v. Highfield*, 13 East 407.

Defective Description Cured by Defendant's Plea.—Where the description of the property sued for was defective in one particular, which was fully corrected and supplied by the defendant's plea, it was held that the plaintiff could recover, the declaration and plea together leaving no doubt as to the property sued for. *Campe v. Renandine*, 64 Miss. 441.

2. Thus it has been held insufficient to describe the property sued for as "120 acres of common land that lieth in a tract of land containing 210 acres," the bounds only of the whole tract being given, *Rochester v. Hammond*, *Quincy (Mass.)* 159; *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; and a declaration describing the lands sued for as part of a larger tract near certain creeks of no public notoriety, *Hitchcox v. Rawson*, 14 Gratt. (Va.) 526; and a declaration for "a portion of a strip of land ten rods wide off from the west side" of a designated forty-acre lot, *White v. Hapeman*, 43 Mich. 267, were likewise held insufficient. But a description of land as fifty acres

4. Statement of Plaintiff's Interest and Estate—*a.* **ALLEGATION OF AMOUNT—Extent of Plaintiff's Interest.**—Although the amount of land sued for need not be definitely alleged if the description in other respects is sufficient,¹ the estate or interest of the plaintiff in the property should be stated with reasonable certainty.²

Plaintiff should Declare for More than He Claims.—He may, and often should, declare for a greater interest than he actually claims, for in that case he may recover for a less amount, while in all cases the amount of his recovery is limited by his declaration. He may recover less, but he cannot in any instance recover more, than he has declared for.³

b. **ALLEGATION OF TENURE.**—In addition to alleging his interest in the premises, the plaintiff should generally allege the nature of his estate, whether it be a fee simple, a life estate, or for a term

in the southern part of a lot has been held sufficiently certain. *St. John v. Northrup*, 23 Barb. (N. Y.) 25.

Blank in Description.—A material omission from the description will make it fatally defective, even after verdict. *Unversaw v. Myers*, 37 Ind. 487. So a declaration for "part of the south-west quarter of section—" was held too uncertain, even though the acreage was given. *Jolly v. Ghering*, 40 Ind. 139.

1. *Jones v. Porter*, 3 P. & W. (Pa.) 132.

2. *Haight v. Clifford*, 42 Wis. 571.

Extent of Interest Only need be Stated.—The plaintiff is required to state the extent of his interest. He need not state the evidence or proof upon which he expects to rely. *Larum v. Wilmer*, 35 Iowa, 244; *Kansas Pac. R. Co. v. McBratney*, 12 Kan. 9; *Richards v. Pierce*, 44 Mich. 444.

Pleading where Declaration Fails to Show Nature and Quality of Estate.—If the declaration fails to state the nature and quality of the estate claimed by the plaintiff, it should be demurred to before pleading to the merits. After issue joined, it is too late to move for dismissal on such ground. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

Demurrer Improper at Common Law.—A demurrer will not lie to the declaration in the common-law action of ejectment. If the declaration is defective, the proper mode of reaching the defect is by motion to set it aside before entering into the consent rule and pleading not guilty. *Doe v. McDougal*, 48 Ala. 383.

In Indiana it has been held that a failure to state the nature or extent of

the interest claimed by the plaintiff cannot be taken advantage of by demurrer, a motion to make more certain being the proper pleading. *Schenck v. Kelley*, 88 Ind. 444.

3. *Alabama.*—*Jones v. Walker*, 47 Ala. 175; *White v. St. Guirons, Minor* (Ala.) 337; *Baker v. Chastang*, 18 Ala. 417.

California.—*Gillespie v. Jones*, 47 Cal. 259.

Florida.—*Horne v. Carter*, 20 Fla. 45.

Georgia.—*Bailey v. Jones*, 14 Ga. 384; *Bryan v. Averett*, 21 Ga. 401.

Kentucky.—*Bowles v. Sharp*, 4 Bibb (Ky.) 551; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 49; *Young v. Adams*, 14 B. Mon. (Ky.) 102.

New York.—*Harrison v. Stevens*, 12 Wend. (N. Y.) 170; *Van Alstyne v. Spraker*, 13 Wend. (N. Y.) 578; *Barley v. Roosa*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 113; *Bear v. Snyder*, 11 Wend. (N. Y.) 592.

Pennsylvania.—*Santee v. Keister*, 6 Binn. (Pa.) 36.

Tennessee.—*Patton v. Cooper*, *Cooke* (Tenn.) 133; *Bird v. Fannon*, 3 Head (Tenn.) 12.

Wisconsin.—*Riehl v. Bingenheimer*, 28 Wis. 84.

Undivided Interest.—Plaintiff may recover an undivided interest less than the one declared for. *Halsey v. Martin*, 22 Cal. 645. But it has been held that the plaintiff cannot recover for an undivided interest less than the whole under a declaration for the entire premises. *Murphy v. Orr*, 32 Ill. 489; *Hardin v. Kirk*, 49 Ill. 153. But see *Bresee v. Stiles*, 22 Wis. 120.

Ejectment for Dower.—In ejectment for dower, where the dower has been

of years; if for life, for whose life; if for a term of years, the duration thereof.¹

5. Allegation of Seisin or Title—Prior Possession.—While the plaintiff must tender an issue as to the title to the property in his complaint,² it is not necessary for him to set forth at

assigned by admeasurers, the declaration need not be for an undivided third of the original estate but may be for the specific lands admeasured. *Borst v. Griffin*, 9 Wend. (N. Y.) 307; *Ward v. Kilts*, 12 Wend. (N. Y.) 137.

1. *Mitchell v. Campbell*, 19 Oregon 198; *Payne v. Treadwell*, 16 Cal. 220; *Rawlings v. Bailey*, 15 Ill. 178; *Wyman v. Brown*, 50 Me. 139; *Rawson v. Taylor*, 57 Me. 343; *Parker v. Murch*, 64 Me. 54; *Goodall v. Henkel*, 60 Mich. 382; *Thompson v. Wolf*, 6 Oregon 308.

Averment of Ownership in Fee Simple.—An averment that the plaintiff is "the owner in fee simple" of the lands sued for is a sufficient averment of his title. Such an averment is not demurrable as a conclusion of law. *Johnson v. Vance*, 86 Cal. 128.

No Further Averment Necessary.—If the declaration avers an ownership and seisin in fee in the plaintiff, and an ouster by the defendant previous to the commencement of the action, it is not necessary to aver further that the plaintiff was the owner in fee at the commencement of the suit. *Salmon v. Symonds*, 24 Cal. 260.

"Fee" Equals "Fee Simple."—The word "fee" without any adjunct or limitation describes the same estate as the words "fee simple," the two expressions being used indifferently by the best law writers. *Jordan v. Record*, 70 Me. 529; *Baker v. Bessey*, 73 Me. 472; *Com. v. Roxbury*, 9 Gray (Mass.) 451; *Butrick v. Tilton*, 141 Mass. 93.

"Claims in Fee Simple Absolute."—An averment that the plaintiff "was possessed of" certain lands, which "the said plaintiff claims in fee simple absolute," is an averment of title to the premises in fee simple. *Marshall v. Shafter*, 32 Cal. 176.

Allegation that Plaintiff Is "Owner."—An allegation that the plaintiff is the owner of the land sued for has been held a sufficient description of the nature of his estate to sustain the action, in the absence of a demurrer or other defense before issue joined. *Johnson v. Crookshanks*, 21 Oregon 339. For

the allegation that the plaintiff "is the owner" of the land sued for is substantially an allegation of seisin in fee in ordinary instead of in technical language. *Garwood v. Hastings*, 38 Cal. 216.

Substantial Allegation.—A complaint is sufficient on demurrer which substantially shows title in the plaintiff by the facts stated, without formally stating in conclusion that he is the owner of the property. *Lovely v. Speiss-hoffer*, 85 Ind. 454.

Facts in Issue Conclusive.—The plaintiff may aver seisin in fee, for life, or for years, or he may aver a former possession and ouster. In either case, whatever is put in issue and determined is conclusive and final. *Caper-ton v. Schmidt*, 26 Cal. 479.

Plaintiff must Prove Estate Declared For.—The plaintiff can only recover on the estate declared for. *Bowman v. Pinkham*, 71 Me. 295. He cannot allege a seisin in fee simple and recover on proof of a life estate. *Almond v. Bonnell*, 76 Ill. 536; *Forsyth v. Rowell*, 59 Me. 131. Nor can a plaintiff, proving an estate in fee tail, recover on alleging a fee simple estate. *Hamilton v. Wentworth*, 58 Me. 101; *Parker v. Murch*, 64 Me. 54.

Fractional Parts.—The plaintiff may recover under a declaration claiming the fee simple to a portion of the whole estate. *Almond v. Bonnell*, 76 Ill. 536.

2. *Johnson v. Crookshanks*, 21 Oregon 340.

Legal Title in Plaintiff.—The declaration must show a legal title in the plaintiff at the commencement of the suit, in the absence of a statute allowing recovery on an equitable title. *Jones v. Lofton*, 16 Fla. 189; *Simmons v. Spratt*, 20 Fla. 495; *Carn v. Haisley*, 22 Fla. 317; *Emeric v. Penniman*, 26 Cal. 119; *Huntington v. Jewett*, 25 Iowa 249. An equitable interest ripening into a legal title after suit is brought will not sustain the action. Thus a tax deed executed after suit brought will not support the action, although plaintiff might have held a certificate of sale and might have had

length all the facts relating to his title.¹

Need Not Set Out Evidence of Title.—The plaintiff need not set out in his declaration his muniments of title,² nor attach copies of the

the deed before suit. *Paul v. Fries*, 18 Fla. 573.

Variance.—If the plaintiff aver a legal right to the possession of the property sued for, he cannot recover on proof of an equitable title only. *Groves v. Marks*, 32 Ind. 319.

Averment of Control and Possession.—An averment that the plaintiff exercised "acts of control over and possession of portions" of the premises sued for is not equivalent to an averment of actual possession of the premises or any part thereof. *Brennan v. Ford*, 46 Cal. 7.

Averment of Seisin in Fee Simple.—An averment of seisin in fee simple is a sufficient averment of the plaintiff's right of possession, *Parr v. Van Horn*, 38 Ill. 226; since it is equivalent to an averment of the right to immediate possession of the property. *Halsey v. Gerdes*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 395. But see *Moore v. Lehman*, 52 N. Y. Super. Ct. 283.

1. *Garrison v. Sampson*, 15 Cal. 93.

It is sufficient to state that the plaintiff has lawful title to the premises which the defendant in possession wrongfully withholds from him. *Keller v. Ruiz De Oceana*, 48 Cal. 638; *Hihn v. Mangenberg*, 89 Cal. 268; *Coryell v. Cain*, 16 Cal. 567; *Salmon v. Symonds*, 24 Cal. 260; *Brown v. Martin*, 25 Cal. 82; *Payne v. Treadwell*, 16 Cal. 220; *Walter v. Lockwood*, 23 Barb. (N. Y.) 228, 4 Abb. Pr. (N. Y.) 309; *People v. New York*, 28 Barb. (N. Y.) 240; *Ensign v. Sherman*, 14 How. Pr. (N. Y. Supreme Ct.) 439; *Sanders v. Leavy*, 16 How. Pr. (N. Y. Supreme Ct.) 308.

Matters of Evidence.—All matters of evidence, such as the mesne conveyances in the plaintiff's title, should be stricken from the complaint on motion. *Coryell v. Cain*, 16 Cal. 567; *Larco v. Casaneuava*, 30 Cal. 560. It is sufficient to state that the plaintiff was lawfully entitled to the possession of the premises. *Gladwin v. Stebbins*, 2 Cal. 103.

General Character Only.—The general character only of the estate claimed need be averred. A detailed statement of the facts which constitute such estate is not required. *Austin v. Schluyter*,

7 Hun (N. Y.) 275. But if the plaintiff undertakes to set out the details, he should set them out with sufficient definiteness to inform the defendant what it may be necessary for him to controvert. *Gillis v. Black*, 6 Iowa 439.

Bill of Particulars.—When the declaration is general and the defendant is in doubt for what the plaintiff means to proceed, an order for particulars may be obtained. *Den v. Phillips*, 21 N. J. L. 436. See article **BILLS OF PARTICULARS**, vol. 3, p. 549.

The bill of particulars sets forth only the documentary evidence upon which the plaintiff intends to rest his suit. All other evidences of title are excluded. *Graham v. Whitely*, 26 N. J. L. 255.

No Notice of Proof in Rebuttal Required.—Although the plaintiff is required to set forth fully the documentary evidence of his title in his bill of particulars, he is not required to give notice to the defendant of the documents which he may have to use in rebuttal. *Miller v. Mead*, 39 N. J. L. 538.

Variance.—The plaintiff must prove his title as set forth in his bill of particulars, for if the bill of particulars specifies that he claims by devise, he cannot claim by descent. *Graham v. Whitely*, 26 N. J. L. 255.

Two Counts—Surplusage.—A declaration which sets up a tax title to the premises in one count, and then in another count makes the usual general allegations, is not liable to a general demurrer, since the first count may be treated as surplusage. *Cole v. Seagraves*, 88 Cal. 103.

Allegation of Estoppel.—The plaintiff should not attempt to set up estoppel by former judgment in his complaint. *Clink v. Thurston*, 47 Cal. 21.

2. *Pease v. Hannah*, 3 Oregon 301.

Specific Deraignment of Title.—If the plaintiff attempts to set forth a specific deraignment of his title, he must aver every fact required for recovery. *Castro v. Richardson*, 18 Cal. 478.

Probate of Will must be Averred.—If, in such a deraignment of title, a will is set out in the declaration as one of the links in the chain, it is necessary to aver that it has been admitted to

title papers to his petition,¹ but he must allege a right to the immediate possession of the property.²

Date Immaterial.—Although the seisin or prior possession of the property is a pleadable and issuable fact, and should be alleged in the complaint,³ it need not be laid on any particular day, the date being material only where the mesne profits are involved.⁴

probate. *Castro v. Richardson*, 18 Cal. 478.

Contract of Sale in Abstract of Title.—Where a contract of sale is set up in the plaintiff's abstract of title, it should be sufficiently set out to take the transaction out of the statute of frauds, giving to the defendant all the necessary information about its essential elements. 3 Lack. Jur. (Pa.) 289.

Allegation of Sale by Order of Court.—It is not necessary to plead all the proceedings in a sale by order of court. It is sufficient to describe the title of the plaintiff, setting forth a copy of the sheriff's certificate of sale, together with an allegation that it has been confirmed. *Belles v. Miller*, 10 Wash. 259.

1. *Boardman v. Beckwith*, 18 Iowa 292.

But if he does undertake to show his title in the complaint, he should set it out with sufficient particularity to inform the defendant what it may be necessary for him to controvert. *Gillis v. Black*, 6 Iowa 439.

2. **Right of Possession.**—Right of possession is incident to the legal title, and therefore one having the legal title is presumed to be in possession. *Levy v. Cox*, 22 Fla. 546.

Must be Alleged.—Where it is so enacted by statute, the plaintiff must allege that he is entitled to the possession of the property. *Bingham v. Kern*, 18 Oregon 199. Such an allegation is essential, and is not supplied by alleging the plaintiff's ownership in fee and a withholding of possession. *Barclay v. Yeomans*, 27 Wis. 682.

Averment of Time.—The plaintiff's right of possession must be averred to have accrued at a time when it actually existed. *Vreeland v. Ryerson*, 28 N. J. L. 205.

Statutory Averments should be Made.—All the averments prescribed by the statute must be included within the complaint where the statute so orders; the complaint should aver that the plaintiff is entitled to possession, or that the defendant wrongfully or un-

lawfully withholds the same from him, *Alvord v. Hetsel*, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 88; *Taylor v. Crane*, 15 How. Pr. (N. Y. Supreme Ct.) 358; even though the premises may be unoccupied. *Platto v. Jante*, 35 Wis. 629.

3. **Defect Cured by Verdict.**—Although the seisin of the plaintiff should be alleged, the omission so to allege is cured by a verdict that he was disseised. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

4. *Yount v. Howell*, 14 Cal. 465. It is sufficient if stated generally. *Masterson v. Townshend*, 57 N. Y. Super. Ct. 21; *Oury v. Duffield*, 1 Arizona 509; *Billings v. Sanderson*, 8 Mont. 201.

Omission of Year.—Where the declaration alleges that the plaintiff was seised of the premises sued for on a certain day and month, but omits to state the year, it will be presumed that the seizure was previous to the commencement of the suit. *Whiteside v. Branch Bank*, 10 Ala. 249.

Omission of Day of Month.—A failure to state in the declaration upon what day of the month the plaintiff was ousted from his possession, though ground for a demurrer, is cured by verdict. *Parr v. Van Horn*, 38 Ill. 226.

Statutory Limitation.—Where a statute requires the plaintiff to have been seised or possessed within a certain time preceding the institution of the suit, a complaint alleging an ouster antecedent to the statutory limitation does not on its face bar the action. A complaint alleging an ouster more than five years before the institution of the suit, but alleging seisin in fee and right of possession in plaintiff, is not on its face defective under a statute requiring seisin or possession within five years of the commencement of the action. *Peter v. Stephens*, 11 Mont. 115.

Continuance of Seisin Presumed.—When seisin has once been shown, it will be presumed to continue until allegation and proof of adverse possession in some one else. *Balch v. Smith*, 4

General Statement Sufficient.—In short, a general statement of the title or right of the plaintiff is sufficient.¹

6. Averment of Ouster.—The plaintiff must aver that the defendant has ousted him, and withholds from him the possession of the premises sued for, or his declaration may be fatally defective.²

Substantial Averment Sufficient.—The plaintiff need not, however, allege formally that he has been ousted by the defendant, and that the property is wrongfully withheld from him, provided these facts appear substantially from the context of his declaration.³

Wash. 497. An allegation that the ancestor of the plaintiff died seised or possessed of the property has been held sufficient to show seisin in plaintiff. *Garner v. Manhattan Bldg. Assoc.*, 6 Duer (N. Y.) 539; *Balch v. Smith*, 4 Wash. 497. And an averment that the plaintiff was possessed of the property sued for on a certain day, and that while so possessed on a certain later day the defendant entered and ejected him, shows possession of plaintiff sufficiently, although twenty-five years intervene between the two days. *Schoonmaker v. Doolittle*, 118 Ill. 605. Nor does it follow that the plaintiff's right of action is lost because it is averred to have accrued thirty years before suit brought. *Van Cleve v. Rook*, 40 N. J. L. 25.

In Minnesota an allegation of title in the plaintiff on a day before the commencement of the suit will raise no presumption of ownership or right of possession at the time of suit brought. A declaration so alleging is defective, and the defect is not cured by an allegation that the entry of the defendant was wrongful and in defiance of the plaintiff's rights. *Armstrong v. Hinds*, 8 Minn. 254; *Miller v. Hoberg*, 22 Minn. 249.

1. *Masterson v. Townshend*, 57 N. Y. Super. Ct. 21; *Oury v. Duffield*, 1 Arizona 509; *Billings v. Sanderson*, 8 Mont. 201; *Northern Pac. R. Co. v. Lilly*, 6 Mont. 65; *McCauley v. Gilmer*, 2 Mont. 202; *Mauldin v. Ball*, 5 Mont. 96; *Helena First Nat. Bank v. Roberts*, 9 Mont. 328.

In Indiana the declaration need not allege that the plaintiff owns the land sued for in fee, *Vance v. Schroyer*, 82 Ind. 114; but must allege his right of possession, *Vance v. Schroyer*, 77 Ind. 501; *Swaynie v. Vess*, 91 Ind. 584; or it will be bad on demurrer, *Miller v. Shriner*, 87 Ind. 147; *Simmons v. Lindley*, 108 Ind. 297; both before and after

verdict, *Mansur v. Streight*, 103 Ind. 358.

2. *Holmes v. Williams*, 16 Minn. 164. No judgment can be regularly taken against one as to whom there is no such allegation. *McKinlay v. Tuttle*, 42 Cal. 570. But in a complaint against several defendants it was held immaterial error that the declaration averred an ouster by the "defendant." *Fay v. McKeever*, 59 Cal. 307.

After Judgment by Default.—The want of an averment of ouster is fatal even where a judgment by default has been taken through the mistake or inadvertence of the counsel of the defendant. *Watson v. Zimmerman*, 6 Cal. 46.

Florida—*Allegation of Ouster Unnecessary.*—"The statute prescribes a form for all actions of ejectment. The old fictions accompanying the action are abolished, and the plea of not guilty puts in issue the title. In actions of ejectment, other than between tenants in common, there can be no ground upon which an ouster can be required to be alleged in the declaration." *Gale v. Hines*, 17 Fla. 773.

Demand, where Required, should be Alleged.—Where a demand for the possession of the premises sued for is a condition precedent to the right of action, it should be alleged in the complaint. *McClane v. White*, 5 Minn. 178.

3. *Van Voorhis v. Kelly*, 31 Hun (N. Y.) 293.

Ouster in Substance.—He must allege facts, however, to show that at the commencement of the suit the defendant was in possession of the premises to which, at that time, the plaintiff was legally entitled. *Alexander v. Campbell*, 74 Mo. 142. A declaration alleging ownership in plaintiff, possession by defendant at commencement of suit, together with an unlawful withholding of premises after demand therefor by plaintiff, is sufficient. *Wells v. Masterson*, 6 Minn. 566.

Date need Only Be Subsequent to Plaintiff's Title.—The exact date of the occurrence of such ouster need not be stated, provided it be laid subsequent to the accrual of the plaintiff's title, and before the commencement of the suit.¹

Also one alleging ownership in fee in plaintiff, subsequent entry by defendant, and wrongful withholding of possession. *McClane v. White*, 5 Minn. 178; *Merrill v. Dearing*, 22 Minn. 376.

Wrongful Withholding Equivalent to Ouster.—An averment of a wrongful withholding of the possession by the defendant is equivalent to an averment of ouster. *Marshall v. Shaffer*, 32 Cal. 176; *Rego v. Van Pelt*, 65 Cal. 254.

Continuous Adverse Holding.—A complaint in ejectment which fails to aver a continued adverse holding on the part of the defendant will be deemed insufficient. *Steinback v. Fitzpatrick*, 12 Cal. 295. But it is not necessary, in order to recover on the ground of adverse possession by plaintiff, to aver an adverse possession for the statutory number of years. It is sufficient in such a case to aver that the plaintiff's grantor had been in possession more than the statutory number of years before the institution of the suit, although such an averment is unnecessary and superfluous. *Gillespie v. Jones*, 47 Cal. 259.

Negating all Possible Right of Possession in Defendant.—There is no necessity of denying every possible rightful character of defendant's possession. Although such possession is a pleadable and issuable fact, if it rests upon any existing right, it must be shown affirmatively in the defense. *Payne v. Treadwell*, 16 Cal. 220.

"Wrongful or Unlawful" Possession.—The use of the adjectives "wrongful" or "unlawful" to characterize the possession of the defendant, adds nothing to the weight of the declaration. The words are mere surplusage, and, although harmless, they do no good. *Payne v. Treadwell*, 16 Cal. 220.

"Wilfully, Fraudulently, Maliciously, and Forcibly."—The use of the words "wilfully, fraudulently, maliciously, and forcibly," to describe the entry and ouster by the defendant, does not affect a claim good in other respects. *Hildreth v. White*, 66 Cal. 549.

In Indiana the complaint should allege that the defendant keeps the plaintiff from the possession of the premises unlawfully. *Levi v. Engle*,

91 Ind. 330; *Lafayette Second Nat. Bank v. Corey*, 94 Ind. 457. The declaration will not be bad, however, for want of the word "unlawfully," provided words of equivalent import are used. *Smith v. Kyler*, 74 Ind. 575.

1. *Collier v. Corbett*, 15 Cal. 183; *Coryell v. Cain*, 16 Cal. 567; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414.

Where the plaintiff's title was alleged in the declaration to have accrued on October 1, 1819, and the ouster was alleged to have taken place "afterwards," to wit, on the 2d of April in the said year, the declaration was held sufficient, the word "afterwards" being held sufficient to show that the ouster was subsequent to the accrual of the plaintiff's title. *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210.

Mesne Profits.—The allegation of time as to ouster or seisin is not material, unless the mesne profits are in question. *Kidder v. Stevens*, 60 Cal. 414; *Collier v. Corbett*, 15 Cal. 183.

"On or About."—An allegation of ouster "on or about" a certain date is sufficient. *Collier v. Corbett*, 15 Cal. 183.

Clerical Error.—A mere clerical error as to the date of the ouster, as where it is alleged to have been made subsequent to the filing of the declaration, will not be fatal to the declaration. *Cole v. Segraves*, 88 Cal. 103.

Ouster Laid after Commencement of Term.—An averment of ouster after commencement of the term is sufficient even where the date of it has been incorrectly laid under a *videlicet*. *Miller v. Shackelford*, 4 Dana (Ky.) 267.

Title must Precede Ouster.—A declaration averring an ouster previous to the plaintiff's acquiring title will be fatally defective, unless the mistake is a mere clerical error. *Coryell v. Cain*, 16 Cal. 567.

Omission from Date of Ouster.—A mere clerical omission in the date of the alleged ouster is not material. An averment that the defendant ousted the plaintiff on the — day of March, 1889, is not sufficiently defective to sustain a motion to make the complaint more specific. *Helena First Nat. Bank v. Roberts*, 9 Mont. 323.

7. Allegation for Mesne Profits.—Although the plaintiff was not originally permitted to recover mesne profits or damages for the use and occupation of the disputed property, he may now in most cases join a claim for the mesne profits with the action of ejectment.¹ The statement for the profits and damages in such cases is quite formal and exceedingly simple.²

8. Prayer for Judgment.—Where the judgment sought is for the recovery of the lands, the prayer for judgment is simple;³ but where the mesne profits and damages are to be recovered in the same action, considerable care should be taken properly to express the demand, especially if special damages are sought.

9. Notice to Appear.—A notice in writing by the plaintiff or his attorneys to the tenant in possession, to appear and apply to the court to be admitted defendant instead of the casual ejector, should be subjoined to the declaration.⁴

1. Plaintiff in Count for Mesne Profits.—Where a count for mesne profits is included in the suit, it may be in the name of either the nominal or the real plaintiff. *Shadwick v. McDonald*, 15 Ga. 392.

Limitations.—Limitations will run against an action for the recovery of the rents and profits, although it be joined with a suit in ejectment. Thus an action for the rents and profits has been held to be barred in three years. *Seibert v. Baxter*, 36 Kan. 189, *cited* in 41 Kan. 306.

Averment of Receipt by Defendant.—It is not absolutely necessary to aver in the declaration that the defendant has received the rents and profits from the premises sued for. If the complaint alleges, in addition to the ouster and damages therefor, the rental value of the premises, it will sustain a judgment for the possession of the premises and the value of the rents and profits. *Johnson v. Visher*, 96 Cal. 310. And an allegation of the value of the "use and occupation, rents and profits," will be sufficient without averring that such rents and profits were received by defendants. *Patterson v. Ely*, 19 Cal. 28.

2. General Averment of Damages Sufficient.—A general averment of damages, together with a prayer for a specified sum, is sufficient to support a judgment for damages. *Martin v. Durand*, 63 Cal. 39.

3. Omission of Prayer.—Where there is no other defect in the pleadings or procedure, a judgment for possession is proper in the absence of a specific

prayer therefor. *Evans v. Schafer*, 119 Ind. 49.

Petition for Injunction Not Allowed.—The complaint should not, in addition to the usual prayer for relief, ask for an injunction to restrain trespass or waste pending the suit, *Riemer v. Johnke*, 37 Wis. 258; nor to prevent defendant from claiming title to the land recovered. *Doyle v. Franklin*, 40 Cal. 106.

Prayer for Cancellation of Title.—A complaint which, in addition to the usual prayers, asks that the defendant's title be declared void and canceled of record, is not on that account demurrable, although it fails to set out any facts tending to support such prayer. *Hiles v. Johnson*, 67 Wis. 517.

4. Adams on Ejectment 229.

Contents of Notice.—The notice should require the tenant to appear and apply to the court to be admitted defendant instead of the casual ejector within a certain time from the delivery of the declaration. *Adams on Ejectment* 230.

Notice Not Aided by Statement.—The notice in ejectment, being in the nature of a process, cannot be aided by any statement of the person serving the declaration, nor by the defendant appearing and excepting, unless they also enter into the common rule. *Craig v. Clarke*, 3 A. K. Marsh. (Ky.) 252.

Notice must be Read or Explained to Defendant.—The notice subjoined to the declaration should be read, literally or substantially, to the person upon whom it is served, or such person must be informed of the object and purpose of the service; and where an affidavit of

10. Service of the Declaration.—The declaration in ejectment, being a kind of process to bring the real defendant into court, must be properly delivered to the party upon whom it is served.¹ It should be served personally upon the party in possession of the premises at the time of service.²

If the Possession of the Premises is Divided among several, then it should be served upon each party separately.³

Personal Service Is Impossible or Inconvenient.—It frequently happens, however, that a personal service is impossible. In such cases, it is generally provided by statute that, if there be no one in possession of the premises, or if the same be unimproved vacant property, a copy of the declaration and summons shall be conspicuously posted and set up upon the premises, together with any further notice that the court may direct.

XVI. PROCEDURE IN DEFENSE.—Upon being properly summoned, the defendant may disclaim the possession, appear and answer to the action, or allow the judgment to go by default. Should he adopt the latter course, judgment should not be entered up against him, as in other actions, but a trial *ex parte* should be had and a judgment entered upon the finding therein.⁴ If, on the other hand, he conclude to appear and defend, he should file one of the pleas, general or special as required, within the time allowed him.⁵

service is required, compliance with these conditions should be stated in it. *Den v. Fen*, 10 N. J. L. 237.

Names of Tenants should be Prefixed.—Although it does not seem necessary to prefix more than the name of the individual tenant upon whom the particular declaration is served, it is better, where there are several, to prefix the names of all of them to each separate declaration.

1. Defendant Not Served.—A judgment against a defendant not served is void. Where there are two defendants, however, and one of them is served, the judgment is valid against the one served, although void as to the other one. *Pardon v. Dwire*, 23 Ill. 572.

Knowledge may Waive Explanation.—Where a party was told that the printed declaration and notice served upon him was a declaration in ejectment, without further explanation, but it appeared that he knew the nature of the papers, the service was held sufficient, notwithstanding he was an illiterate person. *Jackson v. Stiles*, 1 Cow. (N. Y.) 222.

Service Not Equivalent to Demand.—The service of the declaration in ejectment is not equivalent to a demand of the possession of the premises. *Den v. Westbrook*, 15 N. J. L. 371.

2. Bledsoe v. Wilson, 2 Dev. (N. Car.) 314; *Pleak v. Chambers*, 5 Dana (Ky.) 63; *Tate v. Doe*, 24 Miss. 465; *Young v. Algeo*, 3 Watts (Pa.) 223; *Charter Oak L. Ins. Co. v. Cummings*, 90 Mo. 267.

3. Tate v. Doe, 24 Miss. 465.

Computation of Days of Service.—Where service for a fixed number of days is required by the statute, it is customary to include either the day of the service or the day of the appearance in the required number. But where a number of entire days are required, neither the day of the service nor the day of the appearance is counted. *Den v. Drake*, 8 N. J. L. 303.

4. MacKenzie v. Renshaw, 55 Md. 298; *Chester v. Field*, 87 Cal. 422; *Sims v. Thompson*, 30 Ala. 158.

While judgments irregularly obtained will be set aside, the motion for that purpose must be seasonably made. A motion to strike out judgment twenty-two years afterwards will not be granted. *Amey v. Marshael*, 63 Md. 369. But an application to strike out a judgment against the casual ejector will be more readily granted than in other cases. *Dennis v. Kelso*, 28 Md. 333.

5. Extension of Time to Plead.—The court may in its discretion allow a

XVII. THE PLEA—1. The General Issue—*a.* IN GENERAL—"Not Guilty."—The general issue plea in the action of ejectment is "not guilty."¹ This puts in issue the title and right of possession of the plaintiff and the amount of damages claimed by him.²

Statutes have Changed Common Law but Little.—At the common law, no other plea was regularly admissible, the defendant being permitted to defend on condition that he enter into the "consent rule" and plead the general issue. In this respect, the statutes, although abolishing the fictions of the action, have made little or no change in the common-law practice.³

b. ITS SCOPE AND APPLICATION—**Very Comprehensive.**—Under the

plea to be filed after the time appointed by statute. Where the defendant had no notice of the action brought, notice having been served on a tenant only, the court was justified in exercising such discretion. *Short v. Conlee*, 28 Ill. 219.

Plea Filed after Expiration of Rule.—A plea filed after the expiration of the rule will be stricken from the record, and judgment entered, notwithstanding the defendant attended on the day named in the notice and the plea was filed before the entry of default. *Kelley v. Inman*, 4 Ill. 28.

Plea should be Filed with Consent Rule.—It is the usual practice for the defendant to file his plea when he enters into the consent rule. This being the custom, it should not be deviated from without the sanction of the court previously obtained. *Den v. Drake*, 8 N. J. L. 303. If the defendant fail to do this, judgment may be entered against the casual ejector, but should not regularly be entered as by default against the real defendant to the action. *Jackson v. Vischer*, 2 Johns. Cas. (N. Y.) 106; *Jackson v. Woodward*, 2 Johns. Cas. (N. Y.) 110.

Only Matter in Defense need be Plead.—Although the defendant is required to plead all matter of a strictly defensive character, he need not plead matter which would constitute a cause of action in his favor. *Ayres v. Bensley*, 32 Cal. 620.

Material Allegations Only to be Answered.—The defendant need only answer those allegations of the complaint which are material to a good complaint in ejectment. He is not required to controvert immaterial or irrelevant allegations, which would be stricken out on proper motion. *Doyle v. Franklin*, 48 Cal. 537. It is

sufficient to deny in the answer the averments of the plaintiffs with respect to their ownership and right of possession, without denying their allegations as to the ownership of their grantors, such averments being superfluous. *Morgan v. Tillottson*, 73 Cal. 520.

Prior Sale to Defendant.—An averment in the answer of a sale to the defendant by the alleged grantor of the plaintiff, prior to that to the plaintiff, amounts only to a denial of the plaintiff's title and requires no pleading in reply. *Thompson v. Thompson*, 52 Cal. 154.

1. *Adams on Ejectment* 270.

2. *Marshall v. Shafter*, 32 Cal. 176; *Petty v. Mays*, 19 Fla. 652; *Doe v. Butler*, 6 Ga. 88.

3. *Bernard v. Elder*, 50 Miss. 336.

Death, Coverture, etc.—The death of the plaintiff before suit brought may be shown under the general issue, *Gosser v. Hickenlooper*, 81* Pa. St. 281, 33 Leg. Int. (Pa.) 24; also the coverture of the defendant, *Black v. Tricker*, 52 Pa. St. 436; and an agreement fixing the boundary line between adjoining lands. *Jacobs v. Moseley*, 91 Mo. 457.

Title.—The defendant may show under the general issue a paramount title in himself, *Clayton v. School Dist. No. 1*, 20 Kan. 256; *Murray v. Boissier*, 10 Martin (La.) 293; and arising out of the plaintiff at the commencement of the suit. *Raynor v. Timerson*, 46 Barb. (N. Y.) 518.

Answer should Plead Ultimate Facts.—An answer which sets up the evidence of the facts upon which the defendant relies, instead of the ultimate facts themselves, is defective if properly objected to. *Hemenway v. Francis*, 20 Oregon 455.

general issue, the defendant in ejectment may offer evidence of any matter tending to defeat the plaintiff's action.¹

1. *California*.—Bruck *v.* Tucker, 42 Cal. 346.

Florida.—Horne *v.* Carter, 20 Fla. 45; Barco *v.* Fennell, 24 Fla. 378.

Illinois.—Sheldon *v.* Van Vleck, 106 Ill. 45.

Kansas.—Hall *v.* Dodge, 18 Kan. 277; Wicks *v.* Smith, 18 Kan. 508; Clayton *v.* School Dist. No. 1, 20 Kan. 256.

Louisiana.—Kellar *v.* Parish, 11 La. Ann. 111.

Maine.—Stanley *v.* Perley, 5 Me. 369; Chaplin *v.* Barker, 53 Me. 275; Morse *v.* Sleeper, 58 Me. 329. See also article ANSWERS IN CODE PLEADING, vol. 1, pp. 825, 826.

Michigan.—Miller *v.* Beck, 68 Mich. 76.

Mississippi.—Hutton *v.* Thornton, 44 Miss. 166; Bernard *v.* Elder, 50 Miss. 336.

Missouri.—Jacobs *v.* Moseley, 91 Mo. 457; Hart *v.* Steedman, 98 Mo. 452; Bird *v.* Sellers, 113 Mo. 580.

New York.—Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; Gilman *v.* Gilman, 111 N. Y. 265.

Ohio.—Rhodes *v.* Gunn, 35 Ohio St. 387; Wintermute *v.* Montgomery, 11 Ohio St. 442; Kyser *v.* Cannon, 29 Ohio St. 359; Forrest *v.* Jelke, 7 Ohio Cir. Ct. Rep. 23.

Pennsylvania.—Gallagher *v.* McNutt, 3 S. & R. (Pa.) 409; Black *v.* Tricker, 52 Pa. St. 436; Gosser *v.* Hickenlooper, 33 Leg. Int. (Pa.) 24, 81* Pa. St. 281.

Virginia.—Reynolds *v.* Cook, 83 Va. 817.

Special Pleas Unnecessary.—The only plea in ejectment is "not guilty." Any other plea is unnecessary and may be rejected. Reynolds *v.* Cook, 83 Va. 817; Hutton *v.* Thornton, 44 Miss. 166; Sheldon *v.* Van Vleck, 106 Ill. 45; Roosevelt *v.* Hungate, 110 Ill. 595; Gallagher *v.* McNutt, 3 S. & R. (Pa.) 409; Bruck *v.* Tucker, 42 Cal. 346. Where, after filing the general issue plea, the defendant filed a special plea containing matter admissible in evidence under the general issue, it was held that the court should of its own motion have stricken out the special plea, upon an application by the plaintiff to require the defendant to elect between his pleas. Barco *v.* Fennell, 24 Fla. 378.

"Not Guilty" puts Case at Issue.—

The plea of not guilty puts the case at issue without a formal joinder. Gallagher *v.* McNutt, 3 S. & R. (Pa.) 409. The *similiter* is mere form. Walker *v.* Armour, 22 Ill. 658.

General Issue Waives Defects in Declaration.—It is too late, after pleading the general issue, for the defendant to take advantage of any defects in the declaration. Sturdevant *v.* Murrell, 8 Port. (Ala.) 317; James *v.* Tait, 8 Port. (Ala.) 476; Ware *v.* Bradford, 2 Ala. 676.

Equitable Defense.—An inchoate or equitable right or title in the defendant must be specially pleaded if the legal title is in the plaintiff. It is error, in the absence of statute, to admit evidence of such a title under the general issue. Powers *v.* Armstrong, 36 Ohio St. 357; Petty *v.* Mays, 19 Fla. 652; Du Pont *v.* Davis, 35 Wis. 631; Stewart *v.* Hoag, 12 Ohio St. 623. See also, upon this subject, *post*, article EQUITABLE DEFENSES.

"Not Guilty" Admits Possession by Defendant.—The general issue admits that the defendant was in possession of the land sued for at the institution of the suit. Ulsh *v.* Strode, 13 Pa. St. 433; Hill *v.* Hill, 43 Pa. St. 521; Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377. If the defendant wishes to deny his possession of a part or the whole of the premises he must set the facts forth specially. Bernard *v.* Elder, 50 Miss. 336. But see Doe *v.* Butler, 6 Ga. 88; James *v.* Brooks, 6 Heisk. (Tenn.) 150; Gibson *v.* Norway Sav. Bank, 69 Me. 579; Cooper *v.* Page, 62 Me. 192; Wyman *v.* Richardson, 62 Me. 293; Gammon *v.* Huff, 67 Me. 184; Colburn *v.* Grover, 44 Me. 47; Treat *v.* Strickland, 23 Me. 234.

Verified Complaint.—Where a complaint has been verified, an answer which fails to deny specifically the averments of ouster and possession will be insufficient. Smith *v.* Doe, 15 Cal. 100. An allegation that "defendants wrongfully and unlawfully entered upon and dispossessed" the plaintiff is not sufficiently denied by an answer which simply denies that "defendants wrongfully and unlawfully entered," etc., because it does not deny the alleged entry and ouster. Busenius *v.* Coffee, 14 Cal. 91. The defendant

c. DEFENSE FOR A PART ONLY.—If the defendant wishes to defend for a part only of the premises sued for, he should specify in his answer for what particular part he does defend.¹ If he sets up a title in himself to an undivided interest, he should specify what interest or share he claims.²

2. Special Answers—*a.* IN GENERAL.—It is provided in many states that instead of pleading the general issue, the defendant may file an answer setting forth his defense. Although, in such cases, any plain statement of facts negating the right of possession claimed by the plaintiff would seem to be sufficient,³ the defendant should, if he desire to put upon the plaintiff the fullest burden of proof, specifically deny each and every material allegation in his complaint.⁴

must answer not only the character of the possession, but also the fact of possession. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

1. *Hemenway v. Francis*, 20 Oregon 455; *Anderson v. Fisk*, 36 Cal. 625; *Guy v. Hanly*, 21 Cal. 397.

After verdict and judgment, an answer may be held sufficient, on appeal, which would have been defective had it been properly objected to below. Thus an answer which describes the land for which the defendant defends as "about 120 acres of said land—the farming land on the north side of the county road—" is very indefinite and would probably be held insufficient if properly objected to below; but if not objected to below, it must be presumed on appeal that the defect was supplied by proof at the trial. *Hemenway v. Francis*, 20 Oregon 455.

2. *Pease v. Hannah*, 3 Oregon 301.

3. *La Rue v. Oppenheimer*, 20 Cal. 517; *Vanduyn v. Hepner*, 45 Ind. 589; *Arnold v. Smith*, 80 Ind. 417; *Collins v. McDuffie*, 89 Ind. 562.

Special Answer Demurrable.—If, instead of pleading the general issue, the defendant pleads specially, his special answer may be demurred to for insufficiency. *Over v. Shannon*, 75 Ind. 352; *Gaff v. Greer*, 88 Ind. 122.

4. *Ford v. Sampson*, 17 How. Pr. (N. Y. Supreme Ct.) 447, 30 Barb. (N. Y.) 183; *Sharp v. Daugney*, 33 Cal. 505; *Schenk v. Evoy*, 24 Cal. 104; *Reed v. Newton*, 22 Minn. 541; *Curtiss v. Livingston*, 36 Minn. 312; *Den v. Sanderson*, 18 N. J. L. 426; *McTarnahan v. Pike*, 91 Cal. 540; *Over v. Shannon*, 75 Ind. 352; *Railsback v. Walke*, 81 Ind. 409; *Caines v. Katz*, 95 Mo. 333; *Billings v. Sanderson*, 8 Mont.

201. See also article ANSWERS IN CODE PLEADING, vol. I, p. 777.

Under Statute.—Where the statute, as in *Washington*, requires the defendant to plead the estate or license by which he holds possession, a general denial will create no issue. If, under such a statute, the defendant files a general issue plea, the plaintiff will be *prima facie* entitled to judgment on pleading and proving a legal right to the possession of the premises. *Allen v. Higgins*, 9 Wash. 446.

Whole Title should be Pledged.—Defendant should plead all the title under which he claims. *Shaffer v. Scuddy*, 14 La. Ann. 582. While not obliged to set out the details of it, if he undertakes to do so, he should give it fully enough to inform the defendant what he has to answer. *Gillis v. Black*, 6 Iowa 439.

Averment of Title in Defendant.—While an averment of title in the defendant and the recital of the series of facts constituting such title amount to no more than the general issue, *Marshall v. Shafter*, 32 Cal. 176; *Clink v. Thurston*, 47 Cal. 21, still, if the defendant set up title and possession in himself, he should aver that such title and possession were adverse to the plaintiff's title. *Anderson v. Fisk*, 36 Cal. 625. Thus, where the answer admitted the possession of the defendant and averred an ownership in fee in him, setting forth his title from a sale under an order of the court, it was held that such answer was not a denial of the plaintiff's title unless title passed to the defendant by such sale. If the said sale was void, then the answer admitted the plaintiff's title. *Pryor v. Madigan*, 51 Cal. 178.

b. DISCLAIMER. (See also article DISCLAIMERS, vol. 6, p. 627.)—If the defendant makes no pretense of ownership and has, in fact, no interest in the premises, he should set up a disclaimer either in connection with other defenses, or, at any rate, sufficiently early to give due warning to the plaintiff before going to trial.¹

c. LIMITATIONS OR ADVERSE POSSESSION—No Special Plea Necessary.—As the plaintiff cannot show himself entitled to the possession as against an adversary possession for the necessary period, no special plea of limitations is required.²

In such a case the defendant need only show the deed, the order of sale, and the order of the court ratifying the same. It will be presumed from these that all the preceding steps have been properly taken. *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107.

Failure Specially to Deny Withholding.—If the answer denies the entry and ouster, but does not specially deny the withholding of possession at the commencement of the action, such withholding is not therefore admitted by the pleadings. *Hawkins v. Reichert*, 28 Cal. 534.

Plea Denying Possession Only.—A plea to the whole cause which denies the possession of the defendant, answers only a part of the complaint and is therefore bad. *Dickerson v. Hendryx*, 88 Ill. 66.

1. *Steinmets v. Logan*, 3 Watts (Pa.) 160.

Liability for Costs.—The defendant should file a plea along with his disclaimer in order to avoid any liability for damages and costs. *Bratton v. Mitchell*, 5 Watts (Pa.) 69; *Tripner v. Abrahams*, 47 Pa. St. 220; *Kirkland v. Thompson*, 51 Pa. St. 216; *Lea v. Slatterly*, 7 Baxt. (Tenn.) 235. See article DISCLAIMERS, vol. 6, p. 627.

Disclaimer for a Part.—If the defendant in possession when suit brought disclaims for only a portion of the land claimed, the plaintiff has a right to proceed to trial. *Zeigler v. Fisher*, 3 Pa. St. 365.

Disclaimer of Record.—It is not always necessary, where the defendant does not wish to contest the plaintiff's title, to enter the disclaimer as of record. *McCannon v. Johnston*, 19 Pa. St. 434; but if he wishes to avoid a verdict for costs, he should enter it as of record either at the entry of the plea or sufficiently early to give the

plaintiff due warning. *Steinmets v. Logan*, 3 Watts (Pa.) 160.

Dilatory Disclaimer.—A disclaimer cannot be filed after the time allowed for filing pleas in abatement without leave of the court. *Ayer v. Phillips*, 69 Me. 50.

2. *Wintermute v. Montgomery*, 11 Ohio St. 442; *Kyser v. Cannon*, 29 Ohio St. 359; *Rhodes v. Gunn*, 35 Ohio St. 387; *Stocker v. Green*, 94 Mo. 280; *Holmes v. Kring*, 93 Mo. 452; *Fairbanks v. Long*, 91 Mo. 628; *Bird v. Sellers*, 113 Mo. 580; *Miller v. Beck*, 68 Mich. 76; *Horne v. Carter*, 20 Fla. 45. And see, in general, article LIMITATIONS, STATUTE OF.

In Mississippi the defendant, by the Code of 1871, is not allowed to plead limitations specially. *Dean v. Tucker*, 58 Miss. 487. Such pleas are nullities and may be stricken out by the court. *Wilson v. Williams*, 52 Miss. 487.

In Florida special pleas of the statute of limitations are not allowed, and it has been held that the court should strike out such pleas on its own motion. *Weiskoph v. Dibble*, 18 Fla. 24.

In California the defendant may both deny the plaintiff's title and plead the statute of limitations. *Willson v. Cleveland*, 30 Cal. 192; *Dillon v. Center*, 68 Cal. 561.

Limitations by Special Statute.—A special statute of limitations need not be pleaded, but may be availed of as a defense under the general issue. *Fairbanks v. Long*, 91 Mo. 628; *Bird v. Sellers*, 113 Mo. 580; *Stubblefield v. Borders*, 92 Ill. 279.

Tax-sale Titles.—A simple denial of the plaintiff's title is sufficient, even though it has been acquired at a tax sale and the defendant intends to attack its validity. *Terrell v. Wheeler*, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 178. But if the defendant pleads a tax-sale title, he must aver all the

d. PUIS DARREIN CONTINUANCE—New Matter must be Specially Plead.—In spite of the comprehensiveness of the general issue, new matter, such as a title acquired subsequent to issue joined, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.¹

Transfer of Title should be Plead.—A transfer of title by the plaintiff, or to the defendant pending the action, should therefore be specially pleaded in a supplemental answer.²

XVIII. VERDICT AND JUDGMENT—1. **In General**—May Be General.—The verdict and judgment in the action of ejectment may be either special or general as the case may require. If it be shown that the plaintiff or plaintiffs have a right to recover the possession of the premises described in the declaration, then a general verdict for the plaintiff or plaintiffs is sufficient in law for the entry of a corresponding judgment.³

various matters necessary to the validity of his title. *Nicoll v. Fast*, 59 Barb. (N. Y.) 275.

1. *Spratt v. Price*, 18 Fla. 289; *Hardy v. Johnson*, 1 Wall. (U. S.) 371; *Yount v. Howell*, 14 Cal. 468. And see in general, articles PUIS DARREIN CONTINUANCE; SUPPLEMENTAL PLEADINGS.

Plea of Mortgage PUIS DARREIN.—A mortgagor may set up a lease from the mortgagee in a special plea *puis darrein continuance*. *Simmons v. Brown*, 7 R. I. 427. But another defendant cannot set up a mortgage assigned to him pending suit. *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64.

Plea of Entry PUIS DARREIN.—A plea of entry by the plaintiff or his lessor upon the possession of the defendant, since suit brought, is bad and may be demurred to. *Tyler v. Canaday*, 2 Barb. (N. Y.) 160; *Den v. Sanderson*, 18 N. J. L. 426.

Tax Deeds.—A tax deed issued to defendant, after issue joined, cannot be introduced in evidence without something on the record in the nature of a plea *puis darrein continuance*. *Hurd v. Raymond*, 50 Mich. 369. But it has been held that a tax deed in the hands of the original purchaser may have relation to the day when such party was entitled to it, which date was held admissible under the general issue, even though it preceded the joinder of issue. *Spratt v. Price*, 18 Fla. 289.

2. *Moss v. Shear*, 30 Cal. 468; *Leavitt v. School Dist. No. 19*, 78 Me. 574; *Jenney v. Potts*, 41 Mich. 52; *Doe v. Collins*, 7 Ala. 480.

Recovery by Stranger.—A plea of recovery by a stranger *puis darrein continuance* is insufficient. If the plaintiff's title is superior to that of the defendant, the mere recovery of the premises by a third party during the pendency of the suit ought not to prevent his recovery as against the defendant. *Doe v. Holman*, 19 Ala. 734.

In Alabama a plea *puis darrein continuance* of a recovery by a stranger is demurrable if pleaded to the whole action, because in this state a plaintiff may proceed for his costs and damages in ejectment after the premises have been recovered against him by an adversary plaintiff in another suit. *Doe v. Holman*, 19 Ala. 734.

3. *Hamner v. Eddins*, 3 Stew. (Ala.) 192; *Joy v. McKay*, 70 Cal. 445; *Hutton v. Reed*, 25 Cal. 478; *Morse v. Hewett*, 28 Mich. 481; *Schaefer v. Causey*, 8 Mo. App. 142, 76 Mo. 365; *Kennedy v. Keating*, 3 Ohio L. Bul. 555; *Ewing v. Alcorn*, 40 Pa. St. 492; *Cambria Iron Co. v. Tomb*, 53 Pa. St. 422; *Barrow v. Navee*, 2 Yerg. (Tenn.) 227; *Roberts v. Pharis*, 8 Yerg. (Tenn.) 447; *Allard v. Lamirande*, 29 Wis. 502; *Kershner v. Kershner*, 36 Md. 309.

Need Not Specify Land Recovered.—A general verdict for the plaintiff has been held sufficient which failed to specify the lands recovered. *Hamner v. Eddins*, 3 Stew. (Ala.) 192; *Hutton v. Reed*, 25 Cal. 478.

All Issues must be Found.—The jury must pass upon all the issues submitted to them by the court. A verdict which does not comprehend all such issues may be set aside. *Wood v. McGuire*, 17 Ga. 361.

Should Specify for Different Parties.—If there are a number of plaintiffs or defendants, some of whom have a right to the possession while some have not, the verdict should specify the finding for the different parties separately.¹

May Be General for the Entire Premises.—If the verdict be for all the lands claimed in the declaration, it may in that respect be for such premises generally.²

Court may Direct.—Where there is no doubt as to the facts, the court may direct a verdict as in other cases without interfering with the discretion given to the jury by the statutes. *Hal-lam v. Doyle*, 35 Minn. 337. See in general, upon this subject, article DIRECT-ING VERDICT, vol. 6, p. 667.

Privy Verdict.—The jury may render a privy verdict to the clerk at his office by agreement of all the parties. *M'Murray v. O'Neal*, 1 Call (Va.) 246.

1. *Mahoney v. Middleton*, 41 Cal. 41; *Cunningham v. Bradley*, 26 Ga. 238; *Rumph v. Truelove*, 66 Ga. 480; *Faloon v. Simshauser*, 130 Ill. 649.

Defendants may Demand Separate Verdicts.—Where there are several defendants they may demand separate verdicts. In the absence of such demand, however, a general verdict will be conclusive against them. *Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 Cal. 409.

One Defendant may Object to Defend Jointly.—Where one of two defendants objects to being sued as a joint occupant, the plaintiff may proceed against him separately, or may recover for an undivided share from the other. *Dillaye v. Wilson*, 43 Barb. (N. Y.) 261.

Verdict for Successful Plaintiffs Only.—Where all of the plaintiffs do not show title in themselves, the verdict should be for those only who have succeeded in establishing their title. *Walton v. Follansbee*, 131 Ill. 147. And see *Foster v. Foster*, 2 Stew. (Ala.) 356.

Verdict Not Sustained by Evidence.—A joint verdict for two tracts of land will be reversed in toto if there is no evidence to sustain it as to one of them. *Herd v. Dew*, 8 Humph. (Tenn.) 502. But if the plaintiff proves his right to part of the premises in possession of several defendants he may have a verdict and judgment against them jointly. *Homer v. Chicago, etc., R. Co.*, 38 Wis. 165.

Number of Parties Immaterial.—In ejectment, where there are a number

of plaintiffs, some may recover and others not, regardless of the number of the parties. *Sutton v. Dameron*, 100 Mo. 141.

Joint Answer.—Where the several defendants file a joint answer, amounting to a general denial, a joint general verdict against them will be sufficient. *Holmes v. Gay*, 6 Bush (Ky.) 47; *McGarvey v. Little*, 15 Cal. 27; *Smith v. Shackelford*, 9 Dana (Ky.) 453. And this, too, where the answer ends with a prayer for separate verdicts. To entitle them to separate verdicts, the defendants should set forth the particular portions of land occupied or claimed by each of them. *Patterson v. Ely*, 19 Cal. 28. But if the proof at the trial show their holdings to be separate and not joint, the jury may find separately in each case as if they had defended separately. *Smith v. Shackelford*, 9 Dana (Ky.) 453.

Mesne Profits.—There cannot be a joint verdict for mesne profits against defendants who hold separately, and not jointly. *Cunningham v. Bradley*, 26 Ga. 238.

Husband and Wife.—If a husband and wife sue jointly in ejectment, they must recover jointly or not at all. There cannot be a judgment in favor of the wife and against the husband. *Bartow v. Draper*, 5 Duer (N. Y.) 130.

Separate Parcels in Severalty.—Where there are several defendants holding separate parcels in severalty, the plaintiff may take a verdict against one only. *Rogers v. Arthur*, 21 Wend. (N. Y.) 598.

2. *Apthorp v. Backus*, Kirby (Conn.) 416; *Goodhue v. Baker*, 22 Ill. 262; *Pennel v. Weyant*, 2 Harr. (Del.) 501; *Johnson v. Visser*, 96 Cal. 310; *Johnson v. Jones*, 68 Ga. 825; *Buckley v. Cunningham*, 4 Bibb (Ky.) 285; *Farrow v. Farrow*, 2 J. J. Marsh. (Ky.) 388; *Woolry v. Clay*, 3 A. K. Marsh. (Ky.) 136; *Minkhart v. Hankler*, 19 Ill. 47.

"Property in Question."—A verdict that "we, the jury, find the defendant

Partial Verdict should Specify.—But if, on the other hand, the verdict be for a part only, it should specify such part with the same certainty as is required in describing the premises in the declaration.¹

2. Special Verdicts—*a.*—IN GENERAL—Limited to the Lands Sued for.—It is often expedient and sometimes necessary to state in the verdict the lands and tenements awarded to the plaintiff. In such cases, the statement should be carefully limited to the lands and

guilty of improperly withholding the property in question," and assessing the amount of damages awarded, is sufficiently certain where the "property in question" is amply described in the declaration. *Patrick v. Young*, 18 Fla. 50.

Verdict need Not Define Possession of Defendant.—The verdict need not necessarily state the exact quantity of land in possession of the defendant. *Little v. Bishop*, 9 B. Mon. (Ky.) 249. For although the proof may show that the defendant is in possession of only a portion of the land, the verdict and judgment may be for the whole. *Coleman v. Henderson*, 3 Ill. 251.

Recovery Limited to Amount Declared For.—The plaintiff can recover only the interest claimed in his declaration. He cannot recover any interest subsequently acquired, *De Mill v. Moffat*, 49 Mich. 125; but he can recover for an extension of the possession of the defendant pending suit, provided the same be included within his claim. *Taylor v. Cox*, 2 B. Mon. (Ky.) 436.

Possession of Part—Judgment for Whole Tract.—Where the plaintiff has proven his right to the possession of the whole tract of land claimed, a judgment in his favor to that extent will not be bad because the defendant was in possession of only a part of the said premises. *Camarillo v. Fenlon*, 49 Cal. 202; *Farnham v. Sherry*, 71 Wis. 568; *Vallejo v. Fay*, 10 Cal. 377; *Guy v. Hanly*, 21 Cal. 397.

1. Georgia.—*Bailey v. Jones*, 14 Ga. 384.

Illinois.—*East St. Louis v. Hackett*, 85 Ill. 382.

Kentucky.—*Bowles v. Sharp*, 4 Bibb (Ky.) 551; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 49; *Young v. Adams*, 14 B. Mon. (Ky.) 102.

Maryland.—*Minke v. McNamee*, 30 Md. 294; *Howard v. Moale*, 2 Har. & J. (Md.) 249.

Michigan.—*Moran v. Lezotte*, 54 Mich. 83.

Missouri.—*Gray v. Givens*, 26 Mo. 291.

New York.—*Bear v. Snyder*, 11 Wend. (N. Y.) 592; *Vrooman v. Weed*, 2 Barb. (N. Y.) 330; *Van Alstyne v. Spraker*, 13 Wend. (N. Y.) 578; *Truax v. Thorn*, 2 Barb. (N. Y.) 156; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Neilson v. Neilson*, 5 Barb. (N. Y.) 565.

Ohio.—*Treon v. Emerick*, 6 Ohio 391.

Pennsylvania.—*Bachop v. Critchlow*, 142 Pa. St. 518; *Phillips v. Hanby*, 5 Del. (Pa.) 102.

Tennessee.—*Brogan v. Savage*, 5 Sneed (Tenn.) 689; *Loard v. Philips*, 4 Sneed (Tenn.) 566.

Vermont.—*Evarts v. Dunton*, *Brayt*. (Vt.) 67.

Virginia.—*Clay v. White*, 1 Munf. (Va.) 162.

General Verdict for a Part.—It has been held that the jury may render a general verdict even where the plaintiff shows himself entitled to only a part of the lands claimed. *McKay v. Glover*, 7 Jones (N. Car.) 41; *Paine v. York*, 10 Humph. (Tenn.) 340; *Holdfast v. Shepard*, 6 Ired. (N. Car.) 361. The more correct course is to set forth in the verdict the exact share or estate to which the plaintiff has proven himself entitled, and to enter the judgment accordingly. *Pierce v. Wanett*, 10 Ired. (N. Car.) 446.

Undivided Interests.—If the plaintiff claim the whole of the premises and prove title only to an undivided part, he may have a verdict for such part. *Bachop v. Critchlow*, 142 Pa. St. 518; *Gray v. Givens*, 26 Mo. 291. In some cases it may be necessary for him to amend his complaint in order to retain his verdict, *Smith v. Long*, 12 Abb. N. Cas. (N. Y. Ct. App.) 113, 3 Civ. Pro. Rep. (N. Y.) 396; *Ryerss v. Wheeler*, 25 Wend. (N. Y.) 434; but not where the part to which the plaintiff is entitled has been described in the verdict. *Vrooman v. Weed*, 2 Barb. (N. Y.) 330.

tenements described in the declaration, and to which the plaintiff has successfully proven his title.¹

Description should Identify Lands Awarded.—Every such verdict should describe the premises awarded by it with such particularity that after judgment has been entered upon it, the sheriff may be enabled to deliver up the possession to the plaintiff.²

1. *East St. Louis v. Hackett*, 85 Ill. 382.

Excessive Verdict.—If the verdict be for more land than the plaintiff is entitled to, the court may grant a motion for a new trial unless the plaintiff remits such excess. *Gillespie v. Jones*, 47 Cal. 259. Such a verdict is always defective. *Patton v. Cooper*, *Cooke* (Tenn.) 133; *Mourning v. Missouri Coal, etc., Co.*, 99 Mo. 320; *Price v. Breckenridge*, 77 Mo. 447; *Gamble v. Daugherty*, 71 Mo. 599.

Remittitur Allowable.—In such cases a remittitur is allowed in both the trial and the appellate court. *Keen v. Schnedler*, 92 Mo. 516.

2. *Sturdevant v. Murrell*, 8 Port. (Ala.) 317; *Crommelin v. Minter*, 9 Ala. 594; *Sims v. Thompson*, 30 Ala. 158; *Bennet v. Morris*, 9 Port. (Ala.) 171; *Sawyer v. Fitts*, 2 Port. (Ala.) 9, 4 Stew. & P. (Ala.) 365; *Lawrence v. Davidson*, 44 Cal. 177; *Northern R. Co. v. Jordan*, 87 Cal. 23; *Rosenthal v. Matthews*, 100 Cal. 81; *Roe v. Doe*, 30 Ga. 608; *Munger v. Grinnell*, 9 Mich. 544; *Lockwood v. Drake*, 1 Mich. 14; *Rivier v. Pugh*, 7 Heisk. (Tenn.) 715.

Reasonable Certainty.—What is a sufficient description of the land awarded by the verdict and judgment depends on the circumstances surrounding the case. In general a verdict is sufficiently definite which enables the officer to determine what land to deliver to the plaintiff. *Crawford v. Ahrnes*, 103 Mo. 88. If the boundary lines, as given in the verdict, can be traced on the ground, *Buse v. Russell*, 86 Mo. 209; or if it refers to something of a permanent and public nature, *Smith v. Brotherline*, 62 Pa. St. 461; or to any object or boundaries so that it appears from the record that its boundaries are capable of identification, *Lawrence v. Davidson*, 44 Cal. 177, the verdict is sufficient. *Meier v. Meier*, 105 Mo. 411; *Paul v. Smiley*, 4 Munf. (Va.) 468.

Sufficiently-certain Verdicts.—The following verdicts have been held sufficiently certain: for "the west half of

the southeast quarter, and twenty-five acres off the west end of the southwest quarter of the northeast quarter; all in section 15, township 16, range 8," *Sims v. Thompson*, 30 Ala. 158; for all the land described except such parts "as were sown to grain by the defendant during the fall of 1890 and the winter of 1891," *Rosenthal v. Matthews*, 100 Cal. 81; for four certain parcels of land, "except so much of said two last described portions or parcels of land as is contained in the record of the plat of the village of Royal Oak, recorded in record of deeds for said county of Oakland," *Lockwood v. Drake*, 1 Mich. 14; for all the land described, except the fifty acres upon which defendant formerly resided. *Singleton v. Ake*, 3 Humph. (Tenn.) 626; *Simpson v. Shannon*, 5 Litt. (Ky.) 322.

Insufficient Verdicts.—Verdicts for "fifty acres of the southeast fractional quarter of fractional section twenty-four, in township eighteen of range eighteen, in the district, etc.," *Crommelin v. Minter*, 9 Ala. 594; for "one hundred and twenty feet on the south side of St. Michael street, commencing at the centre of the house occupied by James Wilson in 1817, and running sixty feet east and west, by one hundred and twenty feet south," *Bennet v. Morris*, 9 Port. (Ala.) 171; for "the west three-fourths of the northwest fractional quarter" of a certain section, "except twenty-five acres on the west half of said section, and three acres cut off by the road from the southwest corner of said section," *Munger v. Grinnell*, 9 Mich. 544; for a strip of land two feet wide, instead of seven, and fifteen rods long, *Kyser v. Cannon*, 29 Ohio St. 359; for the "third share of the 41 acres and 32 perches neat; and if any overplus, it goes to the plaintiff," *Smith v. Jenks*, 10 S. & R. (Pa.) 153; for a certain number of acres, "parcel of the premises in the declaration mentioned," with no designation of boundaries, *Gregory v. Jacksions*, 6 Munf. (Va.) 25; *Hitchcox v. Rawson*, 14 Gratt. (Va.) 526, are de-

Specification of Estate.—It is often required that the verdict should specify the precise character of the estate or title of the plaintiff, whether it be in fee, for life, or for years.¹ In such cases a verdict which fails so to specify is fatally defective.²

fective for uncertainty. And see *Smith v. Jenks*, 10 S. & R. (Pa.) 153; *Stewart v. Speer*, 5 Watts (Pa.) 79; *Harrisburg v. Crangle*, 3 W. & S. (Pa.) 460; *Barton v. Glasgo*, 12 S. & R. (Pa.) 149; *Martin v. Martin*, 17 S. & R. (Pa.) 431; *Tyson v. Passmore*, 7 Pa. St. 273; *Haggey v. Detweiler*, 35 Pa. St. 409; *Hunt v. McFarland*, 38 Pa. St. 69; *Miller v. Casselberry*, 47 Pa. St. 376; *Emig v. Diehl*, 76 Pa. St. 359; *Nolan v. Sweeny*, 80 Pa. St. 77; *Clay v. White*, 1 Munf. (Va.) 162; *Doe v. Northern*, 1 Wash. (Va.) 282; *Northern R. Co. v. Jordan*, 87 Cal. 23; *Miles v. Knott*, 12 Gill & J. (Md.) 442.

Uncertain Verdict Void.—When the verdict is so uncertain as not to admit of the entering up of judgment upon it, it is void. *Roe v. Doe*, 30 Ga. 608; *Smith v. Jenks*, 10 S. & R. (Pa.) 153; *Gittings v. Hall*, 1 Har. & J. (Md.) 14.

Presumption in Favor of Verdict.—Where the defect in the description might have been cured by amendment or evidence, and a verdict is rendered without such defect having been cured, the presumption in the higher court will be in favor of the verdict. *Reid v. Mitchell*, 95 Ind. 397. Thus where the plaintiff described the premises as abutting on a certain street, and then went on to allege that the defendant had taken possession of said street, the description was held sufficient to sustain the verdict. *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128. And a declaration for two houses, one barn, eighty acres of arable land, twenty acres of woodland, with the appurtenances, in Penn township, North Cumberland county, being part of a tract of land surveyed in pursuance of a warrant granted to W. G., has been held sufficient after verdict. *Fisher v. Larick*, 7 S. & R. (Pa.) 99. In short, if the verdict is such as the case warrants it should not be set aside. *Roberts v. Foreman*, 22 Ga. 283; *Fitzgerald v. Williams*, 24 Ga. 343.

1. *Rawlins v. Bailey*, 15 Ill. 178; *Long v. Linn*, 71 Ill. 152; *Van Fossen v. Pearson*, 4 Sneed (Tenn.) 362.

Right of Possession.—A statute requiring the verdict to state the estate

of the plaintiff and describe the land does not dispense with the necessity for a finding on his right of possession. Therefore a verdict finding the fee simple to certain lands in the plaintiff, without a finding as to his right of possession, will not authorize the entry of a judgment for the land. *Asia v. Hiser*, 22 Fla. 378.

Objection Not Raised in Lower Court.—Failure to object to a verdict defective in not stating the estate proved in the court below does not waive such objection. *Long v. Linn*, 71 Ill. 152.

Verdict for Estate Not Declared For.—It has been held that the plaintiff might recover for an estate other than that declared for; that he might declare for an estate in fee, and recover against a stranger a term of years; might declare for an interest in severalty and recover the share of a tenant in common. *Evarts v. Dunton*, *Brayt*. (Vt.) 67; *Chapin v. Scott*, 1 D. Chip. (Vt.) 41; *Rood v. Willard*, *Brayt*. (Vt.) 67.

Seisin in the Crown.—It has never been necessary to find a seisin in the crown of England. If the verdict states that the ancestors of the party have been possessed from 1669 it is sufficient. *Birch v. Alexander*, 1 Wash. (Va.) 34.

2. Even though the declaration states the estate of the plaintiff. *Oney v. Clendenin*, 28 W. Va. 34.

Trial by the Court.—Where the action is tried by the court, the verdict must state the estate to which the plaintiff is entitled, and a defect in this respect will not be supplied by a recital in the judgment that the action was brought for a recovery of the fee. *Koon v. Nichols*, 63 Ill. 163.

But in *Morse v. Hewett*, 28 Mich. 481, it was held that the provisions of the statute requiring the verdict to specify the estate recovered did not apply in a case tried without a jury between a single plaintiff and defendant, where the defendant allowed the case to go by default.

Must Be Correct for All Parties.—A verdict and judgment that "the plaintiffs have a fee simple title" is erroneous where some of them are merely

b. **EQUIVOCAL AND CONDITIONAL VERDICTS**—Verdict should Be Certain.—An equivocal and uncertain verdict is bad.¹

May Be Conditional.—But in ejectment to enforce the payment of unpaid purchase money, it may be conditional, to be set aside on payment of the amount due within a stated time.²

3. The Judgment—*a.* **IN GENERAL.**—The judgment in the action of ejectment should follow the verdict as a matter of course.³ If,

tenants by curtesy. *Patterson v. Hubbard*, 30 Ill. 201.

"Owner."—A finding that the plaintiff is the "owner" of the demanded premises is sufficient under such a statute, the word "owner," when so used, being equivalent to owner in fee. *Hadlock v. Hadlock*, 22 Ill. 384.

1. Where it was submitted to the jury to decide whether, at the time of purchasing the property sued for, the plaintiff had notice of a prior verbal sale to the defendant, and the verdict was "if possession was notice, he had," it was held that the finding was insufficient, because equivocal. *Woodson v. McCune*, 17 Cal. 298. But where the jury found a special verdict that "if the law arising upon the foregoing facts be for the plaintiff, we find for the plaintiff the lands in the declaration mentioned, and one cent damages, but if the law be for the defendant, we then find for the defendant," it was held that the court might render judgment thereon, and this, too, where, in the opinion of the court, the plaintiff was entitled to one tract of land and the defendant to the other. *Hutchison v. Kelly*, 1 Rob. (Va.) 131.

2. *Welch v. Emerson*, 95 Pa. St. 251; *Dixon v. Oliver*, 5 Watts (Pa.) 509; *Chadwick v. Felt*, 35 Pa. St. 305; *Donovan v. Driscoll*, 93 Pa. St. 509; *Hall v. Coburn*, 4 Penny (Pa.) 166; *Wheeling, etc., R. Co. v. Warrell*, 122 Pa. St. 613; *Hunter v. Thompson* (Pa. 1886), 5 Cent. Rep. 247. But where the purchaser defaults in the purchase money, forfeiting the sale, and then takes possession after a sale to a second purchaser, the former is not entitled to a conditional verdict. *Emery v. De Gollier*, 117 Pa. St. 153.

Power to Annex Condition.—The jury cannot give damages for the breach of a parol contract of sale incapable of enforcement by annexing a condition to their verdict, *Gill v. Gill*, 37 Pa. St. 312; nor can they in a second ejectment, after a judgment rendered in favor of defendant, annex a condition

that the plaintiff in whose favor the second verdict is rendered shall pay for the improvements made by defendant in the meanwhile. *Collins v. Rush*, 7 S. & R. (Pa.) 147.

Amendment.—Where the conditional verdict failed to set the time within which payment should be made, it was amended in the Supreme Court, *Kensinger v. Smith*, 94 Pa. St. 384; and a conditional verdict for the defendant has been amended to a corresponding verdict for the plaintiff. *Wells v. Van Dyke*, 106 Pa. St. 111, 109 Pa. St. 330.

3. *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 35; *Lenoir v. South*, 10 Ired. (N. Car.) 237; *Allie v. Schmitz*, 17 Wis. 169; *Lee v. Tapscott*, 2 Wash. (Va.) 276.

Informal Judgment.—A judgment, though informal, may be sufficient if it award the plaintiff his damages as found by the jury and a writ of possession for the land. *Hamner v. Edkins*, 3 Stew. (Ala.) 192. Thus, where the plaintiff proves his ownership in fee and succeeds in securing a general verdict from the jury in his favor, a judgment that he recover the premises described has been held substantially sufficient. *Mapes v. Scott*, 94 Ill. 379.

Judgment for Entire Premises.—A judgment for the whole of the premises claimed should follow a general verdict. *Beaty v. Hudson*, 9 Dana (Ky.) 322; *Mapes v. Scott*, 94 Ill. 379; *Den v. Hammel*, 18 N. J. L. 73.

Upon Individual Findings.—But where there are several findings for distinct parcels of land, the judgment should be entered up against the different defendants separately, according to the verdicts. *Jackson v. Woods*, 5 Johns. (N. Y.) 278; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; *Hogelskamp v. Weeks*, 37 Mich. 422; *Lick v. Stockdale*, 18 Cal. 219; *Leese v. Clark*, 28 Cal. 26.

Nugatory Matter.—The incorporating of nugatory matter in a judgment in ejectment, such as the recital of an incorporeal right, *Taylor v. Gladwin*,

however, the verdict, as rendered by the jury, is not in proper form, the court may change its form, provided the finding concludes the issues.¹

b. FORM—Where Verdict for Defendant.—If the verdict be for the defendant, the judgment should be that he go without day and that he recover his costs as in other cases.²

Where Verdict for Plaintiff.—But if, on the other hand, the verdict be for the plaintiff, then it should be for the land in dispute with damages and costs.³

XIX. THE WRIT OF POSSESSION—1. In General—Execution for Damages

40 Mich. 232, or a special finding inapplicable to the case, *Burkle v. Ingham Circuit Judge*, 42 Mich. 513, does not affect the validity of the judgment.

Additional Words.—The addition of the words "free and clear of all claims of the plaintiff" has been held error where the defendant was adjudged to be the legal owner with the right of possession. *King v. Kindred*, 38 Minn. 354.

1. *Wood v. McGuire*, 17 Ga. 361; *Johnson v. Visser*, 96 Cal. 310; *Thompson v. Mattern*, 115 Pa. St. 501. Thus it has been held that the court might change a verdict for plaintiff for \$1435.79, to a "verdict for the plaintiff for the land described in the writ, without prejudice to the right of the plaintiff to bring suit for mesne profits," *Cope v. Kidney*, 115 Pa. St. 228; *M'Murray v. Oneal*, 1 Call (Va.) 246; and might correct a verdict for "plaintiffs" where there was only one. *Kemble v. Herndon*, 28 W. Va. 524.

Implied Authority to Modify.—It has been held that where a case has been stated and agreed upon by both parties, so as impliedly to authorize the court to modify the verdict, the court might, in its discretion, render a judgment for a part where the jury has rendered a verdict for the whole. *Den v. Hammel*, 18 N. J. L. 73.

2. *Poe on Practice*, § 481; *Blunt v. Wright*, Winst. L. (N. Car.) 89.

But the court cannot render judgment against a plaintiff who has dismissed his suit, for one hundred and twenty-five dollars attorney's fees incurred from the necessity of appointing a guardian *ad litem* for infant defendants. *Mason v. McLean*, 6 Wash. 31.

Judgment in General Terms.—A judgment in general terms is sufficient on a verdict favorable to the defendant. It

may, however, define the line between the plaintiff and defendant when that is the point of controversy. *Laramy v. Ruschke*, 46 Minn. 125.

3. *Poe on Practice*, § 481; *Kershner v. Kershner*, 36 Md. 309; *Wightman v. Doe*, 24 Miss. 675; *Bronson v. Paynter*, 4 Dev. & B. (N. Car.) 393; *Wires v. Nelson*, 26 Vt. 13; *Boyd v. Cowan*, 4 Dall. (Pa.) 138.

But a judgment for damages and rents and profits should not be given where there is no evidence on the subject. *Franklin v. Haynes*, 119 Mo. 566.

Nil Dicit.—If the plaintiff claims damages in his declaration he must release his damages before he can have a judgment upon *nil dicit*. *Cushwa v. Cushwa*, 9 Gill (Md.) 242.

Failure to Award Possession.—A judgment which fails to award the plaintiff possession of the disputed premises may be corrected at a subsequent term. *Hadlock v. Hadlock*, 22 Ill. 384.

In North Carolina no more formal judgment is required in ejectment than in any other action. *Murphy v. Guion*, 2 Murph. (N. Car.) 238.

In Florida it is required that the judgment in favor of the plaintiff shall state the quantity of the estate recovered, and failure to enter it accordingly is error. *Lungren v. Brownlie*, 22 Fla. 491. A judgment which does not state the estate recovered must be set aside and a proper one entered by the court in accordance with the verdict. *Neal v. Spooner*, 20 Fla. 38; *Long v. Linn*, 71 Ill. 152.

Death of Lessor.—Where the lessor dies pending suit a judgment may be rendered and possession given as if he were still living. *Mooberry v. Marye*, 2 Munf. (Va.) 453. But if the lessor so dying had only a life estate in the property the court will not award a writ of possession. *Wilson v. Hall*, 13 Ired. (N. Car.) 489.

and Costs.—That portion of the judgment which is for damages and costs may be executed as judgment in other actions for payment of money.¹

May Enter Peaceably without Writ.—Although, after judgment in favor of the plaintiff for the land, he may enter without a writ if he can do so peaceably, or if the lands are abandoned,² yet the judgment cannot be enforced without process,³ and in practice possession is always had by writ of *habere facias possessionem*.⁴

2. Name and Form.—The writ is known as the writ of *habere facias possessionem*. It is addressed to the sheriff and commands him to deliver to the plaintiff⁵ possession of the premises recovered.⁶

3. When to Issue and when to be Executed—When to Issue.—The writ issues as a matter of course, where the judgment is entered upon the verdict of a jury,⁷ and at common law the writ is irregular if issued after the lapse of a year and a day, unless it has been enjoined, stayed by agreement, writ of error, or appeal.⁸ Nor can it issue after the demise laid in the declaration has expired.⁹

1. Poe on Practice, § 498.

Plaintiff may execute on his judgment for damages and rent, pending proceedings to restrain execution of writ of possession until value of improvements ascertained. *Tissier v. Hill*, 13 Mo. App. 36.

Estreppet to Stay Waste.—In ejectment, a writ of estreppet to stay waste will generally be granted on motion, supported by affidavit. It will not, however, issue as a matter of course. *Higgins v. Roe*, 3 Harr. (Del.) 49.

2. *Witbeck v. Van Rensselaer*, 64 N. Y. 31.

Plaintiff, after judgment, may enter without writ, even though the law prohibits issuance of writ until commissioner appointed to appraise the improvements had reported. *Tribble v. Frame*, 5 Litt. (Ky.) 190.

Not Liable for Trespass.—"The lessor in ejectment may enter after judgment without a writ of possession; and the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, so long as the effect of the judgment continues." *Jackson v. Haviland*, 13 Johns. (N. Y.) 234.

3. *Tribble v. Frame*, 5 Litt. (Ky.) 190; *Jackson v. Haviland*, 13 Johns. (N. Y.) 235; *Petty v. Malier*, 15 B. Mon. (Ky.) 603; *Davis v. Lee*, 2 B. Mon. (Ky.) 300.

4. *Adams on Ejectment* 339.

5. **Death of One Plaintiff.**—If one of

two plaintiffs die after judgment, execution may issue in their joint names, without *scire facias*. *Howell v. Eldridge*, 21 Wend. (N. Y.) 679.

6. **Description by Metes and Bounds.**—Where the premises recovered are described by metes and bounds, the plaintiff cannot take possession at his peril, subject to be put right by the court, as he may in case of a general declaration, verdict, and judgment, but he must be guided by the location as given in the judgment. *Jackson v. Rathbone*, 3 Cow. (N. Y.) 296.

Growing Crops.—Unless plaintiff has recovered mesne profits, he is, on rendition of judgment in his favor, entitled to be placed in possession of the growing crops, as against the defendant and those holding under him. *Gardner v. Kersey*, 39 Ga. 664.

7. *Doe v. Bennett*, 4 B. & C. 897, 10 E. C. L. 466; *Riverside Co. v. Townshend*, 120 Ill. 9; *Sinclair v. Worthy*, Winst. (N. Car.) 114.

8. *Bowar v. Chicago West Div. R. Co.*, 136 Ill. 101.

Special Order.—Where plaintiff fails to take out the writ within a year and a day, it is doubtful if he can do so without special order after the lapse of a year and a day. *Oetgen v. Ross*, 47 Ill. 147.

9. *Jackson v. Haviland*, 13 Johns. (N. Y.) 234.

Even though Suspended by Injunction.—No *habere facias possessionem* can issue after the expiration of the

When to be Executed.—It is not necessary to have a return day for the writ, and if command is made to return the writ within a specified time it is merely directory.¹

4. Alias Writ.—If a writ of *habere facias* be executed by putting the plaintiff in possession, and the plaintiff has been ousted before the return of the writ, by the defendant or one claiming under him, the plaintiff may issue an alias writ.²

demise laid in the declaration, though execution has been suspended by injunction. *Smith v. Hornback*, 3 A. K. Marsh. (Ky.) 392.

1. Jackson v. Hawley, 11 Wend. (N. Y.) 184. In the case of *Witbeck v. Van Rensselaer*, 64 N. Y. 31, the court says: "But the only authority" cited "for the purpose of showing that this rule" (that after the return day of a writ the power of the sheriff to execute it is gone) "applies to a writ of possession is *Adams on Ejectment* 346, note 1, where it is stated that the writ of *habere facias possessionem* cannot be executed after the return day. This note, however, is founded only upon a manuscript decision of the U. S. Cir. Ct. of Pa., cited in *Coxe's Digest*, p. 273, and upon the case of *Dent v. Simmons*, 7 J. J. Marsh. (Ky.) 42, in which no such point was adjudged, but only that where a writ of possession had been fully executed, and the plaintiff in ejectment put in possession and the writ returned executed, and the defendant in the execution afterwards re-entered, the proper remedy for restitution was by warrant for forcible entry, and that an order for an alias writ of possession was erroneous."

2. Jackson v. Hawley, 11 Wend. (N. Y.) 184, *overruling* *Doe v. Roe*, 1 Taunt. 55; *Jackson v. Stiles*, 9 Johns. (N. Y.) 391; *Lloyd v. Roe*, 2 Dowl. N. S. 407.

Dispossession must Be Immediately or Soon after Delivery of Possession.—Mr. Tidd, in his work on practice (vol. 2, 9th ed., p. 1247) limits the rule to cases where the dispossession is immediately or soon after the delivery; but a different rule prevails in *New York*, where it is a common practice to leave the writ without a return day for the express purpose of having it re-executed in case of a future dispossession by the defendant. *Jackson v. Hawley*, 11 Wend. (N. Y.) 184.

Contra.—In the case of *Hinton v. McNeil*, 5 Ohio 509, the court says that after plaintiff is once put in possession

all requirements are satisfied, and for any subsequent dispossession he must resort to a second action; the question of time, or return day, is not mentioned.

Two Judgments for Same Property.—Where two parties sue separately in ejectment against the same defendants, the party who first recovers a judgment and goes into possession thereunder cannot be ousted by the other plaintiff under a subsequent judgment and writ against the defendants. Their respective rights must be determined by a suit between themselves. *Jones v. Chiles*, 2 Dana (Ky.) 33.

Order Only Nisi.—In the case of *Lloyd v. Roe*, 2 Dowl. N. S. 407, a rule absolute in the first instance was denied, but a rule *nisi*, calling upon the tenant to show cause why he should not restore possession, was granted. *Lloyd v. Roe*, 2 Dowl. N. S. 407.

Not to Issue without Notice.—An alias writ will not issue without notice, but notice may be given before execution. *White v. Robinson*, 3 Penny. (Pa.) 222.

Writ Returned Unexecuted.—Where the sheriff returned that he took the plaintiff with him, and, after removing all persons whom he could find on the premises, delivered possession to the plaintiff and departed, and that immediately three persons secretly lodged in the house expelled the plaintiff; that he returned to restore possession, but could not do so; the court held that this was equivalent to a return of the writ unexecuted, and ordered an alias writ. *Upton v. Wells*, 1 Leon 145. See also *Bowar v. Chicago West Div. R. Co.*, 136 Ill. 101.

After Return, Alias Writ will Not Issue.—After a writ of *habere facias* has been once returned "executed," the execution is of record, and no alias will issue. For any subsequent wrongs, a new action must be brought. *U. S. v. Slaymaker*, 4 Wash. (U. S.) 169; *Dent v. Simmons*, 7 J. J. Marsh. (Ky.) 42.

Pluries Writ.—If before the return of the alias writ the plaintiff is again dis-

5. Method of Execution—*a. IN GENERAL.*—The execution of a writ of *habere facias possessionem* must be by putting the defendant, or the parties in possession, out, and by delivery of the possession to the plaintiff by putting him into actual possession of the property.¹

*b. DUTY AND LIABILITY OF PLAINTIFF—***Must Point Out and Locate Property.**—Upon obtaining his writ of possession, it is the duty of the plaintiff to point out to the sheriff the premises to which he has established title, and in so doing he acts at his peril if he takes more than he is entitled to take.²

possessed by the defendant, or one claiming under him, he may have a pluries writ, and so on *ad infinitum*. *Van Rensselaer v. Witbeck*, 2 Lans. (N. Y.) 499. And see *Simpson v. Shannon*, 5 Litt. (Ky.) 322.

1. Putting Tenant out of House.—If there is a house on the premises, the writ must be executed by putting the tenant out of the house and putting the plaintiff into it. *Den v. Bilderback*, 16 N. J. L. 497.

Not Executed until Sheriff Gone.—The writ is not executed until the sheriff has gone, and the plaintiff is left in quiet enjoyment of the premises. *Adams on Ejectment* 343; *Anonymous*, 6 Mod. 115.

Impossible for Sheriff to Go on Land.—As to what is a sufficient delivery in cases where it is impossible for sheriff to go on the land, see *Falvey v. Elliott*, 22 Alb. L. J. 156.

Land Covered with Water.—The sheriff is not prevented from delivering actual possession of land under the writ of possession by its being covered with water. *Perrine v. Bergen*, 14 N. J. L. 355.

Land Held by More than One Tenant.—Where the land recovered is held by one tenant, a delivery of any part, in the name of the whole, will be sufficient; but if there are two or more tenants, separate delivery must be made of the lands held by each tenant. 1 Moll. Ab. 886, H. 2.

Undivided Interest.—On recovery of an undivided interest in the tract of land, the sheriff must put the plaintiff into actual possession of the whole along with the defendant. *Ash v. McGill*, 6 Whart. (Pa.) 391.

Land in Possession of Third Party.—A judgment in ejectment does not bind one not a party or a privy to the suit, and gives no right of entry on land in

his possession, *Kercheval v. Ambler*, 7 J. J. Marsh. (Ky.) 628; although he came into possession after the issuing of the writ of ejectment. *Krepps v. Mitchell*, 156 Pa. St. 320.

An assignee pendente lite, however, may be ejected under judgment against his assignor. *Howard v. Kennedy*, 4 Ala. 592.

Return should Show that Party Ousted Held under Defendant.—Where sheriff puts a person out of possession as holding under defendant, his return should show that essential fact. *Krepps v. Mitchell*, 156 Pa. St. 320.

Tenant of Association Not in Being.—The sheriff is bound to deliver possession as against the tenant of a body not in being. *Monongahela Valley Campmeeting Assoc. v. Patterson*, 96 Pa. St. 469.

Removal of Personalty.—Although it is the duty of the sheriff, if required, to remove from the premises the personal property thereon, yet the omission to do so does not vitiate the execution of the writ if the possession of the land is delivered. *Witbeck v. Van Rensselaer*, 64 N. Y. 27.

2. Bayard v. Colefax, 4 Wash. (U. S.) 43; *Simpson v. Shannon*, 5 Litt. (Ky.) 322; *Den v. O'Hanlin*, 18 N. J. L. 127; *White v. Den*, 24 N. J. L. 753; *Jackson v. Rathbone*, 3 Cow. (N. Y.) 296; *Den v. Johnson*, 12 N. J. L. 275; *Johnson v. Nevill*, 65 N. Car. 677.

Description in Verdict by Metes and Bounds.—Although the plaintiff takes possession at his peril to any extent he chooses, subject to be put right by the court, when the verdict is in general terms, yet when the verdict describes the land by metes and bounds the sheriff cannot give possession beyond it. *Jackson v. Rathbone*, 3 Cow. (N. Y.) 296.

c. DUTY AND LIABILITY OF SHERIFF.—**Must Deliver Peaceable Possession to Plaintiff.**—It is the duty of the sheriff to enter upon the premises, to take possession of the same, to remove all persons thereon, and to deliver peaceable possession to the plaintiff.¹

XX. WRIT OF RESTITUTION. (See also article RESTITUTION.)—Courts of law exercise a sort of equitable jurisdiction over writs of *habere facias possessionem*, and if the plaintiff takes possession under the writ of more land than the judgment allows him, the court, in its discretion, will, by writ of restitution, order the excess to be restored,² and will enforce the writ by process of contempt,

1. See *supra*, XIX. 5. a. *In General.*
Court will Not Instruct.—"The court will not direct the sheriff in what manner he shall execute process. * * * The court should not advise the sheriff, by ordering him to do particular acts, as being essential and proper to the rightful performance of his duty. Although so ordered he might be prosecuted for his acts, and the court might be placed in the position of being required to give judgment upon a matter which it had prejudged without due consideration, and the sheriff might be subjected to damages for obeying an order, and that, too, by the judgment of the court in obedience to whose order the acts were done. The sheriff must act, under the advice of his counsel, on his own responsibility." *Bowie v. Brahe*, 4 Duer (N. Y.) 677, 2 Abb. Pr. (N. Y.) 161.

Directions of Plaintiff.—As seen before, when the verdict is general, the sheriff must follow the directions of the plaintiff, but when verdict is special he must follow it. See *supra*, XIX. 5. b. *Duty and Liability of Plaintiff*, and notes.

What Force Sheriff may Use.—When any house is recovered by any real action, or by *eject. firmæ*, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere facias seisinam* or *possessionem*, etc., and after judgment it is not the house in right and judgment of law of the tenant or defendant. *Semayne's Case*, 5 Coke 92.

When Execution Made before Notice of Stay.—If, after execution of a writ of possession by putting the plaintiff or his assignee into possession, the sheriff is served with notice of a stay of execution, he is not bound to put out the plaintiff or his assignee and reinstate the tenant, and his refusal to do so is

not a contempt of the order for stay of execution. *People v. Cooper*, 20 Hun (N. Y.) 486.

2. *Oetgen v. Ross*, 47 Ill. 147; *Coleman v. Henderson*, 3 Ill. 252; *Ex p. Reynolds*, 1 Cai. (N. Y.) 500; *Jackson v. Hasbrouck*, 5 Johns. (N. Y.) 366; *Watson v. Floral College*, 2 Jones (N. Car.) 211; *Perry v. Tupper*, 70 N. Car. 538; *Shaw v. Bayard*, 4 Pa. St. 257.

In Doubtful Cases, Court will Award Feigned Issue.—If the plaintiff take possession of more land than he has in fact recovered, the court will grant a writ of restitution. If the case is doubtful, a feigned issue will be awarded. *Jackson v. Hasbrouck*, 5 Johns. (N. Y.) 366.

Will Only Issue where Verdict General.—Where the declaration and judgment in an action of ejectment are general, and the plaintiff takes under the writ more than he is entitled to recover, on motion in the court issuing the writ the defendant may have restitution; not so, however, where the lands are specially described. *Natchez v. Vandervelde*, 31 Miss. 722, citing *Jackson v. Rathbone*, 3 Cow. (N. Y.) 291.

Where Excess Taken after Return of Writ.—The writ of restitution will only lie in cases where a greater amount of land or a greater interest therein than the plaintiff has been awarded is taken by execution. It will not lie where the excess is taken after the return of the writ. Thus when a party recovered in an action of ejectment a one-sixth interest in a lot, and, after the return of the writ, ousted the defendant of the whole, no writ of restitution will lie, but a separate action must be brought. One of the justices holds that where the writ is properly executed and the defendant is ousted before return, the only remedy is by a new action. *Gardiner v. Schuylkill Bridge Co.*, 2 Binn. (Pa.) 452.

when it cannot be enforced by execution.¹ So also if after possession is delivered the judgment is reversed on appeal,² or set aside.³

Party Turned out by Mistake.—If a party is turned out of possession by mistake in executing a writ of possession, in certain cases he may, on motion to the court, be restored to possession.⁴

XXI. NEW TRIALS—1. **In General.**—New trials may be granted in actions of ejectment as well as in other civil actions,⁵ for the

Judgment by Default.—When the plaintiff recovers judgment against the casual ejector by default, and thereupon takes possession of more than he is entitled to, he will be ordered to restore the excess. *Jackson v. Stiles*, 5 Cow. (N. Y.) 418.

Restitution to Plaintiff.—The courts of law have the same equitable jurisdiction over writs of restitution that they have over writs of *habere facias*, and if too much is taken under a writ of restitution, the party taking under the writ may be ordered to restore to the plaintiff. *Den v. O'Hanlin*, 18 N. J. L. 127.

1. "Where restitution is directed by order, it must be enforced by execution if that process can effect it; if not, then there is no way to protect the party except by punishing disobedience of the order as a contempt. In 2 Salkeld, section 88, it is said that, where a judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment should be granted upon the rule for contempt if there be not restitution. By this is meant, I suppose, that where the judgment is set aside, there is no roll on which to enter either a judgment for restitution or a suggestion. And as the rule or order directing restitution is the only authority for it, disobedience to it is treated as a contempt. I am unable to perceive any reason why the practice pursued in the case cited should not apply to the cases before us." Mullin, P. J., in case of *Dawley v. Brown*, 43 How. Pr. (N. Y. Supreme Ct.) 20.

2. *Hall v. Wells*, 54 Miss. 289.

Appellate Court may Award.—If the plaintiff, pending a writ of error, enforces his judgment on reversal, the appellate court may award the writ of restitution if the fact of the possession of plaintiff is of record. If the record does not show the execution, a

scire facias should issue. *Hall v. Wells*, 54 Miss. 289.

Where Appellate Court on Reversal Falls to Award Writ.—Where, on reversal of judgment in the action of ejectment, either party would be entitled to a writ of possession, if the court fail to award the writ, the party entitled may have the order of reversal amended by inserting an order of restitution. *Martin v. Rector*, 28 Hun (N. Y.) 409.

Premises in Possession of Third Party.—If the premises are in possession of a third party, holding under an unexpired lease, the court will not, on reversal of judgment, order restitution to plaintiff. *Carter v. Anderson*, 16 Daly (N. Y.) 437.

3. *Den v. Inslee*, 7 N. J. L. 161; *Den v. Fen*, 12 N. J. L. 321; *Dawley v. Brown*, 43 How. Pr. (N. Y. Supreme Ct.) 17; *Jackson v. Howd*, 1 Cal. (N. Y.) 503; *Greer v. McClelland*, 1 Phila. (Pa.) 128.

4. *Hall v. Hilliard*, 6 Ala. 43; *Ex p. Reynolds*, 1 Cal. (N. Y.) 500.

5. Being an ejectment case is no reason at all against granting a new trial; for though a new ejectment may be brought, yet here will be a change of possession by which the defendant will be a sufferer. This objection against granting a new trial because a new ejectment may be brought has been overruled again and again. Lord Mansfield, in *Goodtitle v. Clayton*, 4 Burr. 2224. See also *Taylor v. Sutton*, 15 Ga. 107 (citing with approval *Goodtitle v. Clayton*, 4 Burr. 2224), where the same point was raised, that no new trial could be granted in the action of ejectment.

New Trials Specially Favored in Ejectment.—The rules applicable to other cases in new trials are not so rigidly enforced in ejectment. *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309. So also in *Iowa*, by statute, *Newell v. Sanford*, 10 Iowa 397; *White v. Poorman*, 24 Iowa 108.

same reasons and upon the same grounds.¹

2. How Obtained—Procedure as in New Trials Generally.—The procedure for obtaining new trials in actions of ejectment in nowise differs from the usual procedure in other actions,² except in those states where, in actions of ejectment, new trials are obtainable as a matter of right.³

3. As a Matter of Right under Statute—*a.* IN GENERAL.—In many states new trials are now granted as a matter of right in actions of ejectment for the recovery of real property.⁴ As a rule, in these states, but one new trial is obtainable as a matter of right, although a second may be had for cause shown.⁵

b. WHO ENTITLED TO DEMAND.—Generally it is provided that the unsuccessful party, whether plaintiff or defendant, is the one entitled to a new trial.⁶ The right extends, however, only to the

Defense Stricti Juris.—"Although the law permits a defendant in ejectment to set up an outstanding title in a third person with which he has no connection, yet it is a defense *stricti juris*, and new trials will not be granted to enable a defendant to avail himself thereof, unless the court below have either refused to permit it to be made, or have grossly erred in acting on it." *Peck v. Carmichael*, 9 Yerg. (Tenn.) 328.

Cumulative Evidence.—Although there is a class of cases where second new trials should be granted in ejectment causes, when, by common law, a new trial would not be granted, yet this rule cannot be extended to allow new trials in ejectment suits where the defeated party has failed without excuse to produce available testimony, or to enable him to produce cumulative testimony. *Laffin v. Herrington*, 17 Ill. 399.

1. See article NEW TRIALS.

The unsuccessful party in an action of ejectment, as in other civil cases, is entitled to a new trial for sufficient legal cause, such as an erroneous ruling of the court in the admission or exclusion of evidence, a misdirection of the court to the jury, or a finding of the jury contrary to the evidence. *Emmons v. Bishop*, 14 Ill. 153.

Kansas.—In Kansas, by statute, second new trials will not be granted except on such grounds as in other cases a new trial may be had. *Clayton v. School Dist. No. 1*, 20 Kan. 256.

2. See article NEW TRIALS.

3. It has been held that when by statute a new trial must be granted as a matter of right in actions of eject-

ment, on application and performance of certain conditions, a new trial will not be granted on ground that verdict is contrary to the evidence, or on other common-law grounds. *Skinner v. Tibbitts*, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 370.

4. Rev. Stat. Indiana (1888) Civ. Pro., § 1064; McClain's Statutes Iowa, § 4498; Code Civ. Pro. Kansas, § 599; Rev. Stat. Mich. 1882, c. 269, § 36; Statutes Minn. (1891), 5414; Throop's Ann. Code Civ. Pro. (N. Y.) 1525; Compiled Statutes Nev. Code Civ. Pro., p. 822, § 630; Rev. Stat. Wis. 3092 (1878).

New York.—The right to demand a new trial as a matter of right on payment of costs and damages awarded on first trial has not been taken away by the code. *Cooke v. Passage*, 4 How. Pr. (N. Y. Supreme Ct.) 360; *Rogers v. Wing*, 5 How. Pr. (N. Y. Supreme Ct.) 50.

5. *Boland v. Gillett*, 44 Wis. 329.

In New York, under Code Civ. Pro., § 1525, a third trial may be granted if the court is satisfied that justice will thereby be ascertained and promoted, although no error may have been committed upon trial, nor any other grounds exist which at common law give a right to a new trial. *Keeler v. Dennis*, 39 Hun (N. Y.) 18.

New Trial on Writ of Error.—A new trial ordered by the Supreme Court on a writ of error is not such a new trial as comes within the meaning of such a statute. *Gilman v. Wayne Circuit Judge*, 21 Mich. 372.

6. See statutes cited in note to *supra*, XXI. 3. *a. In General.*

Minnesota.—"Whether the respond-

party against whom the judgment is rendered, his heirs, representatives, or assigns.¹

c. WHEN GRANTED—Payment of Costs as Condition Precedent.—The payment of the costs of the former trial is generally a condition precedent to the granting of a new trial under the statute.²

Payment of Damages.—And in some states the payment of the damages awarded is also a condition precedent to the granting of a new trial.³

Power of Court to Impose Conditions.—But the court has no power of

ent was or was not entitled to a new trial depends wholly upon the statute. Section 5, c. 64, p. 595, Pub. Stat., enacts, 'that any person against whom a judgment for the recovery of specific real property is rendered, may, within six months after written notice of judgment, upon the payment of all costs and damages recovered thereby, demand another trial by notice in writing to the adverse party or to his attorney in the action, and thereupon the action may be brought to trial by either party.' Now the only party to an action of ejectment as in this case against whom a judgment for the recovery of real property can be rendered, must be the defendant. He is in possession, and in no reasonable sense can it be contended that a judgment denying the plaintiff's right to a recovery is a judgment against him for a recovery. It is impossible to recover from him what he has not got. Again, the second trial is to be granted upon the payment of costs and damages. Damages in ejectment are awarded for the withholding of the property in dispute, or for rents and profits, and it cannot be claimed that such damages could be recovered against a plaintiff not in possession. * * * When the plaintiff institutes his action he ought to know whether he has any title and what it is, and our statute does not see fit to allow him to make repeated experiments at the expense and to the inconvenience of the defendant, unless he can bring himself within the rules applicable to other civil actions." *Howes v. Gillett*, 10 Minn. 400.

1. *Forsyth v. Van Winkle*, 9 Fed. Rep. 247; *Howell v. Leavitt*, 90 N. Y. 238.

2. *Setzke v. Setzke*, 121 Ill. 30; *Golden v. Snellen*, 54 Ind. 282; *McSheely v. Bentley*, 31 Ind. 235; *Whitlock v. Vancleave*, 39 Ind. 511.

New York.—Under the New York statute the court may impose, as a condition precedent to granting of a new trial in ejectment, the payment of all costs, including extra allowance granted by former judgment. *Wing v. De La Rionda*, 20 Civ. Pro. Rep. (Brooklyn City Ct.) 183, 125 N. Y. 678.

Damages and Costs, How Paid.—The damages and costs awarded in the first trial may be paid into court, to the clerk, and he is bound to accept national banknotes. *Dennison v. Genesee Circuit Judge*, 37 Mich. 281.

Setting Aside Order for New Trial.—An order vacating a first judgment in an action for the recovery of real estate, and for a new trial, will be set aside and cause struck from docket on proof of nonpayment of costs. *Golden v. Snellen*, 54 Ind. 282.

Proof of Nonpayment.—The issue thus raised as to payment or nonpayment of costs may be tried upon affidavits of the parties, if no objection is made. *Golden v. Snellen*, 54 Ind. 282.

Erroneous Certification of Costs "Paid."—Where the clerk certifies to the court that the costs are paid, when in fact they have not been, on discovery of the mistake the court may set aside the order for a new trial if application is made at same term, but if application is not made during the term the new trial will be had as if the costs were actually paid. *Cook County v. Calumet, etc., Canal, etc., Co.*, 131 Ill. 509.

3. *Myers v. Phillips*, 68 Ill. 270.

New York.—Payment of damages for detention is not a requirement of the New York statute. *Risley v. Rice*, 11 Civ. Pro. Rep. (N. Y. Supreme Ct.) 367.

Nominal Damages.—When the statute requires payment of damages, the benefit of the statute is not lost by a failure to pay "one cent" awarded as damages. *Myers v. Phillips*, 68 Ill. 270.

its own motion to impose conditions not prescribed,¹ and consequently, in the absence of statutory conditions precedent, a new trial will issue as a matter of course.²

Order will Not Issue before Judgment.—But the order for it will not issue before a judgment is rendered on the merits.³

d. PROCEDURE—New Trial Granted Only upon Application.—Notwithstanding a new trial may issue as a matter of right, none will be granted until application is made therefor by the party entitled.⁴

Form, etc., of Application.—The application should be made in the court where the first trial was had.⁵ It should generally be made in writing, showing both the rendition of the judgment and the performance by the party applying of the conditions precedent to a new trial.⁶

When Application must be Made.—Application must be made within the time allowed by statute. As to when the time allowed by

1. *Schrodt v. Bradley*, 29 Ind. 353; *Whitlock v. Vancleave*, 39 Ind. 511; *Shaw v. McMaren*, 2 Hill (N. Y.) 417.

2. *Haseltine v. Simpson*, 61 Wis. 427.

Stipulation—New York.—After the submission of a case by agreement under the code, the unsuccessful party is not entitled to have a new trial as of course. *Lang v. Ropke*, 1 Duer (N. Y.) 701; *Roberts v. Baumgarten*, 58 N. Y. Super. Ct. 407.

New York—Hearing at General Term.—It has been held in New York that when judgment upon verdict is stayed and exceptions of defendant directed to be heard, in the first instance, at general term, and the exceptions are overruled and judgment ordered for plaintiff upon verdict, that a new trial may be had under the statute. *Phyfe v. Masterson*, 45 N. Y. Super. Ct. 338.

3. *Whitlock v. Vancleave*, 39 Ind. 511; *Hall v. Sanders*, 25 Kan. 538; *Sacia v. O'Connor*, 47 N. Y. Super. Ct. 53.

After Appeal.—Where, on an appeal in an action of right, the cause is remanded for judgment in accordance with the opinion of the appellate court, the judgment so rendered is such a judgment of the lower court that a new trial may be granted as if no appeal had been taken. *Butterfield v. Walsh*, 25 Iowa 263.

Nonsuit.—The *Michigan* statute contemplates a trial on the facts; it has no reference to a nonsuit. *Hoffman v. St. Clair Circuit Judge*, 37 Mich. 131. *Contra*, *Conan v. Follis*, 61 Wis. 224.

Judgment by Default—Indiana.—After judgment by default a new trial will not be granted as of right under

Indiana statute. *Fisk v. Baker*, 47 Ind. 534.

New York.—In New York the granting of a new trial in ejectment after judgment by default may be granted if justice requires. *Reed v. Loucks*, 61 How. Pr. (N. Y. Supreme Ct.) 434, *overruling* *Christie v. Bloomingdale*, 18 How. Pr. (N. Y. Supreme Ct.) 12.

Trial by Court—Findings.—When the trial is before a court without a jury and judgment is rendered conditionally before findings are completed and filed, the statutory time for demanding a new trial runs from the filing of the findings, as the judgment until then is incomplete. *O'Blinskie v. Kent Circuit Judge*, 34 Mich. 62.

4. *West v. Cameron*, 39 Kan. 740; *Marsh v. Elliott*, 51 Ind. 547.

5. *Fraser v. Weller*, 6 McLean (U. S.) 11; *Christopher v. Detroit*, etc., R. Co., 56 Mich. 176; *Cunningham v. Milwaukee*, 13 Wis. 120.

6. In *Indiana* the application must be in writing and must show the rendition of the judgment, the time when rendered, that all the costs have been paid, and that a new trial is demanded as of right and without cause. *Marsh v. Elliott*, 51 Ind. 549; *Crews v. Ross*, 44 Ind. 481; *Starr v. Winning*, 7 Ind. 311; *Shuman v. Gavin*, 15 Ind. 93; *Falls v. Hawthorn*, 30 Ind. 444.

May be Made in Open Court.—It has been held that a demand for a new trial, made in open court, in the presence of the opposite party, is a substantial compliance with the Kansas statute. *Doster v. Sterling*, 33 Kan. 381.

statute begins to run, the courts of the various states have decided differently.¹

Notice of Application.—As a general rule, it is unnecessary that the opposite party or his attorney be served with notice.²

1. Wisconsin.—In Wisconsin it is held that the time runs from the perfection of the judgment by taxation and insertion of costs. *Haseltine v. Simpson*, 61 Wis. 427.

Michigan.—So when trial is before the court without a jury, and judgment is rendered conditionally upon certain findings, it has been held in Michigan that the time runs from the perfection of judgment by the filing of findings. *O'Blinskie v. Kent Circuit Judge*, 34 Mich. 62.

Pendency of Appeal.—The three years after judgment in which, under How. Stat., § 7822, a plaintiff in ejection has the right to a new trial on payment of costs, begins to run from the time the judgment is affirmed by the Supreme Court. *Boyce v. Osceola Circuit Judge*, 79 Mich. 154.

New York.—In New York the time runs from date of first judgment, not from time of affirmance on appeal.

Chautauqua County Bank v. White, 23 N. Y. 347.

2. Whitlock v. Vancleave, 39 Ind. 511; *Dennison v. Genesee Circuit Judge*, 37 Mich. 285; *Haseltine v. Simpson*, 61 Wis. 427.

Notice on the Journal.—In Kansas the opposite party is entitled to be apprised of the demand for a new trial by "notice on the journal." *Doster v. Sterling*, 33 Kan. 381.

It is error for the court to refuse another trial when demanded by the party against whom a judgment is rendered in an action for the recovery of real property, when demand is made by "notice on the journal" within the proper time. A notice on the journal, entered by the clerk, who is the only person authorized to make such entries, under the direction of the court, is the only way another trial can be demanded "by notice on the journal." *McManamy v. Ewing*, 1 Kan. 580.

ELECTION OF REMEDIES.

BY D. H. BOLLES.

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CROSS-REFERENCES.

See in general, as to the various forms of action between which an election may be had, articles *ASSUMPSIT*, vol. 2, p. 987; *REPLEVIN*; *TRESPASS*; *TRESPASS ON THE CASE*; *TROVER*.

As to Election between Different Counts in Same Complaint or Declaration, see article *COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS*, vol. 5, p. 302.

Election in Actions Concerning Various Subject-matters, see articles *CARRIERS*, vol. 3, p. 812; *CONTRACTS*, vol. 4, p. 913; *SALES*, etc.

Election between Statutory and Equitable Remedies to Reach Property of Debtor, see article *CREDITORS' BILLS AND FRAUDULENT CONVEYANCES*, vol. 5, p. 388.

Appeal from Refusal to Compel Election and the Presumption on Appeal of the Election where there Are Inconsistent Clauses in Complaint, see article *APPEALS*, vol. 2, pp. 87, 465.

Joinder of Different Causes of Action in One Suit or Action, see article *ACTIONS*, vol. 1, p. 108.

Amendments Changing Form or Cause of Action and Introducing New Cause of Action, see article *AMENDMENTS*, vol. 1, p. 458.

Election where there Is a Concurrent Jurisdiction, see article *JURISDICTION*.

Theory of the Case, whether Contract or Tort, etc., see article *THEORY OF THE CASE*.

Election between Different Counts in Indictments, see article *INDICTMENTS*.

I. DEFINITIONS—**General**.—Election of remedies, in its generic sense, is the act of choosing between the different modes of procedure and relief allowed by the law on the same state of facts, which modes may be termed “coexisting remedies.”¹

Specific.—In its technical and more restricted sense, election of remedies is the adoption of one of two or more coexisting remedies, with the effect of precluding a resort to the others. The remedies here intended are known as exclusive or alternate remedies.²

II. CLASSES OF ACTIONS SUBJECT TO ELECTION.—The election is not restricted to any classes of remedies. Whenever the law supplies to a party two or more methods of redress in a given case, based upon inconsistent theories, however those methods may differ, either in the form or the forum of procedure, or in the personality

1. The phrase “coexisting remedies” is used in the text as the correct expression of the generic idea, and it covers every instance where the law supplies more than one remedy on a given state of facts.

The term “concurrent remedies” is not infrequently employed for the same purpose, but as it is also employed quite as often where exclusive remedies are intended, the phraseology of the text seems preferable.

The term “accumulative remedies” would naturally suggest the same idea, but usage has imparted to it a different and well settled meaning, and it is used to designate the remedies created by statute and applied to cases in which and for which common-law remedies existed before. *Anderson's Dict. of Law*.

2. “If a man has several remedies for the same thing, he has an election to use which he pleases.” *Co. Lit.* 145 *a*, cited in 3 *Comyns' Dig.*, title *Election*.

Election of remedies is but a branch, though it has become a very important branch, of the general subject of optional or alternative procedure. The same effect that follows the adoption of one of several remedies, to wit, exclusion from resort to the other, follows the adoption of an alternative provision in a contract, or the acceptance

of a benefit under a will or other instrument of donation, when, by the terms or effect of the instrument, such acceptance involves the sacrifice or surrender of some property or right on the part of the donee.

The rule is of quite ancient origin, and was recognized and applied by the common-law courts from a period anterior to the reign of Elizabeth. It is claimed by Judge Story and other juridical writers that it was borrowed from the civil law. 2 *Story's Eq. Juris.*, §§ 1078, 1080 *et pas*.

Its ancient application was confined in the main to instruments of a testamentary character, and until it became the subject of cognizance in equity, its application even to them was rare. The court of chancery greatly improved upon the common law use of it, for the law courts could entertain cases only where the party upon whom devolved the right had made his election, but chancery assumed and exercised the power to compel him to make it when and as the equities of the situation required. Thus administered, it became a highly important and salutary rule of equity jurisprudence.

The application of the principle to remedies on any extended scale is of comparatively modern development.

of the parties to the several proceedings, the party is put to his election, and his choice of either is a bar to his resort to the other. Thus he may be required to elect between two or more actions *ex contractu*, or two or more actions *ex delicto*, or between remedies one or more of which belong to one class, and one or more to the other, or between remedies all equitable, or remedies one or more of which are of equitable, and the residue of legal, cognizance.¹

III. WHEN THE ELECTIVE PRINCIPLE APPLIES—Inconsistent Remedies. —As already stated, the principle does not apply to all coexistent remedies. As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and if not satisfied with the result of that, he may commence and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action and in another for damages on account of the fraud, both proceeding on the theory of ratifying the sale. But he cannot maintain either if he has rescinded the sale, or if, on the theory of rescission, he has resorted to replevin to recover

1. Election under the Code.—It has been suggested that in those states where the code system of practice obtains, consistency would require that the doctrine of election should be ignored. That doctrine, it is said, deals with the forms of action, and the code expressly abolishes all forms of action requiring the party to state his facts and claim the redress he desires. The point of the suggestion is, let the party state the case and the court administer the appropriate relief. That this is a mistaken view, both of the essential theory of election and the office and tenor of the code, is easily demonstrated.

(1.) The code does, indeed, purport to abolish forms of action, but it does not profess to abolish the essential rights of the citizen, or the various means of redress or relief which the law provides for the violation of them. On the contrary, the object of its enactment was to facilitate those means, and thus render it an easier task for him to vindicate the rights with which it is the office of the law to clothe him. Thus, though it did away with trover and trespass as forms of action, it did not profess to condone either, nor to disable the injured party from suing the wrongdoer in an action

and upon allegations adapted to the character and measure of the injury. Nor was this its effect. Nor, again, did it take from the injured party the right to waive the tort and sue *ex contractu*. Nor did it obliterate the distinction between wrong and contract. It is just as easy now to plead the conversion as a wrong or as a sale as it was before the code went into effect.

(2.) Election goes not to the form but to the essence of the remedy. It applies to the case where the law (not the practice) supplies to a party, in vindication of a right, two or more modes of procedure predicated upon conflicting theories. The function of the code is dormant until the party has made his election. Then its agency is to regulate his proceedings.

(3.) The idea of letting the party state his case and the court administer the proper relief is wholly aside from the question. The court will do that, of course, when the case comes before it. But the court has nothing to do in the matter till the plaintiff has made his election.

In a word, the right of election which the law confers must be exercised, and the particular mode of procedure chosen, before the functions of either the code or the court intervene.

the property. No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts.¹

Application of Test of Inconsistency.—As soon as the choice is made and one of the alternative remedies proffered by the law adopted, his act at once operates as a bar as regards the other, and the bar is final and absolute. This result indicates and emphasizes the distinction between remedies of this character and remedies consistent, for in case of the latter the satisfaction of one is the only bar to the other. This test (inconsistency) seems easy of application, yet the fact has not prevented confusion and a degree of contradiction in the reported cases. In view of this fact it will be well to note a few of the instances which, it would seem at first glance, involve the principle of election, but which a closer study will show do not, and also some in which the errors of trial courts in this regard have been corrected on review.²

1. Affirming Sale—Action for Fraud.—Thus in *New York* it is held that an act or action based on the theory of affirming a sale induced by fraud of the vendee will not defeat an action for damages consequent upon the fraud, *New York Land Imp. Co. v. Chapman*, 118 N. Y. 288, the reason being that both are in the line of affirming the sale, and therefore are consistent.

Inconsistency of Remedies the Essential Condition.—That the inconsistency of the remedies at the choice of the suitor is the essential condition of every application of the doctrine of election, is the teaching more or less direct and explicit of every case by which it is illustrated. We are not left, either, to merely inferential proof on this head. The proposition has been plainly and sharply enunciated by the courts of many of the states, and especially in the state of *New York*. Thus, in the case of *Garrison v. Marie*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 113, it is held that if one who has the right to affirm or repudiate a transaction brings an action, or takes other decisive steps, on the theory of repudiation, he cannot afterward be heard to maintain the opposite.

The same proposition was decided in the case of *Avila v. Manhattan Chemical Co.*, 32 Hun (N. Y.) 1. Still more sharply is the test applied by the court of appeals in the cases of *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Kinney v. Kiernan*, 49 N. Y. 164.

And the proposition is strikingly illustrated in a subsequent adjudication of the same court in *Moller v. Tuska*, 87 N. Y. 169.

2. Sale Induced by Fraud.—Thus a party sells goods to a firm, induced by the fraud of the partner who negotiates the purchase, and, as the price is not paid when it matures, sues the partners therefor and enters judgment. This will not prevent the vendor from suing the fraudulent partner and recovering damages for the fraud, for, says the court, the wrongdoer has by his wrongdoing supplied the vendor with an additional security for the debt, and it is but right that he should be allowed to avail himself of the benefit. *Morgan v. Skidmore*, 3 Abb. N. Cas. (N. Y. Ct. App.) 92.

On an analogous principle, the owner of property which he had sold, induced thereto by the fraudulent representations of the vendee, was upheld in replevying from an officer who had seized a part of the goods, and in presenting to the vendee's assignee his claim for the price of the residue. *Powers v. Benedict*, 88 N. Y. 605.

It was insisted by the defendant in that case that the plaintiff, by thus prosecuting his claim for the price of part of the goods, had elected to ratify the sale and had precluded himself from his action of replevin, which proceeded upon the opposite theory, but the court decided that he had the right to take the goods where he could find them and realize the balance of his claim through the bankruptcy of

IV. FINALITY OF ELECTION—1. General Rule.—It may, therefore, be stated as approximately if not substantially true that, subject to the exceptions hereafter stated, the first pronounced act of election is final and imperative. It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy.¹

the wrongdoer, and that a man must not be allowed to lose his property through the acts of the wrongdoer in scattering it.

The case of *Hersey v. Benedict*, 15 Hun (N. Y.) 282, decides the same proposition.

Attacking General Assignment.—Again, a creditor who attacks a general assignment may yet, if it is upheld, share in the benefit of it the same as if he had been friendly. *Mills v. Parkhurst*, 126 N. Y. 89.

This at first blush seems directly at variance with the doctrine of election, but, rightly regarded, that doctrine does not touch the case. The debtor, by his assignment, has created an irrevocable trust in behalf of the impugning creditor as well as of the others, and the only method of executing the trust is to pay him his *pro rata* share. That share is his, unconditionally, whether he assails the instrument or not. But while his impeachment of the instrument will not debar him from the benefit, the same principle does not apply to the facts reversed. If by any significant act he acquiesces in the assignment, he is debarred from attacking or endeavoring to impair it. *Rapalee v. Stewart*, 27 N. Y. 310.

Party must Have Two Remedies.—Finally, it is to be observed that to make a case for the application of the elective principle, the party must actually have at command two inconsistent remedies. It is not enough that he supposes he has them or even acts on that supposition. He must have them in fact. Thus a party, believing that he had a cause of action against the defendant for conversion, brought suit in trover and was defeated, inasmuch as the only case he proved was breach of contract. When he brought his action on contract, the defendant made the point that he was barred by his former suit, but the court held otherwise, holding with *Morris v. Rexford*, 18 N. Y. 552, and *Kinney v. Kiernan*, 49 N. Y. 164,

that "the institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights which he really possesses." *McNutt v. Hilkins*, 80 Hun (N. Y.) 235.

The following are a few of the adjudications in the courts of other states, on the subjects illustrated in this note. *Wells v. Robinson*, 13 Cal. 133; *Morrill v. Blackman*, 42 Conn. 329; *Browning v. Bancroft*, 8 Met. (Mass.) 278. *In re Van Norman*, 41 Minn. 494; *Gould v. Blodgett*, 61 N. H. 115; *Coos Bay R. Co. v. Wieder*, 26 Oregon 453.

1. *Alabama*.—*Towns v. Alford*, 2 Ala. 378; *Murray v. Ezell*, 3 Ala. 148.

Arkansas.—*Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458.

California.—*Rucker v. Hall*, 105 Cal. 425.

Colorado.—*Sickman v. Abernathy*, 14 Colo. 174.

Georgia.—*Lamar v. Pearre*, 90 Ga. 377; *Brunswick Co. v. Dart*, 93 Ga. 747.

Illinois.—*Herrington v. Hubbard*, 2 Ill. 569; *Derickson v. Krause*, 4 Ill. App. 507; *Rockford Ins. Co. v. Travelstead*, 29 Ill. App. 654; *Yourt v. Hopkins*, 24 Ill. 326; *Stier v. Harms*, 154 Ill. 476.

Indiana.—*Kepler v. Jessup*, 11 Ind. App. 241; *American Furniture Co. v. Batesville*, 139 Ind. 77; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381.

Massachusetts.—*Bradley v. Brigham*, 149 Mass. 141; *Stevens v. Pierce*, 151 Mass. 207; *Miller v. Hyde*, 161 Mass. 472.

Michigan.—*Rowley v. Towsley*, 53 Mich. 329; *Thomas v. Watt*, 104 Mich. 201.

Minnesota.—*Bjork v. Bean*, 56 Minn. 244; *Dyckman v. Sevaton*, 39 Minn. 132; *Gammon v. Ganfield*, 42 Minn. 368.

Missouri.—A party is not allowed to occupy inconsistent positions in the

2. **Exceptions**—*a.* **WANT OF JURISDICTION.**—Like most rules of general application, this is subject to certain exceptions. Thus if the first action is brought in a court that does not possess or acquire jurisdiction, this as an act of election is futile and goes for naught.¹

b. **PREMATURE ACTION.**—If the action is commenced before the cause of action has accrued, and is defeated for that reason, the suitor is not precluded from commencing another action after

same matter as a suitor. *Long v. Long*, 111 Mo. 12. He is bound by his election to take either of two inconsistent courses, his choice being final. *Nanson v. Jacob*, 93 Mo. 331; *Johnson-Brinkman Commission Co. v. Missouri Pac. R. Co.*, 52 Mo. App. 407; *Green v. St. Louis*, 106 Mo. 454; *Comstock v. Eastwood*, 108 Mo. 41; *Bensieck v. Cook*, 110 Mo. 173. If he proves before the assignee of the wrongdoer a claim for the value of goods converted, he cannot afterwards sue in trover. *Nanson v. Jacob*, 93 Mo. 331.

New York.—The remedy first adopted is final. *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416; *Rice v. King*, 7 Johns. (N. Y.) 20; *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 53; *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 432; *Morris v. Rexford*, 18 N. Y. 552; *Beloit Bank v. Beale*, 34 N. Y. 473; *Rodermund v. Clark*, 46 N. Y. 354; *Goss v. Mather*, 46 N. Y. 689; *Kinney v. Kiernan*, 49 N. Y. 169; *Kennedy v. Thorp*, 51 N. Y. 174; *Conrow v. Little*, 115 N. Y. 387; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34; *Cheeseman v. Sturges*, 9 Bosw. (N. Y.) 246; *Terry v. Munger*, 49 Hun (N. Y.) 560; *Roberts v. Ely* (Supreme Ct.), 9 N. Y. St. Rep. 796; *Stewart v. Huntington* (Supreme Ct.), 16 N. Y. St. Rep. 112; *Mills v. Parkhurst*, 126 N. Y. 89; *Garrison v. Marie*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 113. Though the parties to the two actions are different, the result is the same. *Roberts v. Ely* (Supreme Ct.), 9 N. Y. St. Rep. 796; *Geiler v. Littlefield*, 4 Misc. Rep. (N. Y. C. Pl.) 152; *Welch v. Seligman*, 72 Hun (N. Y.) 138; *Colvin v. Shaw*, 79 Hun (N. Y.) 56; *Heidelberg v. National Park Bank*, 87 Hun (N. Y.) 117.

South Carolina.—*Weisiger v. Wood*, 36 S. Car. 424.

Texas.—*Lera v. Treiberg* (Tex. Civ. App. 1893), 22 S. W. Rep. 236; *Bauman v. Jaffray*, 6 Tex. Civ. App. 489.

Wisconsin.—*Warren v. Landry*, 74 Wis. 144.

United States.—*Pine Lake Iron Co. v. Lafayette Car Works*, 53 Fed. Rep. 853; *Robb v. Vos*, 155 U. S. 13.

1. *Enterprise Soap Works v. Sayers*, 51 Mo. App. 310.

Contra—Michigan.—The text proposition seems incontrovertible. It is difficult to believe or maintain that a procedure which we are taught to regard as an absolute nullity for any purpose is yet potent as a bar to the enforcement of a valuable, and it may be a vital, right. Yet that very doctrine has been decided in Michigan in the case of *Nield v. Burton*, 49 Mich. 53. What renders this adjudication especially difficult to approve is the fact that while the suitor's resort to a court void of jurisdiction debars him from the alternative remedy as decided in that case, it does not, according to *In re Buddington*, 29 Mich. 472, and *Bassom v. Taylor*, 39 Mich. 682, preclude him from prosecuting his first remedy over again in a court possessing jurisdiction. Of course no one will question the soundness of the last stated proposition. But it is based distinctively on the ground of the nullity of the action of a court void of jurisdiction, and it is hard to understand how the same conditions can raise a bar against the alternative. Besides, the proposition of the text is well and cogently fortified by analogy. The principle that upholds it is the one which lies at the foundation of the second and third of this series of exceptions. The suitor is not to be prejudiced in his right of election either by his premature suit or his mistaken remedy, for the reason that under the conditions of each it is impossible for him to secure a final disposition of his case on the merits. No argument is needed to show that the action of a tribunal void of jurisdiction leads to a result equally futile, and of the same character.

the cause of action has matured.¹

c. MISTAKEN REMEDY.—If the suitor has, in his first action, mistaken his remedy and adopted a mode of redress incompatible with the facts of his case, and is defeated on that ground, he is still free to elect and proceed anew.²

d. IGNORANCE OF MATERIAL FACTS.—If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy. But if he does not do this with reasonable dispatch, he will be deemed to have waived the right and his original act will ripen into a bar.³

V. CAPACITY TO ELECT.—The power to choose between conflicting remedies is substantially coextensive with the right to prosecute or defend an action. Logical and legal consistency would seem to require that the right to litigate and the power to elect should stand on the same footing, the one co-ordinate with the

1. *New England Bank v. Lewis*, 8 Pick. (Mass.) 113; *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133.

2. *Arkansas.*—*Fluty v. School Dist.*, 49 Ark. 94.

Indiana.—*Bunch v. Grave*, 111 Ind. 351.

Iowa.—*Smith v. Bricker*, 86 Iowa 285.

Michigan.—*Kingsbury v. Kettle*, 90 Mich. 476; *McLaughlin v. Austin*, 104 Mich. 489.

Minnesota.—*In re Van Norman*, 41 Minn. 494.

Mississippi.—*Madden v. Louisville*, etc., R. Co., 66 Miss. 258; *Conn v. Bernheimer*, 67 Miss. 498; *Tucker v. Wilson*, 68 Miss. 693.

New Hampshire.—*Gould v. Blodgett*, 61 N. H. 115.

New York.—*White v. Whiting*, 8 Daly (N. Y.) 23; *Bowdish v. Page*, 81 Hun (N. Y.) 170.

3. *California.*—An act indicative of election, but put forth in ignorance of material facts, is a nullity. Such an act is decisive only when put forth after the party shall have become acquainted with them. *Wells v. Robinson*, 13 Cal. 133; *King v. Lagrange*, 50 Cal. 328.

Iowa.—*Mankin v. Mankin*, 91 Iowa 406.

Maryland.—If a party, after discovery of the fraud (or other invalidating fact), delays, or continues to deal with the subject-matter of the contract as before, he affirms the sale or other

transaction. And, though he may afterwards discover other invalidating circumstances, he cannot disaffirm. *Clements v. Smith*, 9 Gill (Md.) 160. *Generally*, *Howard v. Carpenter*, 11 Md. 259.

Michigan.—*Lentz v. Flint*, etc., R. Co., 53 Mich. 444.

Minnesota.—*Kraus v. Thompson*, 30 Minn. 64.

Missouri.—Bringing assumpsit, before notice of the facts warranting rescission, is not conclusive of the plaintiff's election to affirm the contract, except where the rights of innocent persons have intervened. Attaching creditors are not within the exception. *Goodger v. Finn*, 10 Mo. App. 226.

New York.—It must be a substantive and material, not merely cumulative, fact which gives him a new opportunity to rescind. *Bach v. Tuch*, 47 Hun (N. Y.) 536, 126 N. Y. 53; *Sacia v. Decker*, 1 Civ. Pro. Rep. (N. Y. C. Pl.) 47; *Underhill v. Ramsey* (Supreme Ct.), 2 N. Y. Supp. 451; *Borts v. Ferguson*, 46 Hun (N. Y.) 129; *Rochester Distilling Co. v. Devendorf*, 72 Hun (N. Y.) 622; *Tannenbaum v. Armeny*, 81 Hun (N. Y.) 581; *Rommel v. Townsend*, 83 Hun (N. Y.) 353; *Equitable Co-operative Foundry Co. v. Hersee*, 33 Hun (N. Y.) 169, 103 N. Y. 25; *Hays v. Midas*, 104 N. Y. 602; *Smith v. Smith*, 141 N. Y. 31; *Hyatt v. Clark*, 118 N. Y. 563.

Ohio.—*Parmlee v. Adolph*, 28 Ohio St. 10.

other. But careful scouting discloses a few exceptions so obscure that they have been almost entirely overlooked, so anomalous and illogical that they have not been cited or even recognized since their original enunciation.¹

VI. WHAT ACTS DETERMINE ELECTION.—The rules upon this subject deducible from the authorities cited² are simple.

Mere Words are Not Sufficient to bind a party, though they declare a purpose to resort to a particular remedy or embody a threat to employ it. But

Words are under Some Conditions Equivalent to Acts, especially if they are designed to influence the course of a party concerned and really do so.³

1. Goods in Custody of Sheriff.—One of these is to the effect that when goods in the custody of the sheriff are tortiously interfered with, that officer may of course sue in tort, but he has no election and cannot, under any circumstances, have assumpsit. If this be true of the sheriff, it applies in any case to any officer whose custody of property is interrupted. *Westervelt v. Jacquelin*, Anth. (N. Y.) 320.

Conversion by Consignee of Goods.—Again, it has been held that a consignee for sale by him on commission has no choice of remedies in case the consignee wrongfully converts them. If he sues—at all he must sue for the wrong. *Moffat v. Wood*, Seld. Notes (N. Y.) 186.

2. Arkansas.—*Bently v. Dillard*, 6 Ark. 79; *Hempstead v. Watkins*, 6 Ark. 317; *Burton v. Hynson*, 14 Ark. 32; *Arrington v. Washington*, 14 Ark. 218.

California.—*Hanly v. Kelly*, 62 Cal. 155.

Illinois.—*Derickson v. Chicago South Branch Dock Co.*, 18 Ill. App. 531; *Hanchett v. Riverdale Distillery Co.*, 15 Ill. App. 57; *Dobbins v. Hanchett*, 20 Ill. App. 396; *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57; *Morgan v. Thetford*, 3 Ill. App. 323; *Perry v. Pearson*, 30 Ill. App. 389; *Warren v. Wallridge*, 61 Ill. 173; *Preston v. Spaulding*, 120 Ill. 208; *Brumbach v. Flower*, 20 Ill. App. 219; *Gibbs v. Jones*, 46 Ill. 319.

Indiana.—*Gregory v. Schoenell*, 55 Ind. 101.

Massachusetts.—*Hooker v. Olmstead*, 6 Pick. (Mass.) 481; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175.

Michigan.—*Thompson v. Howard*,

31 Mich. 309; *Button v. Trader*, 75 Mich. 295; *Black v. Miller*, 75 Mich. 323; *Alterange v. Christiansen*, 48 Mich. 60; *Kenyon v. Woodruff*, 33 Mich. 310; *German American Seminary v. Kiefer*, 43 Mich. 105.

Minnesota.—*Thomas v. Joslin*, 36 Minn. 1.

Missouri.—*Anchor Milling Co. v. Walsh*, 20 Mo. App. 107; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558; *Enterprise Soap Works v. Sayers*, 51 Mo. App. 310.

New York.—*Litchfield v. Irvin*, 51 N. Y. 51; *Rapalee v. Stewart*, 27 N. Y. 310; *Cavanagh v. Morrow*, 67 How. Pr. (N. Y. Supreme Ct.) 241; *McCall v. Proal*, 48 N. Y. Super. Ct. 403; *Baird v. New York*, 96 N. Y. 567; *Manning v. Dayton*, 7 N. Y. Leg. Obs. 21; *Lewis v. Mott*, 36 N. Y. 395; *Conrow v. Little*, 115 N. Y. 387; *Terry v. Munger*, 121 N. Y. 161; *Bowker Fertilizer Co. v. Cox*, 106 N. Y. 553; *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498; *Lloyd v. Brewster*, 4 Paige (N. Y.) 537; *Acer v. Hotchkiss*, 97 N. Y. 395; *People v. Stephens*, 71 N. Y. 527; *Hughes v. Vermont Copper Min. Co.*, 7 Hun (N. Y.) 678.

Oregon.—*Ehrman v. Astoria*, etc., R. Co., 26 Oregon 377.

Pennsylvania.—*Seanor v. McLaughlin*, 165 Pa. St. 150.

Rhode Island.—*Whitford v. Chace*, 7 R. I. 322.

South Carolina.—*Cook v. Cook*, 2 Brev. (S. Car.) 349.

Texas.—*Roeder v. Robson*, 20 Tex. 754; *Rogers v. Green*, 35 Tex. 730.

Vermont.—*Arbuckle v. Hawks*, 20 Vt. 538.

Virginia.—*Tarpley v. Dobyons*, 1 Wash. (Va.) 185.

3. Thus if a creditor of one who has made a general assignment agrees

Property Acquired or a Benefit Received as the outcome of his choice of a particular remedy, or as the result of an incident of the choice, will securely bind the party benefited, though he has commenced no suit or judicial proceeding.

The Commencement of an Action with a full knowledge of the material facts is in most of the states regarded as conclusive. Yet in more than one of them even the significant procedure of commencing suit, or even proceeding to judgment, does not place the party outside the pale of retraction. Still in those states the institution of a suit is strong presumptive evidence of a definitive election.

Judicial Exercise of Power to Amend.—Allowance, too, must be made for the sporadic instances of deviation from the rule growing out of the liberal exercise by the courts of their power of amendment. The instances disclosed by the reports establish no rule, and indeed proffer no reliable hint for the suitor's guidance.¹

VII. SUBJECTS TO WHICH THE DOCTRINE HAS BEEN APPLIED—1. In General.—It will readily be seen that the application of the doctrine of the election of remedies to all the various relationships and transactions known to the law involve, for the greater part, the substantive law of subjects not to be treated in a work on procedure. Thus the rights and legal remedies of an employee who has been unjustly discharged, or of one against whom a fraud has been perpetrated, more properly belong to a treatment of the law of master and servant or of fraud than to a work dealing exclusively with civil and criminal procedure.² The election of a remedy, however, where property has been converted is so intimately related to the different forms of action and the proper course of procedure that that branch of the subject will here be discussed.

2. Conversion—*a.* ORIGINAL REMEDIES.—At common law the party wronged by an unlawful conversion of his personal property had at his command the three remedies, trover, trespass, and replevin. In time another remedy, one of the results of the ingraftment of equitable principles on the law, was, with some qualification, provided. For the benefit of the injured party, the law permitted him to waive the tort, treat the wrongdoer as his agent, and, upon his sale of the property and receipt of the consideration in money or its equivalent, regard his act as a sale for his (the owner's) benefit, and as a receiving and holding of the pro-

with him and the assignee as to the management of the estate, he is precluded from impeaching the assignment.

1. This is not surprising when it is considered that, the power to amend being discretionary, each case is a law unto itself. Doubtless in each reported instance of its exercise substantial justice was done as between the parties, but the aggregate bodies forth neither system nor consistency, and

hence adds nothing of value to the law relating to the subject in hand.

2. For a Full Treatment of the rights of parties who may elect between two or more courses in the various legal relationships, see Am. and Eng. Encyc. of Law, titles AGENCY; BAILMENT; CARRIERS; CONTRACTS; MASTER AND SERVANT; FRAUD; REAL PROPERTY; SALES; STATUTES; TRESPASS; TRUSTS; VENDOR AND PURCHASER; WARRANTY, etc.

ceeds in trust for his use. Thus the wrongdoer, upon converting the property into money or money's worth, became liable to the owner in assumpsit for money had and received. This doctrine, thus established in England, naturally took root on this side the Atlantic, though with some additional application. Thus if, instead of selling the property, the wrongdoer so used it that it could not be reclaimed, as, for instance, if, it being lumber, he used it in building or repairing his house, he could be sued for its value in an action for goods sold and delivered. So, too, on the death of the wrongdoer, his personal representative could be prosecuted in the same form of action. But in some of the states the doctrine was extended to every case of conversion, whether the wrongdoer sold the property or not. If he did sell and receive the money he could still be held liable for money had and received. If he did not, he could be sued for goods sold and delivered, and charged with their value. Hence a difference of adjudication in the courts of different states which still prevails. A decided majority of the states cleave to the English doctrine, but a very considerable number of them have adopted the more liberal rule.¹

1. The English Rule prevails in the following states:

Alabama.—Crow *v.* Boyd, 17 Ala. 51; Strother *v.* Butler, 17 Ala. 733; Pike *v.* Bright, 29 Ala. 332; Fuller *v.* Duren, 36 Ala. 73; Miller *v.* King, 67 Ala. 575; Smith *v.* Jernigan, 83 Ala. 256; the last case holding that a sale of the converted property by the wrongdoer for other property will not warrant assumpsit. The consideration he gets must be money.

Arkansas.—Bowman *v.* Browning, 17 Ark. 599; Hudson *v.* Gilliland, 25 Ark. 100; Chamblee *v.* McKenzie, 31 Ark. 155; Howell *v.* Graves, 27 Ark. 365; the last case deciding that in assumpsit the owner's recovery is measured by the sum of money the wrongdoer realizes.

In this state the rule is restricted to cases where the original possession of the wrongdoer is tortious; if rightful, his subsequent conversion warrants assumpsit, though he keep the property. Johnson *v.* Reed, 8 Ark. 202.

Connecticut.—Philadelphia Loan Co. *v.* Towner, 13 Conn. 264.

Delaware.—Hutton *v.* Wetherald, 5 Harr. (Del.) 38.

District of Columbia.—Stiles *v.* Selinger, 2 Mackey (D. C.) 429.

Georgia.—Barlow *v.* Stalworth, 27 Ga. 517; James *v.* Smith, 62 Ga. 345.

Illinois.—It is difficult to reconcile the cases in this state. Most of the

authorities stand for the English rule, but several strongly disfavor it, as thus: For the rule, Morrison *v.* Rogers, 3 Ill. 317; Dickinson *v.* Whitney, 9 Ill. 406; Staat *v.* Evans, 35 Ill. 455; Gray *v.* St. John, 35 Ill. 222; Creel *v.* Kirkham, 47 Ill. 344; Johnston *v.* Salisbury, 61 Ill. 316; Kellogg *v.* Turpie, 2 Ill. App. 55, affirmed 93 Ill. 265; Horner *v.* Boyden, 27 Ill. App. 573; Frey *v.* Harrison, 29 Ill. App. 243. *Contra*, Daniels *v.* Smith, 15 Ill. App. 339; Toledo, etc., R. Co. *v.* Chew, 67 Ill. 378.

If money is tortiously taken and converted, assumpsit for money had and received will lie, McDonald *v.* Brown, 16 Ill. 32, as it also will when the tortfeasor has sold the property and converted it into money. Alderson *v.* Ennor, 45 Ill. 128; Stiles *v.* Easley, 51 Ill. 275.

Iowa.—There seems to be a conflict of authority in this state also. Thus in Goodenow *v.* Snyder, 3 Greene (Iowa) 599, the court in the opinion lay down the rule that the unlawful conversion alone entitles the owner to assumpsit, but this is squarely negated in effect by the later case of Moses *v.* Arnold, 43 Iowa 187.

Kansas.—Stewart *v.* Balderston, 10 Kan. 142; Tightmeyer *v.* Mongold, 20 Kan. 90; Fanson *v.* Linsley, 20 Kan. 235; Smith *v.* McCarthy, 39 Kan. 308.

Maine.—Webster *v.* Drinkwater, 5 Me. 319; Rogers *v.* Greenbush, 57 Me.

b. ALTERNATIVE REMEDY.—There is, however, another aspect in which the equitable remedy of assumpsit is to be considered. As the theory of it is a transfer of title to the converted property

441; *Emerson v. McNamara*, 41 Me. 565; *Balch v. Patten*, 45 Me. 41; *Foye v. Southard*, 64 Me. 389; *Androscoquin Water Power Co. v. Metcalf*, 65 Me. 40.

Massachusetts.—*Jones v. Hoar*, 5 Pick. (Mass.) 285; *Allen v. Ford*, 19 Pick. (Mass.) 218; *Brown v. Holbrook*, 4 Gray (Mass.) 103.

But one who wrongfully converts bank bills is liable at once in assumpsit at the owner's election. *Mason v. Waite*, 17 Mass. 560. Or if without authority he sells the goods of another, he is also liable in assumpsit or trover. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120.

So a town is liable in assumpsit for an illegal tax actually paid, claim of illegality being thereby waived. *Perry v. Dover*, 12 Pick. (Mass.) 206; *Amesbury Woolen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Sumner v. Dorchester*, 4 Pick. (Mass.) 361; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Dow v. Sudbury*, 5 Met. (Mass.) 773; *Shaw v. Becket*, 7 Cush. (Mass.) 442.

So of an illegal school tax collected and paid to the building committee of the school district. *Joyner v. School Dist. No. 3*, 3 Cush. (Mass.) 567.

Michigan.—*Watson v. Stever*, 25 Mich. 386; *Tolan v. Hodgeboom*, 38 Mich. 624; *Tuttle v. Campbell*, 74 Mich. 652. But where a contract relation exists between the parties, the owner may at his election sue the wrongdoer in assumpsit for goods sold and delivered, even though the latter has made no sale. *Fiquet v. Allison*, 12 Mich. 328; *Coe v. Wager*, 42 Mich. 52; *McLaughlin v. Salley*, 46 Mich. 219; *Loomis v. O'Neal*, 73 Mich. 582; *McDonald v. McDonald*, 67 Mich. 122.

Nevada.—*Carson River Lumbering Co. v. Bassett*, 2 Nev. 249.

New Hampshire.—*Mann v. Locke*, 11 N. H. 246; *Page v. Babbitt*, 21 N. H. 389; *Allen v. Woodward*, 22 N. H. 544; *Smith v. Smith*, 43 N. H. 536.

If a tenant in common sell the entirety of the common property, his cotenant may sue him in assumpsit for his share of the avails, waiving the tort. *White v. Brooks*, 43 N. H. 402.

New Jersey.—*Budd v. Hiler*, 27 N. J. L. 44; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

North Carolina.—*Jones v. Baird*, 7 Jones (N. Car.) 152; *Scottish Carolina Timber, etc., Co. v. Brooks*, 109 N. Car. 698.

Pennsylvania.—The adjudications in this state are decidedly mixed on this question. *Willet v. Willet*, 3 Watts (Pa.) 277; *Pearsoll v. Chapin*, 44 Pa. St. 9, strongly lean to the English doctrine; but *Finney v. M'Mahon*, 1 Yeates (Pa.) 248; *May v. Kornhaus*, 9 W. & S. (Pa.) 121; *McCullough v. McCullough*, 14 Pa. St. 295; *Dundas v. Muhlenberg*, 35 Pa. St. 351, are quite as decidedly the other way.

South Carolina.—*Warren v. Lagrone*, 12 S. Car. 45.

Vermont.—*Wier v. Church, N. Chip.* (Vt.) 95; *Scott v. Lance*, 21 Vt. 513; *Burnap v. Partridge*, 3 Vt. 144; *Centre Turnpike Co. v. Smith*, 12 Vt. 217; *Stearns v. Dillingham*, 22 Vt. 624; *Phelps v. Conant*, 30 Vt. 277; *Elwell v. Martin*, 32 Vt. 220; *Kidney v. Persons*, 41 Vt. 386. And he must have actually received the money on his sale, or its equivalent, *Burnap v. Partridge*, 3 Vt. 144, such as a promissory note or negotiable paper, or the satisfaction of a money demand. *Kidney v. Persons*, 41 Vt. 386. But conversion into money may be presumed when the property is salable from lapse of time. *Flower Brook Mfg. Co. v. Buck*, 18 Vt. 238. Taking payment in a commodity such as a harness would meet the conditions. *Kidney v. Persons*, 41 Vt. 386. So if timber is converted and sold, but enough is not realized to pay for cutting, the case does not authorize assumpsit. *Lemington v. Stevens*, 48 Vt. 38.

West Virginia.—*Maloney v. Barr*, 27 W. Va. 381.

The *Contrary Rule* prevails in the following states:

California.—*Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380; *Lehmann v. Schmidt*, 87 Cal. 15; *Chittenden v. Pratt*, 89 Cal. 178; *Lataillade v. Orena*, 91 Cal. 565.

Indiana.—*Cooper v. Helsabeck*, 5 Blackf. (Ind.) 14; *Jones v. Gregg*, 17 Ind. 84; *Morford v. White*, 53 Ind. 547.

from the owner to the wrongdoer or his vendee, it is the opposite of the theory upon which are predicated the remedies of trespass, trover, and replevin, which is that of continued title in the injured party. This fact renders it the alternative remedy of each of them, and therefore a resort to it bars all recourse to either of them, and *vice versa*. The owner of converted property may reclaim it wherever he finds and identifies it, except from a purchaser for value and in good faith, or he may recover its value in trespass or trover, or, instead of taking it by replevin or seeking satisfaction in damages, he may sue for its value in assumpsit.¹

Kentucky.—Pritchard *v.* Ford, 1 J. Marsh. (Ky.) 544; Guthrie *v.* Wickliffe, 1 A. K. Marsh. (Ky.) 83; Eversole *v.* Moore, 3 Bush (Ky.) 51; Haddix *v.* Wilson, 3 Bush (Ky.) 525.

Missouri.—Floyd *v.* Wiley, 1 Mo. 430; Johnson *v.* Strader, 3 Mo. 359; Gordon *v.* Bruner, 49 Mo. 570.

Montana.—Galvin *v.* MacMin, etc., Co., 14 Mont. 508.

New York.—The courts of this state were at first inclined to adopt the English rule and hold that assumpsit would not lie for goods converted until the wrongdoer had sold them and realized the value, though occasional doubts were mooted as to the logical consistency of the restriction. Butts *v.* Collins, 13 Wend. (N. Y.) 156; Putnam *v.* Wise, 1 Hill (N. Y.) 240; Berly *v.* Taylor, 5 Hill (N. Y.) 577; Osborn *v.* Bell, 5 Den. (N. Y.) 370; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270; Henry *v.* Marvin, 3 E. D. Smith (N. Y.) 71; Tryon *v.* Baker, 7 Lans. (N. Y.) 511; Schroepel *v.* Corning, 6 N. Y. 107.

In Tryon *v.* Baker, 7 Lans. (N. Y.) 511, the subject of the conversion was money, and the court held that the wrongdoer was liable as for money had and received, though it still remained in his hands.

In Cummings *v.* Vorce, 3 Hill (N. Y.) 282; Osborn *v.* Bell, 5 Den. (N. Y.) 370, the restricted rule was criticised and the broad doctrine distinctly favored. In Abbott *v.* Blossom, 66 Barb. (N. Y.) 353, the English dogma was explicitly repudiated and it was practically ignored in Hawk *v.* Thorn, 54 Barb. (N. Y.) 164, and McGoldrick *v.* Willits, 52 N. Y. 612, the latter being a decision by the court of last resort. Finally the liberal doctrine was asserted in Wigand *v.* Sichel, 3 Keyes (N. Y.) 120, decided by the same

court, and in the quite recent (and the latest) case of Terry *v.* Munger, 121 N. Y. 161. The law of New York therefore confers upon the owner of converted property the immediate right to sue the wrongdoer in assumpsit as for goods sold and delivered, though the property still remains in his hands.

Ohio.—Barker *v.* Cory, 15 Ohio 9. *South Dakota*.—Rosum *v.* Hodges, 1 S. Dak. 308.

Tennessee.—Floro *v.* Sims, 1 Overt. (Tenn.) 16; Ott *v.* Whitworth, 8 Humph. (Tenn.) 494; Alsbrook *v.* Hathaway, 3 Sneed (Tenn.) 454; Scruggs *v.* Davis, 5 Sneed (Tenn.) 265; Campbell *v.* Reeves, 3 Head (Tenn.) 226; Bennett *v.* Kennerly, 3 Head (Tenn.) 675; Brown *v.* Bibb, 2 Coldw. (Tenn.) 434; Stewart *v.* Vaughn, 3 Coldw. (Tenn.) 24; Hamilton *v.* Nowlin, 5 Coldw. (Tenn.) 84; Phillips *v.* Green, 4 Heisk. (Tenn.) 350; Kirkman *v.* Philips, 7 Heisk. (Tenn.) 224; Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1; McCombs *v.* Guild, 9 Lea (Tenn.) 81.

Wisconsin.—Here is another state whose authorities on the subject seem at odds. Thus in Kely *v.* Owens, 4 Chand. (Wis.) 166, and Elliott *v.* Jackson, 3 Wis. 649, the adjudications are based on the English rule; but in Smith *v.* Schulenberg, 34 Wis. 51; Walker *v.* Duncan, 68 Wis. 624; Grannis *v.* Hooker, 29 Wis. 65; Norden *v.* Jones, 33 Wis. 600; Western Assur. Co. *v.* Towle, 65 Wis. 254, it was held that the owner may waive the tort and recover upon contract.

United States.—Janes *v.* Buzzard, Hempst. (U. S.) 240.

1. Assumpsit the Alternative of Trover, Trespass, and Replevin.—The cases cited in the preceding note relating to the conflict of law in the several states are pertinent here also. But in addition to them the following

c. STATUTORY REMEDY—When Remedy Exclusive.—If the statute gives a new substantial right and provides an adequate remedy, or

are apropos, as showing the alternativeness of the remedies.

Alabama.—See generally, on this subject, *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228.

A tenant in common may sue in tort or assumpsit at his election for his cotenant's sale of the common property. *Anderson v. Rice*, 20 Ala. 239; *Cowles v. Garrett*, 30 Ala. 341; *Arthur v. Gayle*, 38 Ala. 259. So a joint tenant has the like option against an officer who sells the joint property under an execution against his cotenant individually. *Smyth v. Tankersley*, 20 Ala. 212. And if a person sells assets of a deceased person before letters of administration, the administrator, when appointed, can elect between the two. *Upchurch v. Norsworthy*, 15 Ala. 705.

California.—Notwithstanding the code, the distinction between assumpsit and trespass still obtains. *DeWitt v. Hays*, 2 Cal. 464.

Georgia.—*Perdue v. Harwell*, 80 Ga. 150.

Illinois.—*Dickinson v. Whitney*, 9 Ill. 406; *Staat v. Evans*, 35 Ill. 455.

Indiana.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109.

Kansas.—*Akin v. Davis*, 11 Kan. 580.

Kentucky.—*Daniel v. Daniel*, 9 B. Mon. (Ky.) 197.

Maine.—See in general *Ware v. Percival*, 61 Me. 391. One can sue, either in tort or assumpsit, an officer who has illegally sold his property, *Richardson v. Kimball*, 28 Me. 463; the assessors in tort or the town in assumpsit where his property is sold on an illegal assessment, *Hathaway v. Addison*, 48 Me. 441; *Look v. Industry*, 51 Me. 375; the maker of a note who has procured its surrender by fraud and thereby obtained the money or its equivalent, *Penobscot R. Co. v. Mayo*, 67 Me. 470; or one by whom his property has been wrongfully taken and sold, or wrongfully sold or stolen and converted into money, *Higgins v. Brown*, 20 Me. 332; *Howe v. Clancey*, 53 Me. 130; *Foye v. Southard*, 64 Me. 389; and even a minor who has stolen his property and converted it into money, *Shaw v. Coffin*, 58 Me. 254; *Simpson v. Bowden*, 33 Me. 549.

Maryland.—*Stockett v. Watkins*, 2 Gill & J. (Md.) 343.

Massachusetts.—*Lamb v. Clark*, 5 Pick. (Mass.) 193; *Boston, etc., R. Corp. v. Dana*, 1 Gray (Mass.) 83; *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 Mass. 297; *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Brown v. Magorty*, 156 Mass. 209.

Michigan.—*Bowen v. School Dist. No. 9*, 36 Mich. 149; *Chandler v. Childs*, 42 Mich. 128; *Martin v. Sheridan*, 46 Mich. 93; *Nield v. Burton*, 49 Mich. 53; *Buckeye Tp. v. Clark*, 90 Mich. 432.

Minnesota.—*Marshall v. Gilman*, 52 Minn. 88.

Mississippi.—*Jamison v. Moon*, 43 Miss. 598.

Missouri.—A party cannot waive a tort and sue in assumpsit if the effect would be to confer jurisdiction on a court that would not otherwise possess it, or bring it within the purview of a statute that could not otherwise include it. *Finlay v. Bryson*, 84 Mo. 664.

New Hampshire.—*Chauncey v. Yeaton*, 1 N. H. 151; *Hill v. Davis*, 3 N. H. 384; *Knapp v. Hobbs*, 50 N. H. 476; *Kimball v. Jackman*, 42 N. H. 242.

An overseer of the poor, who unlawfully coerced an insane person to work and paid his wages into the town treasury, subjected himself to damages in tort, and the town to assumpsit for the amount, at the election of the person wronged. *Abbot v. Fremont*, 34 N. H. 432; *Carleton v. Haywood*, 49 N. H. 314.

New Jersey.—*Heller v. Elliott*, 45 N. J. L. 564.

New York.—*Talbot v. Rochester Bank*, 1 Hill (N. Y.) 295; *Baumann v. Jefferson*, 4 Misc. Rep. (N. Y. C. Pl.) 147; *People v. Woods*, 121 N. Y. 522. A defendant, sued and arrested for the conversion of goods intrusted to him on the responsibility of his wife, was discharged on its appearing that the plaintiff had previously procured a judgment against her by confession for the value of the goods. *Fields v. Bland*, 81 N. Y. 239.

Pennsylvania.—Assumpsit will not lie for the value of property lawfully taken but unlawfully detained, for it does not amount to conversion.

even in the absence of the latter qualification, that remedy is exclusive. If the statute provides a new remedy in a case already remediable, and, by its terms or necessary implications, makes it manifest that the intent is to render the remedy exclusive, it will be so treated.¹

Remedy Merely Cumulative.—If the statute provides a new remedy for a pre-existing right, the remedy will be regarded as cumulative and alternative and as allowing the use of the old remedies at the election of the party concerned, unless the terms of the statute provide to the contrary.²

Boyer v. Bullard, 102 Pa. St. 555; *Weiler v. Kershner*, 109 Pa. St. 219. After a considerable length of detention, however, a conversion may be presumed and the possessor will be liable to an action for money had and received. *Whitney v. Bruner*, 10 W. N. C. (Pa.) 239.

South Dakota.—Trespass, trover, and replevin lie for the recovery of goods wrongfully converted or their value, and assumpsit for the price, as the alternative against the original wrongdoer, or the person to whom he has disposed of them, even if he be a bona fide purchaser, as in the case below. *Rosum v. Hodges*, 1 S. Dak. 308.

Tennessee.—Where the common property is sold by an officer under execution against one cotenant, the other may elect to regard the sale as a conversion of the whole and sue for it in trover (*i. e.*, his part), or as a sale merely of his cotenant's share and then take his proper part of the property. *Rains v. McNairy*, 4 Humph. (Tenn.) 356; *Cheek v. Wheatley*, 3 Sneed (Tenn.) 492. One who buys goods with notice of a prior sale by the vendor will be liable to the first vendee, either in tort or assumpsit, at his election. *Floro v. Sims*, 1 Overt. (Tenn.) 16; *Ott v. Smith*, 8 Humph. (Tenn.) 494; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454; *Scruggs v. Davis*, 5 Sneed (Tenn.) 265; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Bennett v. Kennerly*, 3 Head (Tenn.) 675; *Brown v. Bibb*, 2 Coldw. (Tenn.) 434; *Stewart v. Vaughn*, 3 Coldw. (Tenn.) 24; *Hamilton v. Nowlin*, 5 Coldw. (Tenn.) 84; *Phillips v. Green*, 4 Heisk. (Tenn.) 350; *Kirkman v. Philips*, 7 Heisk. (Tenn.) 224; *Baker v. Huddleston*, 3 Baxt. (Tenn.) 1; *Vance v. Mottley*, 92 Tenn. 310.

Vermont.—Misappropriation of a note by one man which belongs to

another, and which he uses to pay his debts, is a conversion for which assumpsit will lie the same as if he had sold it and received the proceeds. *Doon v. Ravey*, 49 Vt. 293. But it will not lie where the converted property is sold and the money obtained, but the owner fails to prove the sum realized and other needed details. He must resort to trover or trespass. *Saville v. Welch*, 58 Vt. 683.

Wisconsin.—*Kalkhoff v. Zoehrlant*, 40 Wis. 427; *Fox Lake v. Fox Lake*, 62 Wis. 486.

United States.—*Dibblee v. Sheldon*, 10 Blatchf. (U. S.) 178.

1. *Faribault v. Misener*, 20 Minn. 396; *Brown v. Beatty*, 34 Miss. 227; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Henniker v. Contoocook R. Co.*, 29 N. H. 146; *State v. Manchester, etc.*, R. Co., 62 N. H. 29; *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Hueston v. Eaton, etc.*, R. Co., 4 Ohio St. 685; *Little Miami R. Co. v. Whitacre*, 8 Ohio St. 590; *Shepard v. Darke County*, 8 Ohio St. 354; *State v. Marlow*, 15 Ohio St. 114; *Walker v. Mad River, etc.*, R. Co., 8 Ohio 38; *Phillips v. St. Clair Incline Plane Co.*, 153 Pa. St. 230; *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367; *McKinney v. Monongahela Nav. Co.*, 14 Pa. St. 65; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 747.

2. *Arkansas.*—*Lee v. State*, 22 Ark. 231.

Georgia.—*Jenkins v. Nolan*, 79 Ga. 295.

Indiana.—*American Furniture Co. v. Batesville*, 139 Ind. 77.

Maine.—*Bear-Camp-River Co. v. Woodman*, 2 Me. 404; *Portland v. Atlantic, etc.*, R. Co., 66 Me. 485; *York v. Goodwin*, 67 Me. 260.

Maryland.—*Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Anne Arundel County v. Duckett*, 20 Md. 468.

VIII. ELECTION BETWEEN LAW AND EQUITY.—It is not infrequently the case that the suitor is confronted with a choice of jurisdictions on the same state of facts, and has the right to invoke the aid of either a court of law or a court of equity. If he resorts to both he will ordinarily be compelled to make his election, adopting one and abandoning the other. This compulsion is administered usually, if not always, by the court of equity, sometimes on its own motion, but generally on the motion of the defendant.¹

IX. SIMULTANEOUS ACTIONS.—In the instances under this head, the question involved is not one of jurisdiction, but rather as to what the court ought to do and what it will do with the two actions the plaintiff is waging. Thus a party brings an action in this state and another action in another state, on practically the same facts, and for substantially the same relief. If the defendant objects and brings this remedial duplication to the notice of the home court, the court will compel the plaintiff to elect which action he will abide by. There is no inconsistency of remedies

Massachusetts.—*Essex v. Brooks*, 164 Mass. 79.

Michigan.—*Bellant v. Brown*, 78 Mich. 294.

Mississippi.—*Moseley v. Anderson*, 40 Miss. 49.

Missouri.—*Franklin v. Gumersell*, 9 Mo. App. 84; *State v. Donnelly*, 9 Mo. App. 519; *Hawk v. Applegate*, 37 Mo. App. 32; *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520; *Soulard v. St. Louis*, 36 Mo. 546; *Iba v. Hannibal*, etc., R. Co., 45 Mo. 469; *Tackett v. Huesman*, 19 Mo. 525; *Moore v. White*, 45 Mo. 206; *State v. Severance*, 55 Mo. 378; *State v. Bittinger*, 55 Mo. 596; *Householder v. Kansas City*, 83 Mo. 488; *Cummings v. Winn*, 89 Mo. 51; *Markowitz v. Kansas City*, 125 Mo. 485.

Nebraska.—*Omaha, etc., R. Co. v. Menk*, 4 Neb. 21.

New Hampshire.—*Adams v. Richardson*, 43 N. H. 212; *Batchelder v. Kelly*, 10 N. H. 436.

New Jersey.—*Coxe v. Robbins*, 9 N. J. L. 384; *Wooley v. Campbell*, 37 N. J. L. 169; *Benton v. Goodale*, 66 N. H. 424.

New York.—*Colden v. Eldred*, 15 Johns. (N. Y.) 220; *Farmers' Turnpike Road v. Coventry*, 10 Johns. (N. Y.) 389; *Graham v. Delaware, etc., Canal Co.*, 46 Hun (N. Y.) 386; *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371.

Ohio.—*Darling v. Peck*, 15 Ohio 65; *Hathaway v. Springfield, etc., R. Co.*, 2 W. L. M. (Ohio) 481; *Badgely v. Hamilton County*, 1 Disney (Ohio)

316; *Feuchter v. Key*, 48 Ohio St. 357.

South Carolina.—*Tompkins v. Augusta, etc., R. Co.*, 37 S. Car. 382.

Tennessee.—*Moyers v. Brown*, 10 Humph. (Tenn.) 79.

Texas.—*Moore v. Gammel*, 13 Tex. 120; *Hardy v. Broadus*, 35 Tex. 668; *Lang v. Dougherty*, 74 Tex. 226; *Schley v. Hale*, 1 Tex. App. Civ. Cas., § 931.

Virginia.—*Booker v. M'Roberts*, 1 Call (Va.) 243.

1. Merely granting an injunction as auxiliary to an action at law in which every issue may be tried does not change the mode of trial from law to equity. *Pool v. Paul*, 23 Iowa 421.

Where one party is using one court for his remedy and another party on the same facts is using another court for his, the court cannot compel an election. That can be done only where the same party resorts to the two. *Ex p. Sterns*, 14 Ala. 597.

A complainant in equity who has also sued at law cannot be compelled to elect between them till the answer is in. *Semmes v. Mott*, 27 Ga. 92.

An action at law pending five years will not be allowed to be superseded by a bill in equity in a matter of which both have jurisdiction. *Angus v. Robinson*, 62 Vt. 60.

It is too late to raise the point of a remedy at law when the cause in the equity court is on for hearing, if that court has jurisdiction of the subject and is competent to administer relief.

and the court will usually, unless the equities of the situation stand in the way, compel such election. See article **SIMULTANEOUS ACTIONS**.

Clark *v.* Flint, 22 Pick. (Mass.) 231; Raynham *v.* Raynhām, 23 Pick. (Mass.) 148. And too late when the case is reserved for consideration by a full bench. Barker *v.* Walsh, 14 Allen (Mass.) 172.

Where the parties in an equity suit agree to submit the cause on stipulated facts, the agreement waives all objection to the form of the proceeding. Tarbell *v.* Bowman, 103 Mass. 341.

A party who has the option of mak-

ing his defense either at law or in equity is bound by his choice though defeated. Carlyle *v.* Long, 5 Litt. (Ky.) 168.

Where two courts have jurisdiction of the subject-matter, plaintiff ought not to proceed in both. If he does, and both are law courts, the first suit may be pleaded in abatement in the second, but if either is in equity he will be compelled to elect. Bradford *v.* Williams, 2 Md. Ch. 5.

ELECTIONS.

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I. STATUTORY CONTESTS—1. Introductory Statement.—Independently of statutes the proper remedy to test the right of a person to an office is by writ of *quo warranto* or an information in the nature of a writ of *quo warranto*.¹ In many jurisdictions, however, there are special statutes which authorize a simple method to contest elections, and the purpose of this section is the discussion of statutory contests only; proceedings to try title by *quo warranto* will be treated under that title.²

Exclusiveness of Statutory Remedy.—Whether the remedy provided by statute shall be exclusive of the common-law remedy, depends, it is apprehended, on the language of the statute creating it. In some jurisdictions the statutory remedies are exclusive,³ while in others the statutory and common-law remedies are concurrent.⁴

1. *Akin v. Matteson*, 17 Ill. 167; *People v. Stevens*, 5 Hill (N. Y.) 616; *Gass v. State*, 34 Ind. 425; *People v. Scannell*, 7 Cal. 432.

2. See article **QUO WARRANTO**.

"The original common-law writ of *quo warranto* was a civil writ at the suit of the Crown and not a criminal prosecution. *Rex v. Marsden*, 3 Burr. 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them (Com. Dig., *Quo Warranto*, A.), and the first process was summons. *Id.*, c. 2. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto*, which in its origin was 'a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the Crown.' 3 Bl. Com. 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of

trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only.' The effect [of statutes providing for contesting elections] is to relieve the old civil remedy of the burden of the criminal form of proceeding with which it had become incumbered, and to restore it to its original position as a civil action for the enforcement of a civil right. The right and the remedy are thus brought into harmony, and parties are not driven to the necessity of using the form of a criminal action to determine a civil right." *Ames v. Kansas*, 111 U. S. 461.

3. *Parks v. State*, 100 Ala. 634; *State v. Harmon*, 31 Ohio St. 250; *Dalton v. State*, 43 Ohio St. 652; *State v. Marlow*, 15 Ohio St. 114; *Hyde v. Trewhitt*, 7 Coldw. (Tenn.) 65; *State v. Lewis*, 51 Conn. 126; *People v. Hall*, 80 N. Y. 117; *State v. Mason*, 77 Mo. 189; *Garrard v. Gallagher*, 11 Nev. 382; *Ames v. Kansas*, 111 U. S. 459; *Ayres v. Stockwell*, 7 Kan. 98; *Baxter v. Brooks*, 29 Ark. 174.

4. *People v. Londoner*, 13 Colo. 303;

2. Jurisdiction.—The question of jurisdiction of statutory election contests is altogether a matter of statutory regulation. These statutes being subject to frequent change, it is impossible to make any profitable classification of the decisions under them. It is deemed best therefore to merely refer the practitioner to the statutes and cases themselves.¹

3. The Remedy.—The method of contesting elections under the statute is usually by petition, complaint, or statement,² or by a

Darrow *v.* People, 8 Colo. 417; State *v.* Shay, 101 Ind. 39; State *v.* Stearns, 11 Neb. 104; State *v.* Matley, 17 Neb. 564; State *v.* Peacock, 15 Neb. 442; State *v.* Frazier, 28 Neb. 438; McAllen *v.* Rhodes, 65 Tex. 348.

1. Arkansas.—Glidewell *v.* Martin, 51 Ark. 559; Vance *v.* Gaylor, 25 Ark. 32.

California.—McGivney *v.* Pierce, 87 Cal. 124; Saunders *v.* Haynes, 13 Cal. 145; People *v.* Holden, 28 Cal. 123; Gibson *v.* Trinity County, 80 Cal. 359; Calaveras County *v.* Brockway, 30 Cal. 325; Stone *v.* Elkins, 24 Cal. 125.

Colorado.—Vailes *v.* Brown, 16 Colo. 462; Booth *v.* Arapahoe County Ct., 18 Colo. 561; Garfield County Ct. *v.* Schwarz, 13 Colo. 291.

Illinois.—Brush *v.* Lemma, 77 Ill. 496; Misch *v.* Russell, 136 Ill. 22; Greenwood *v.* Murphy, 131 Ill. 604; Kreitz *v.* Behrensmeier, 125 Ill. 141; Lawrence County *v.* Schmaulhausen, 123 Ill. 321; Dickey *v.* Reed, 78 Ill. 261; Talkington *v.* Turner, 71 Ill. 234; Winter *v.* Thistlewood, 101 Ill. 450; Linegar *v.* Rittenhouse, 94 Ill. 209; Young *v.* Adam, 74 Ill. 480; Keating *v.* Stack, 116 Ill. 191.

Indiana.—Bechtel *v.* Albin, 134 Ind. 193; Robertson *v.* State, 109 Ind. 79; State *v.* Adams, 65 Ind. 393.

Kansas.—Norton *v.* Graham, 7 Kan. 166; State *v.* Sheldon, 2 Kan. 322.

Louisiana.—State *v.* Dortch, 41 La. Ann. 846.

Maryland.—Anderson *v.* Levely, 58 Md. 192.

Missouri.—Taaffe *v.* Ryan, 25 Mo. App. 563; Higbee *v.* Ellison, 92 Mo. 13; State *v.* Slover (Mo. 1895), 31 S. W. Rep. 1054; State *v.* John, 81 Mo. 13; State *v.* Sherwood, 42 Mo. 179; State *v.* Lobsinger, 7 Mo. App. 106; State *v.* Buskirk, 43 Mo. 111.

Nebraska.—Foxworthy *v.* Lincoln, etc., R. Co., 13 Neb. 398; Bell *v.* Tempelin, 26 Neb. 249; *In re* Contest Proceedings, 31 Neb. 262; Laird *v.* Leap,

42 Neb. 834; Albert *v.* Twohig, 35 Neb. 563; Miller *v.* Wheeler, 33 Neb. 765.

New Jersey.—McCoy *v.* Boyle, 51 N. J. L. 53; State *v.* Middlesex County, 1 N. J. L. 283; Conger *v.* Convery, 52 N. J. L. 417.

New York.—People *v.* Hall, 80 N. Y. 118.

North Carolina.—Gatling *v.* Boone, 98 N. Car. 573; Roberts *v.* Calvert, 98 N. Car. 580.

Ohio.—Powers *v.* Reed, 19 Ohio St. 189.

Pennsylvania.—Skerrett's Case, 2 Pars. Eq. Cas. (Pa.) 509; Gibbons *v.* Sheppard, 2 Brews. (Pa.) 117; *In re* Sheppard's Election, 77 Pa. St. 295; *In re* Yonkin's Election (Pa. 1888), 13 Atl. Rep. 750; *In re* McNeill's Election, 111 Pa. St. 235; Hulseman *v.* Rems, 41 Pa. St. 396; Thompson *v.* Ewing, 1 Brews. (Pa.) 67; Fowler *v.* Gable, 3 Pa. Dist. Rep. 23.

South Carolina.—*Ex p.* Carson, 5 S. Car. 117.

Tennessee.—Conner *v.* Conner, 8 Baxt. (Tenn.) 11; Anderson *v.* Gossett, 9 Lea (Tenn.) 644; State *v.* Burchfield, 12 Lea (Tenn.) 30; Hord *v.* Rogersville, etc., R. Co., 3 Head (Tenn.) 208; Boring *v.* Griffith, 1 Heisk. (Tenn.) 456; Blackburn *v.* Vick, 2 Heisk. (Tenn.) 378; Wade *v.* Murrey, 2 Sneed (Tenn.) 50.

Texas.—McKinney *v.* O'Connor, 26 Tex. 5; Odell *v.* Wharton, 87 Tex. 173.

Utah.—Ferguson *v.* Allen, 7 Utah 263.

Virginia.—*Ex p.* Ellyson, 20 Gratt. (Va.) 10.

West Virginia.—Loomis *v.* Jackson, 6 W. Va. 613.

2. Alabama.—Taliaferro *v.* Lee, 97 Ala. 92.

Arizona.—Territory *v.* Mohare County (Arizona 1887), 12 Pac. Rep. 730.

California.—Preston *v.* Culbertson, 58 Cal. 198; Roysdon *v.* Carr, 63 Cal. 191; Keller *v.* Chapman, 34 Cal. 635.

notice which serves the double function of a summons and a pleading.¹

4. The Parties—Plaintiffs.—The statutes which authorize election contests usually name the persons by whom the proceedings may be instituted. The right to contest an election is not a vested right, and when given by one legislature it may be taken away by another.² This right is usually conferred on an elector,³ or a

Colorado.—Darrow *v.* People, 8 Colo. 417; Todd *v.* Stewart, 14 Colo. 286.

Illinois.—Talkington *v.* Turner, 71 Ill. 234; Dale *v.* Irwin, 78 Ill. 170.

Indiana.—State *v.* Bell, 116 Ind. 1.

Iowa.—Brown *v.* McCollum, 76 Iowa 479.

Louisiana.—Ducote *v.* Gremillion, 32 La. Ann. 540; Lanier *v.* Gallatas, 13 La. Ann. 175.

Maine.—Rounds *v.* Smart, 71 Me. 382.

Maryland.—Bragunier *v.* Penn, 79 Md. 344; Handy *v.* Hopkins, 59 Md. 169.

Montana.—Lloyd *v.* Sullivan, 9 Mont. 577.

Nebraska.—State *v.* Stearns, 11 Neb. 104; Burke *v.* Perry, 26 Neb. 414.

Nevada.—Egan *v.* Jones, 21 Nev. 433.

New Jersey.—Lehlbach *v.* Haynes, 54 N. J. L. 77; Johnson *v.* Allen, 55 N. J. L. 400.

New York.—People *v.* Ryder, 16 Barb. (N. Y.) 370.

North Carolina.—Goforth *v.* Ruth-erford Constr. R. Co., 96 N. Car. 535; Boyer *v.* Teague, 106 N. Car. 576; Hancock *v.* Hubbs, 98 N. Car. 589.

Pennsylvania.—Acker *v.* Conrad, 2 Pa. Dist. Rep. 469; Battis *v.* Price, 2 Pearson (Pa.) 456; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537; Zerby *v.* Snare, 107 Pa. St. 183.

Wisconsin.—Derflinger *v.* Hil-mantel, 21 Wis. 566.

Canada.—McLennan *v.* Chrisholm, 20 Can. Sup. Ct. 38.

1. Vance *v.* Gaylor, 25 Ark. 32; Whitney *v.* Blackburn, 17 Oregon 564; Myers *v.* Warner, 3 Oregon 212. See also State *v.* Smith, 104 Mo. 661; Lunsford *v.* Culton (Ky. 1893), 23 S. W. Rep. 946; Soper *v.* Sibley County, 46 Minn. 274; O'Gorman *v.* Richter, 31 Minn. 25; Wright *v.* Fawcett, 42 Tex. 203; Williamson *v.* Lane, 52 Tex. 335; Batterton *v.* Fuller (S. Dak. 1894), 60 N. W. Rep. 1071; Halstead *v.* Rader,

27 W. Va. 813; Dryden *v.* Swinburn, 15 W. Va. 235; State *v.* Harmon, 31 Ohio St. 250; Howard *v.* Shields, 16 Ohio St. 184; Gumm *v.* Hubbard, 97 Mo. 311; Applegate *v.* Eagan, 74 Mo. 258; Ledbetter *v.* Hall, 62 Mo. 422; Moffatt *v.* Montgomery, 68 Mo. 162; Shields *v.* McGregor, 91 Mo. 534.

Texas.—The contest of an election authorized by the Act of May 8, 1873, regulating contested elections, and the act to amend the same, approved July 20, 1876 (Gen. Laws, 13th Leg., p. 67; Gen. Laws, 15th Leg., p. 70), cannot be held to be either a "suit, complaint, or plea," in the sense in which those words are used in section 8 of article 5 of the Constitution. Williamson *v.* Lane, 52 Tex. 335; Gibson *v.* Templeton, 62 Tex. 555; Wright *v.* Fawcett, 42 Tex. 203.

2. Gilleland *v.* Schuyler, 9 Kan. 569.

3. *In re* Leisenring, 11 Phila. (Pa.) 400; Marshall *v.* Baldwin, 11 Phila. (Pa.) 403; Sailor *v.* Keating, 11 Phila. (Pa.) 402; Knox County *v.* Davis, 63 Ill. 405; Gibson *v.* Trinity County, 80 Cal. 359.

Electors of One Supervisor District are not qualified to sign a petition for contest in another district because the election for both districts is held at the same place and the election district embraces territory in both supervisors' districts. Third Road Dist. Supervisor, 8 Pa. Co. Ct. Rep. 302. See also *Ex p.* Burke, 22 Pittsb. L. J. (Pa.) 193.

Citizen Representing Class.—A citizen of a township representing a class may bring an action to contest the validity of a certain township election. Perry *v.* Whitaker, 71 N. Car. 477.

Freeholders.—While at a county election to determine the question of "fence" or "no fence," all qualified voters therein are entitled to vote, yet the power to cause such election to be held, or to prevent it, is exclusively in the freeholders; and on a contest of such election, they alone are proper parties. One not a freeholder has no

candidate.¹ A judge of election, however, has no right of contest.²

Defendant.—The question of parties defendant also depends in a large measure on statutes regulating the contest and on the purposes of the election.³

Joinder.—According to some decisions several persons claiming to have been elected to several offices *of the same class* may be united in one petition of contest.⁴ But it is well settled that a joinder cannot be permitted if the offices which are the subject of the contest are not of the same class.⁵

5. The Pleadings—*a. PETITION, COMPLAINT, OR NOTICE*—(1) *The Allegations*—(a) *Time of Election.*—The time of the election must be stated in the complaint or notice in direct terms, and

power to contest such election. *Tharpe v. Hardison*, 69 Ga. 280.

1. *Grinstead v. Scott*, 82 Ky. 88; *Davis v. Dawson*, 90 Ga. 817.

The Vote.—Where a tie vote is returned, either party may contest. *Erdman v. Barrett*, 89 Pa. St. 320.

Incumbent.—The incumbent of an office for a specified term and "until his successor is elected and qualified," holds over in the event of the election of a successor who is not eligible to the office, and he has such an interest in the election as entitles him to invoke a decision as to its legality. *Taylor v. Sullivan*, 45 Minn. 309.

2. *Bernier v. Russell*, 89 Ill. 60.

3. **Contest to Recover Office.**—Under the *Arkansas* statutes an action will lie against one holding over in favor of the person whom the election returns shbw to have been elected. *Wheat v. Smith*, 50 Ark. 266.

Election in Aid of Railroad Construction.—In a proceeding to contest an election held for the purpose of voting bonds of a county to aid in the construction of a railroad, the statute must be strictly followed. The railroad cannot be brought in as a defendant, nor any person other than the officers named in the statute. *Chicago, etc., R. Co. v. Evans*, 41 Kan. 94; *Watts v. Wichita County*, 41 Kan. 402.

Township Election.—A citizen, in behalf of himself and others, may come in and defend an action to contest the validity of a township election. *Perry v. Whitaker*, 71 N. Car. 477.

Election to Relocate County Seat.—Where the election to be contested is one upon the question of relocating the county seat, persons having an interest adverse to the contestants, or some of them, are necessary parties to the contest. *Burke v. Perry*, 26 Neb.

414. See *State v. Peniston*, 11 Neb. 100.

4. *Acker v. Conrad*, 2 Pa. Dist. Rep. 469; *Coopersdale Election*, 157 Pa. St. 637, where several persons elected to the office of common councilmen were permitted to be joined in the same petition of contest, the reason assigned being that "if single petitions are presented, single persons may be selected as contestants, and the evidence might show that neither was elected."

Mahanoy Election Case, 1 Leg. Chron. (Pa.) 314, where the election of several school directors was contested by one petition.

5. *Coopersdale Election*, 157 Pa. St. 637; *Butler Tp. Election*, 4 Pa. Dist. Rep. 350; *Cass Tp. Election*, 2 Leg. Chron. (Pa.) 307; *Vance v. Gaylor*, 25 Ark. 32.

Thus it has been held that a petition will not be entertained wherein it is sought to contest in one proceeding the election of burgess, school directors, councilmen, constable, and justice of the peace. *Coopersdale Election*, 157 Pa. St. 637. Or where the subjects of the contested election are the offices of county judge and school commissioner. *Vance v. Gaylor*, 25 Ark. 33.

And in *Cass Tp. Election*, 2 Leg. Chron. (Pa.) 307, it is said: "The court of quarter sessions acquires no jurisdiction over an election contest involving the election of different persons to different offices, by a single petition, where different persons claim to have been elected to different offices." In that case the election of burgess, school directors, councilmen, constable, tax collector, and justice of the peace was in question, and the petition was quashed, and this action affirmed by the Supreme Court.

must not be left to mere inference.¹

(b) **Right of Contestant to Maintain Contest.**—The petition or notice must show that the contestant has such an interest in the election as will entitle him to maintain the contest under the statutes authorizing it,² as that he is an elector,³ or a candidate for the office the right to which is contested.⁴

Where the Contestant Is a Candidate, the authorities are not in accord as to the necessity for an express averment of contestant's qualifications and eligibility for office, and according to some decisions it is not necessary to aver that the contestant possesses the requisite qualifications for office.⁵ In others it is held that the mere statement that the contestant was duly elected to the office in controversy necessarily implies his eligibility.⁶

So it has been held that to entitle a contestant to the office in controversy, facts showing his eligibility must be stated,⁷ but that he will nevertheless be entitled to a judgment annulling the election, even though the petition is defective in this regard, if it states that he was a duly qualified elector.⁸

1. *People v. Ryder*, 16 Barb. (N. Y.) 370. In this case the court said: "The time of the election is prescribed by law and is essential to its validity; it becomes therefore part of the relator's title and should have been set forth."

2. *Edwards v. Knight*, 8 Ohio 375; *Burke v. Perry*, 26 Neb. 414.

3. *Blanck v. Pausch*, 113 Ill. 60; *Sailor v. Keating*, 32 Leg. Int. (Pa.) 208; *In re Leisenring*, 32 Leg. Int. (Pa.) 198; *Marshall v. Baldwin*, 32 Leg. Int. (Pa.) 208; *Batterton v. Fuller* (S. Dak. 1894), 60 N. W. Rep. 1071; *Minor v. Kidder*, 43 Cal. 229; *Rutledge v. Crawford*, 91 Cal. 526; *Edwards v. Knight*, 8 Ohio 375; *Clanton v. Ryan*, 14 Colo. 419; *Whitney v. Blackburn*, 17 Oregon 575.

Sufficiency of Allegations.—An allegation that contestant was, at the time he filed the written statement of contest, a qualified elector of the county, without alleging that he was so at the time of the election, is insufficient. *Minor v. Kidder*, 43 Cal. 229.

An allegation that contestant is a resident and citizen is not sufficient in a petition contesting an election to a town office; it must be alleged that the petitioner was an elector or it will be fatally defective. *Blanck v. Pausch*, 113 Ill. 60.

Iowa.—Laws 16th General Assembly, Iowa, c. 136, § 1, which makes women eligible for any school office in

the state, repeals by implication so much of section 697 of the Iowa Code as requires the statement that contestant is an elector in election contests. *Brown v. McCollum*, 76 Iowa 479.

4. *Edwards v. Knight*, 8 Ohio 375; *Batterton v. Fuller* (S. Dak. 1894), 60 N. W. Rep. 1071.

5. *Ledbetter v. Hall*, 62 Mo. 423; *People v. Ryder*, 16 Barb. (N. Y.) 375, in which the court held that the fact that contestant had the requisite qualifications for office was to be presumed from the election, if not otherwise, until the contrary was averred and proved by the defendant. See also *Whitney v. Blackburn*, 17 Oregon 575.

6. *Rounds v. Smart*, 71 Me. 382; *Collopy v. Cloherty*, 95 Ky. 330. See also *Ledbetter v. Hall*, 62 Mo. 423, where it was said that, even if it was necessary to allege eligibility, the statement in the notice, "that the contestant had been duly and legally elected to the office in the controversy," necessarily implied his eligibility for the official position.

7. *Rutledge v. Crawford*, 91 Cal. 526; *State v. Long*, 91 Ind. 351; *State v. Bieler*, 87 Ind. 320; *Reynolds v. State*, 61 Ind. 392.

8. *Rutledge v. Crawford*, 91 Cal. 526. The theory on which the court proceeded in this case was that the petition was not fatally defective because it stated a case for some relief, although not for the relief demanded.

(c) **Grounds of Contest**—*aa. GENERALLY.*—It is a general rule that the complaint, petition, or notice must state the grounds of contest with particularity and certainty,¹ so that the adverse party may be prepared to meet them and not be taken by surprise.²

Degree of Certainty.—As regards the particularity required in stating the grounds of contest, the authorities are not uniform. According to some decisions the facts constituting the ground of contest should be stated with such precision that if sustained by proof it will be the duty of the court either to vacate the election entirely or to declare that another than the party returned elected is entitled to the office in question.³ According to others certainty to a common intent will be sufficient.⁴

bb. FRAUD OR MISTAKE.—If the ground on which the contest is

1. *Colorado.*—Todd *v.* Stewart, 14 Colo. 286; Smith *v.* Harris, 18 Colo. 274.

Illinois.—Kreitz *v.* Behrensmeyer, 125 Ill. 141.

Louisiana.—Augustin *v.* Eggleston, 12 La. Ann. 366.

Minnesota.—Soper *v.* Sibley County, 46 Minn. 274; O'Gorman *v.* Richter, 31 Minn. 25.

Missouri.—Castello *v.* St. Louis Circuit Ct., 28 Mo. 259; Shields *v.* McGregor, 91 Mo. 534.

Nebraska.—Todd *v.* Cass County, 30 Neb. 823; State *v.* Peniston, 11 Neb. 100.

Nevada.—Greeley *v.* Holland, 14 Nev. 320.

New Jersey.—Lehlbach *v.* Haynes, 54 N. J. L. 77.

North Carolina.—Rigsbee *v.* Durham, 99 N. Car. 341; Boyer *v.* Teague, 106 N. Car. 576; *Ex p.* Daughtry, 6 Ired. (N. Car.) 155.

Ohio.—Howard *v.* Shields, 16 Ohio St. 184.

Oregon.—Whitney *v.* Blackburn, 17 Oregon 564.

Pennsylvania.—Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553; Skerrett's Case, 2 Pars. Eq. Cas. (Pa.) 509; Thompson *v.* Ewing, 1 Brews. (Pa.) 67; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537; Common Council Contest, First Ward Lancaster, 10 Lanc. (Pa.) 121; Melvin's Case, 68 Pa. St. 333; Mann *v.* Cassidy, 1 Brews. (Pa.) 11; Bertolet's Case, 2 Pa. Dist. Rep. 849; *Ex p.* Burke, 22 Pittsb. L. J. (Pa.) 193.

South Dakota.—Batterton *v.* Fuller (S. Dak. 1894), 60 N. W. Rep. 1071.

West Virginia.—Halstead *v.* Rader, 27 W. Va. 806.

2. Taylor *v.* Taylor, 10 Minn. 107;

Whitney *v.* Blackburn, 17 Oregon 564; Rigsbee *v.* Durham, 99 N. Car. 341; Lehlbach *v.* Haynes, 54 N. J. L. 77.

3. Skerrett's Case, 2 Pars. Eq. Cas. (Pa.) 509; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537; Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553; Mann *v.* Cassidy, 1 Brews. (Pa.) 26; Halstead *v.* Rader, 27 W. Va. 812; Loomis *v.* Jackson, 6 W. Va. 676.

4. Augustin *v.* Eggleston, 12 La. Ann. 366; Election Cases, 65 Pa. St. 36 (by divided court). See also Minor *v.* Kidder, 43 Cal. 229.

Certainty Required in Bill in Equity.—In one state it has been held that the certainty required in a bill in equity will be sufficient, and that the technical allegation of an information in *quo warranto* or in a common-law declaration will not be required. Talkington *v.* Turner, 71 Ill. 234; Dale *v.* Irwin, 78 Ill. 170.

Indicating Kind of Evidence.—In another state it has been said that the object of the notice is not to set forth the case, but to set forth the fact generally that a case will be made, and to indicate the kind of evidence, and not the result or effect of the evidence, by which it is to be made. Howard *v.* Shields, 16 Ohio St. 184, wherein the court said: "We think the notice was sufficient. It contains all that the statute requires—notice that the election will be contested, and a specification of the points relied upon. There is no analogy between such a notice and a declaration at law. * * * The points to be specified are not required for the purpose of setting forth a good case—not for the purpose of informing the contestee that the attack will be successful—but to advise him at what

based is fraud¹ or mistake,² it will not be sufficient to charge fraud generally; such an allegation would be merely conclusion of law. The facts constituting the fraud must be set forth specifically in the notice or petition.³

cc. ACCEPTANCE OF ILLEGAL OR REJECTION OF LEGAL VOTES—NAMES OF VOTERS.—Where the ground of contest is the reception of illegal votes or the rejection of legal votes, the weight of authority is that, in the absence of statutes expressly providing otherwise, it is not necessary to set out the names of the voters whose votes were improperly accepted or rejected.⁴ In some jurisdictions,

points the attack will be made, in order that he may fortify, and not be taken by surprise."

1. Common Council Contest, First Ward Lancaster, 10 Lanc. (Pa.) 121; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537; Mann v. Cassidy, 1 Brews. (Pa.) 11; Smith v. Harris, 18 Colo. 279; Todd v. Stewart, 14 Colo. 286; People v. Glenn County, 100 Cal. 419.

2. Common Council Contest, First Ward Lancaster, 10 Lanc. (Pa.) 121.

3. See cases cited in preceding notes under this subdivision.

Defect—How Taken Advantage of.—In California a complaint defective in this regard may be taken advantage of by special demurrer. People v. Glenn County, 100 Cal. 419.

4. Illinois.—Kreitz v. Behrensmeyer, 125 Ill. 141.

Indiana.—Garrett v. Higgins, 27 Ind. 163; Wheat v. Ragsdale, 27 Ind. 191.

Nebraska.—Burke v. Perry, 26 Neb. 414.

North Carolina.—Boyer v. Teague, 106 N. Car. 576.

Pennsylvania.—Mann v. Cassidy, 1 Brews. (Pa.) 11; Weaver v. Given, 1 Brews. (Pa.) 140; Batturs v. Megary, 1 Brews. (Pa.) 162; Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553; Cusick's Election, 136 Pa. St. 459; Thompson v. Ewing, 1 Brews. (Pa.) 67; Bertolet's Case, 2 Pa. Dist. Rep. 849.

Texas.—Davis v. State, 75 Tex. 420. Wisconsin.—Doerflinger v. Hilman, 21 Wis. 566.

Contra.—Todd v. Cass County, 30 Neb. 823; Rigsbee v. Durham, 99 N. Car. 341, wherein it was held that in an action to set aside an election the complaint must allege specifically and particularly the ground of complaint against the validity or sufficiency of the election; if complainant intends to allege that qualified voters were

denied the right to vote, the names and numbers of them should be given; if the cause of complaint is that the registration books were not open for the registration of voters next before the election, this should be alleged particularly; if the ground of complaint was that qualified voters were not properly counted in a connection and for a purpose as they should have been, the number of such voters and their names should be specified. See also Whitney v. Blackburn, 17 Oregon 575; Lunsford v. Culton (Ky. 1893), 23 S. W. Rep. 946.

Reason for Rule.—"It is contended that greater precision should be required, that the petitioners should be obliged to set out their full knowledge, that they should give the name of every illegal voter, and the specific reason why his vote was illegal. For such a degree of strictness no analogy in pleading has been shown. * * * If such strictness were required, the slightest mistake would be fatal. * * * Let it be known that an election fraud must not only be discovered, but that every individual engaged in it must be ascertained and named before a step can be taken to establish it, and the chance for a fair election will be more and more remote. We cannot thus throw a shield around fraud." Mann v. Cassidy, 1 Brews. (Pa.) 29.

Where Total Vote of Precinct is Rejected.—Where all the votes of a precinct were wrongfully rejected, it is not necessary to the notice to give a list of the votes and the objections to each, but it is essential that it should name the precinct the votes of which were rejected. Halstead v. Rader, 27 W. Va. 813.

Failure to Give List of Voters—How Objection Waived.—A notice of contest that fails to set forth the names of the voters whose votes were alleged to

however, there are express statutory provisions requiring the names of voters whose votes are alleged to be illegal to be given.¹

dd. NUMBER OF VOTES.—Under some statutes it is necessary to show the number of votes improperly received or rejected.² In the absence of express statutory requirements to this effect, the necessity of such an allegation must depend upon the jurisdiction in which the question arises. According to some decisions it would seem necessary to show the number of votes improperly received or rejected,³ while other decisions maintain

have been illegally accepted will not be quashed on appeal for insufficiency for the objection that such failure was not made before the contesting board. *Lunsford v. Culton* (Ky. 1893), 23 S. W. Rep. 946.

Bill of Particulars.—In a proper case the court will order a bill of particulars to be furnished containing the names of the alleged illegal voters and their disqualifications. *Whitehouse v. Schalck*, 5 W. N. C. (Pa.) 122.

1. *Griffin v. Wall*, 32 Ala. 149; *Londoner v. People*, 15 Colo. 557; *Schwarz v. Garfield County Ct.*, 14 Colo. 44; *Gumm v. Hubbard*, 97 Mo. 311; *Lehlbach v. Haynes*, 54 N. J. L. 77; *Preston v. Culbertson*, 58 Cal. 211; *Norwood v. Kenfield*, 30 Cal. 393; *Dryden v. Swinburn*, 15 W. Va. 234; *Collins v. Huff*, 63 Ga. 207.

Improper Influence on Voter.—Notice of contest on the ground that voters were improperly influenced in casting their votes must give the names of the persons alleged to have been so influenced. *Applegate v. Eagan*, 74 Mo. 258.

Receiving of Blank Ballots.—Where an election is contested on the ground that blank ballots have been counted in favor of the contestee, the notice need not state the names of the voters who cast the blanks, since the statute requiring the names of all voters to be stated in the notice does not apply; the objection being not to the voter, but to the action of the officers of the election in counting blanks as votes. *Moffatt v. Montgomery*, 68 Mo. 162.

Illegal Writing on Ballot.—Under Rev. Stat. of Missouri 1889, § 5528, it is not necessary for a notice of contest on the ground of illegal writing contained on some of the ballots to set out the names of the voters, as the statute only requires the names of voters to be given where the ground of contest goes to their qualifications. *Gumm v. Hubbard*, 97 Mo. 311.

What Is a Sufficient Specification of Names.—Where the names of certain parties claimed to be illegal voters appeared on the register as Elias Newton Twist, Patrick White, Colwell Owens Drew, Lewis Dewart Gobin, a notice of contest setting out the names as E. N. Twist, Pat. White, C. O. Drew, and L. D. Gobin, was sufficient. *Preston v. Culbertson*, 58 Cal. 198.

Excuse for Failure to Give Names of Voters.—Where a statute requires the petition to furnish a list of the voters whose votes are alleged to have been illegal, the fact that the contestant was unable to prepare the list for want of information existing in the hands of the contestees, by whose fraud the contestors were prevented from obtaining it, should be alleged in the petition, if intended to be shown as an excuse for noncompliance with the statute. *Schwarz v. Garfield County Ct.*, 14 Colo. 44.

2. *Lehlbach v. Haynes*, 54 N. J. L. 77; *Griffin v. Wall*, 32 Ala. 149; *Preston v. Culbertson*, 58 Cal. 211; *Collins v. Huff*, 63 Ga. 207.

Thus an allegation that "several hundred ballots" cast and counted for contestee were not in conformity with law, is not sufficient. *Lehlbach v. Haynes*, 54 N. J. L. 77.

3. *Zerby v. Snare*, 107 Pa. St. 183; *Weaver v. Given*, 1 Brews. (Pa.) 140; *Batturs v. Megary*, 1 Brews. (Pa.) 162; *Mann v. Cassidy*, 1 Brews. (Pa.) 11; *Thompson v. Ewing*, 1 Brews. (Pa.) 67; *Dryden v. Swinburn*, 15 W. Va. 263; *Loomis v. Jackson*, 6 W. Va. 676; *Whitney v. Blackburn*, 17 Oregon 564; *Soper v. Sibley County*, 46 Minn. 274, where it was held that a notice that the election would be contested because a large number of "legal voters desired and attempted to cast their votes, but with the knowledge, consent, and connivance of the judges

a contrary view.¹

ee. FACTS CONSTITUTING ILLEGALITY.—In the absence of a statute providing otherwise, it has been held unnecessary to state the reasons upon which the charge of illegality of votes received is based.² But under the statutes of one state it is necessary to state the objections to votes alleged to have been illegally received or illegally rejected.³

ff. DISQUALIFICATION TO HOLD OFFICE.—If the ground of contest is the disqualification of the contestee to hold office, facts must be stated to show the disqualification.⁴

(a) **Effect on Election.**—The petition or notice must state facts to show that the result of the election was affected by the illegality or errors charged, as that the contestant would have been elected but for such errors and illegalities, or that the election was thereby rendered void.⁵

of election were * * * prevented from so doing," is insufficient.

What Allegations Sufficient.—A statement that a certain number of votes were received in divisions named from persons not qualified, and that they were counted for one of the candidates, is sufficient. *People v. Ryder*, 16 Barb. (N. Y.) 370; *Weaver v. Given*, 1 Brews. (Pa.) 140.

An allegation charging the receipt of a certain number of votes "and upwards," is sufficient. *Batturs v. Megary*, 1 Brews. (Pa.) 162; *Mann v. Cassidy*, 1 Brews. (Pa.) 11.

1. *Hadley v. Gutridge*, 58 Ind. 315; *Burke v. Perry*, 26 Neb. 414. See also *Kilburn v. Patterson*, 98 N. Car. 593; *Hahn v. Stinson*, 98 N. Car. 591; *Handy v. Hopkins*, 59 Md. 169.

"This first ground of contest was thus stated: 'That he, the said contestor, received at said election, for said office, a greater number of legal votes than were at said election received by said contestee for said office; and that the said contestor was then and there, and is still, eligible to hold and fill said office.' Of course, under this ground of contest, any evidence tending to show the actual number of legal votes received by either of said parties for said office, at said election, would have been admissible, even though it involved the mistake or misconduct of some of the officers of said election." *Hadley v. Gutridge*, 58 Ind. 315.

2. *Gibbons v. Sheppard*, 2 Brews. (Pa.) 1; *Weaver v. Given*, 1 Brews. (Pa.) 143.

Reason for Rule.—"Of what account is it, if a vote has been received which ought to have been rejected, whether

the voter was disqualified by reason of nonpayment of tax, or because of non-age or want of naturalization, or default in making the necessary proof of residence? It is the fact that a person not a qualified elector is permitted to cast his vote, which is of importance to be proved, and the disqualification is as well established by showing one ground of illegality as another." *Weaver v. Given*, 1 Brews. (Pa.) 143.

3. *Dryden v. Swinburn*, 15 W. Va. 263; *Halstead v. Rader*, 27 W. Va. 813.

Rejection of Total Vote of Precinct.—Where the contest is founded upon the rejection of all the votes given at a particular precinct, it is not necessary to state the objections to the rejection of each vote of the precinct. It will be sufficient to name the precinct, and the objections which the contestant alleges to such rejection. *Halstead v. Rader*, 27 W. Va. 813.

4. *Dryden v. Swinburn*, 15 W. Va. 234; *Egan v. Jones*, 21 Nev. 433, wherein it was held that under a constitutional provision that any person convicted of having given or offered a bribe to secure his election shall be disqualified to hold office, and a statute authorizing a contest "when the person whose right to the office is contested was not at the time of the election eligible to said office," a complaint contesting the election and alleging that contestee offered before election to make a bond conditioned that if elected he would return to the county treasurer each month a portion of his salary, but not alleging that contestee had been convicted of offering such bribe, was insufficient.

5. *Carpenter's Case*, 2 Pars. Eq. Volume VII.

(2) *Signature and Verification*.—The necessity for signing and verifying the notice or petition in election contests,¹ the form of such verification,² the persons who must sign or verify such peti-

Cas. (Pa.) 537; *Mann v. Cassidy*, 1 Brews. (Pa.) 11; *Skerrett's Case*, 2 Pars. Eq. Cas. (Pa.) 509; *Miller v. Milligan*, 34 Leg. Int. (Pa.) 159; *Halstead v. Rader*, 27 W. Va. 810; *Loomis v. Jackson*, 6 W. Va. 615; *Woolley v. Louisville Southern R. Co.*, 93 Ky. 223; *Lanier v. Gallatas*, 13 La. Ann. 175; *State v. Mason*, 14 La. Ann. 510; *Whitney v. Blackburn*, 17 Oregon 564; *Bragunier v. Penn.*, 79 Md. 244; *Todd v. Stewart*, 14 Colo. 286; *Hahn v. Stinson*, 98 N. Car. 591; *Nickols v. Ragsdale*, 28 Ind. 132; *Sweepston v. Barton*, 39 Ark. 549. See also *Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *School Dist. No. 3 v. Gibbs*, 2 Cush. (Mass.) 39; *Christ Church Wardens v. Pope*, 8 Gray (Mass.) 140; *Lehlbach v. Haynes*, 54 N. J. L. 81; *M'Neely v. Woodruff*, 13 N. J. L. 352; *Roche v. Bruggemann*, 53 N. J. L. 122; *People v. Cicott*, 16 Mich. 295; *Ex p. Daughtry*, 6 Ired. (N. Car.) 155; *People v. Tuthill*, 31 N. Y. 550; *Ex p. Murphy*, 7 Cow. (N. Y.) 153. *Contra*, *Steele v. Martin*, 6 Kan. 430; *Ledbetter v. Hall*, 62 Mo. 422.

Sufficiency of Allegations.—An averment that "the illegal votes so cast vitiated said election, because if they had been rejected it would, in all probability, have changed the result in petitioner's favor," is insufficient. The petition should aver that the result was—not that it probably would have been—changed by the illegalities charged. *Lanier v. Gallatas*, 13 La. Ann. 175.

So a mere averment that contestant was not elected, and that contestor was entitled to the office, is also insufficient. *Todd v. Stewart*, 14 Colo. 286.

But a petition will not be dismissed merely because it does not aver in express terms that the contestant received the larger number of votes, if such fact be apparent by an examination of the other statements therein. *Miller v. Milligan*, 34 Leg. Int. (Pa.) 159.

And it has been held that a petition which alleges that the returns show that petitioner received a designated number of votes, and that defendant received not more than a designated smaller number, and that the commis-

sion had been erroneously issued to defendant, is sufficient, although it is not directly alleged that defendant was not elected. *Bragunier v. Penn.*, 79 Md. 244.

So, also, the grounds of contest were held sufficiently stated where it was alleged that contestor received seventeen hundred and sixteen votes, contestee seventeen hundred and nineteen votes, and that in eight townships illegal votes were cast for contestee, but for which contestor would have been elected. *Nickols v. Ragsdale*, 28 Ind. 131.

1. **Oath—Maryland.**—If the statute does not require verification of the petition, lack of verification is not a ground of dismissal. *Bragunier v. Penn.*, 79 Md. 244.

Louisiana.—In a contestation for office, under the provisions of Act No. 24 of the legislature of 1877, the plaintiff must file with his suit a "petition signed by at least twenty voters of the parish, praying the court to examine the facts and decide thereon." This requirement of the law is imperative, and a certified copy of such petition (the original of which was filed by the same plaintiff in another suit) will not support his case. *Ducote v. Gremillion*, 32 La. Ann. 540.

2. **Form of Verification.**—In *Pennsylvania*, under a statute requiring an affidavit that the facts set forth in the petition are true, an averment by the petitioners that they are true "to the best of their knowledge and belief" (Election Cases, 65 Pa. St. 20), or "that the statements set forth in the above petition are just and true to the best of their knowledge and belief" (*Acker v. Conrad*, 2 Pa. Dist. Rep. 469), is sufficient.

In *California*, under the same statutory provision, an affidavit that the statement is true except as to matters therein set forth on information and belief, and that as to those matters affiant believes it to be true, has been held sufficient. *Kirk v. Rhoads*, 46 Cal. 404.

So in *Indiana*, under a statute requiring a written statement "specifying the grounds of contest verified by the affidavit of such electors," it has

tions or notice,¹ and the persons who shall administer the oath,² are usually regulated by statute.³

(3) *Defects in, How Reached.*—If a petition contains repugnant or contradictory statements, the remedy is by motion to strike out. A motion to quash on account of this defect cannot be sustained.⁴ Objections because of indefiniteness of the allegations are waived where the opposite party joins issue and gives evidence thereon.⁵

been held that an affidavit is not bad for qualifying the averment of the truth of such statements by the words, "as he is informed and verily believes." *Curry v. Baker*, 31 Ind. 151.

But in *New Jersey*, under a statute which requires as the foundation of a contest the petition of fifteen qualified voters, setting forth "the particular circumstances of the case duly verified by oath or affirmation of at least two of the petitioners," it has been held that a verification to the best of the petitioners' knowledge, information, and belief, is not sufficient, and that the affidavit must be based upon the knowledge of the petitioners. *Johnson v. Allen*, 55 N. J. L. 400 (*distinguishing* *Kirk v. Rhoads*, 46 Cal. 399).

1. By Whom Signed and Verified—Verification.—In *Indiana*, where the statutes prescribe that the statement specifying the grounds of contest shall be verified by the contestor, verification by any other person will be insufficient. *Holton v. Brown*, 46 Ind. 122.

In *Pennsylvania*, under the Act of June 21, 1839 (Pa.), relating to contesting election of aldermen and justices of the peace, and providing that the election returns should be subject to the inquiry of the Court of Common Pleas of the proper county, upon complaint of fifteen or more of the qualified voters of the proper township, ward, or borough, of an undue election or false return, two of whom should take and subscribe an oath or affirmation that the facts set forth in said complaint were true to the best of their knowledge or belief, a petition contesting the election of an alderman was required to be sworn to by two of the petitioners; verification thereof by two other resident electors of the ward was not sufficient. *Clark's Case*, 2 Pars. Eq. Cas. (Pa.) 521. See also *Election of Common Councilmen in 20th Ward*, 3 Pa. Dist. Rep. 118. But it has been held that amendments need not be sworn to by the original petitioners. *Mann v. Cassidy*, 1 Brews. (Pa.) 11.

Signature.—In *Pennsylvania* it has been held that a signature by a counsel is insufficient. *Election of Common Councilmen in 20th Ward*, 3 Pa. Dist. Rep. 118.

But in *Maryland* the petition in an election contest is sufficient if signed in the name of petitioner by his attorney. *Bragunier v. Penn*, 79 Md. 244.

2. Who may Administer Oath—Auditor.—Under a statute authorizing auditors and their deputies to administer oaths necessary in the performance of their duties, and also the oath of office to any officer who receives his certificate of appointment or election from such auditor, and oaths relating to the duties of such officers, a county auditor has authority to take the affidavit of a contestant in an election contest. *Wheat v. Ragsdale*, 27 Ind. 191; *Garrett v. Higgins*, 27 Ind. 162; *Curry v. Miller*, 42 Ind. 320.

Clerk of Circuit Court.—A statute providing that whenever any oath is authorized or required by law, or is necessary in the progress of any cause or proceeding in the Circuit Court, to be taken by any party, or which may be necessary in the discharge of the duties of the clerk, such clerk may administer such oath, does not authorize a clerk of the Circuit Court in vacation, and not acting as a clerk of the board of county commissioners, to administer the oath to a contestant in verifying the statement of the cause of contest. *Albee v. May*, 8 Blackf. (Ind.) 310.

City Recorder.—In *Pennsylvania* the city recorder may administer the oath to a party verifying a petition in an election contest. *Election Cases*, 65 Pa. St. 20.

3. Insufficiency of Affidavit—How Taken Advantage of.—A demurrer assigning a want of sufficient facts as causes stated for contesting an election presents no question as to the sufficiency of the affidavit. *Curry v. Miller*, 42 Ind. 320.

4. *Ewing v. Filley*, 43 Pa. St. 384; *Marshall v. Baldwin*, 32 Leg. Int. (Pa.) 142.

5. *Kreitz v. Behrensmeyer*, 125 Ill. 141.

b. PLEA, ANSWER, OR REPLY.—It has been held unnecessary to plead to a statement of contest in the absence of a statute requiring it.¹ In one state, where proceedings in election contests are similar to proceedings in chancery, the chancery rule that less particularity is required in the answer than in the petition, is followed.² In another state it has been held that the rules governing statements in the petition are applicable to answers, and that no greater particularity is required in the answer than in the petition.³ And in another state it has been decided that an answer or reply in an election contest should be construed according to the ordinary rules applicable to such pleadings.⁴

Remedy for Insufficient Answer.—Where the defendant is required to make his answer more specific, the proper remedy, on his refusal to do so, is by motion to strike out.⁵

Departure.—A party cannot by his reply add a new cause of action to his petition.⁶

Irregularities Not Affecting Election.—Allegations of mere irregularities not affecting the *bona fides* of the election should be stricken out. *Kneass's Case*, 2 Pars. Eq. Cas. (Pa.) 553; *Mann v. Cassidy*, 1 Brews. (Pa.) 11; *Thompson v. Ewing*, 1 Brews. (Pa.) 67.

1. *Griffin v. Wall*, 32 Ala. 149.

2. *Kreitz v. Behrensmeier*, 125 Ill. 141.

Under a denial of an allegation in the petition that the contestant was elected, defendant may show that persons voting for contestant, whose names were not given in the answer, were not legal voters. *Kreitz v. Behrensmeier*, 125 Ill. 141.

Grounds of Illegality.—An answer alleging that a specific number of illegal votes were cast for contestor, if not excepted to, will be sufficient without showing why the votes were illegal or by whom they were cast. *Shepard v. Allen* (Ill. 1888), 17 N. E. Rep. 756.

3. *Weaver v. Given*, 1 Brews. (Pa.) 140.

4. *Baker v. Long*, 17 Kan. 341.

5. *Wheat v. Ragsdale*, 27 Ind. 191.

Sufficient Answer Illustrated.—Where the ground of contest alleged is that the election officers wrongfully certified that contestee received a larger number of votes than contestor, an answer admitting a mistake in contestor's favor as to the number of votes, but setting up that contestor received a number of illegal votes greater than the number wrongfully certified for contestee, is sufficient. *Dobyns v. Weadon*, 50 Ind. 298.

Under a statute providing that no election shall be set aside for illegal votes, unless the number thereof given to the contestee, if taken from him, would reduce the number of his legal votes below the number of legal votes given to some other person for the same office, an answer in an election contest based on the ground that illegal votes were cast for the contestee equal to his declared majority will be sufficient if it alleges that illegal votes were given and counted for the contestor, and that the contestee received the majority of the legal votes cast. *Allen v. Crow*, 48 Ind. 301.

6. *Baker v. Long*, 17 Kan. 341, in which it is said: "Where a reply is filed to an answer containing new matter, it cannot be taken as presenting a new and independent matter of contest, but must be deemed simply a reply to the answer and only available as a defense to such new matter."

What Is Not a Departure.—Where the ground of contest alleged is the misconduct of the election officers in improperly certifying that contestee received a larger number of votes than contestor, and the answer admits a mistake in contestee's favor as to the number of votes, but alleges that contestor received a number of illegal votes greater than the number so wrongfully certified for contestee, a reply alleging that as large a number of illegal votes were received by contestee as by contestor is not a departure. *Dobyns v. Weadon*, 50 Ind. 298.

c. AMENDMENTS—When Allowed.—A notice of contest or petition may be amended in form or substance,¹ especially where leave to amend is had before any progress is made in the hearing of the contest.² And the court may order an amendment on its own motion.³ Such an amendment is allowed at common law by virtue of the power which a court of record possesses of allowing in its discretion amendments for the furtherance of justice.⁴

At What Time.—The application to amend should be made at the earliest opportunity.⁵ But amendments have been permitted after answer,⁶ after evidence and argument,⁷ or even after decree

1. *California*.—Preston v. Culbertson, 58 Cal. 198; Minor v. Kidder, 43 Cal. 229; Rutledge v. Crawford, 91 Cal. 526.

Colorado.—Schwarz v. Garfield County Ct., 14 Colo. 44.

Illinois.—Dale v. Irwin, 78 Ill. 170.

Iowa.—Brown v. McCollum, 76 Iowa 479.

Kansas.—Buckland v. Goit, 23 Kan. 327.

Montana.—Heyfron v. Mahoney, 9 Mont. 497.

Pennsylvania.—Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553; Mann v. Cassidy, 1 Brews. (Pa.) 11; Marshall v. Baldwin, 32 Leg. Int. (Pa.) 168, 11 Phila. (Pa.) 383; *In re* Barber, 10 Phila. (Pa.) 596, 32 Leg. Int. (Pa.) 229; Acker v. Conrad, 13 Pa. Co. Ct. Rep. 97; *Ex p.* Welti, 22 Pittsb. L. J. (Pa.) 197, 3 W. N. C. (Pa.) 165; Battis v. Price, 2 Pearson (Pa.) 456; Election Cases, 65 Pa. St. 35.

Canada.—Collins v. Ross, 20 Can. Sup. Ct. 1.

England.—Shaw v. Reckitt (1893), 1 Q. B. 779.

Contra, Ford v. Wright, 13 Minn. 518.

Fraud.—Where there is a charge of fraud, but it is not averred how the fraud would change the result, the court will allow the contestants to amend in that particular. Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553.

Address and Occupation of Petitioner.—Where a petition to contest an election omits to state the residence, address, and occupation of petitioner, in conformity with the rules in force in *Manitoba*, such defect is merely a formal one and may be amended. Collins v. Ross, 20 Can. Sup. Ct. 1.

Eligibility.—After an election contest case has been remanded on appeal, the statement of contest may be amended to show the eligibility to office of the contester. Rutledge v. Crawford, 91 Cal. 526.

Correcting and Adding Names of Voters.—A statement of contest may be amended by correcting the spelling of the names of persons and by adding other names to conform to the proof, if the adverse party is not misled thereby. Heyfron v. Mahoney, 9 Mont. 497.

If one of the signers of the petition be subsequently ascertained not to be a qualified elector, the court may permit an amendment by adding the name of another elector, with the appropriate vouchers. *In re* Barber, 10 Phila. (Pa.) 579, 32 Leg. Int. (Pa.) 229.

2. Mann v. Cassidy, 1 Brews. (Pa.) 27; Marshall v. Baldwin, 11 Phila. (Pa.) 383.

3. Election Cases, 65 Pa. St. 20.

4. Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553.

"The investigation is one in which the public at large are deeply concerned. * * * Even, therefore, if the statement of contest, as filed in the first instance, lack the clearness and distinctness of allegation always desirable in judicial proceedings, it should not for that reason be peremptorily dismissed; but an opportunity to amend it should be afforded, and by this means the controverted points may be developed for determination and the contest disposed of on its merits, if it have any. * * * The public interests imperatively require that the ultimate determination of the contest should, in every instance, if possible, reach the very right of the case." Minor v. Kidder, 43 Cal. 238.

5. Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 553; Mann v. Cassidy, 1 Brews. (Pa.) 11; Marshall v. Baldwin, 11 Phila. (Pa.) 383.

6. Dale v. Irwin, 78 Ill. 170. In this case the amendment was allowed on the ground that under the *Illinois* statute an election contest is, to all intents and purposes, a chancery proceeding and subject to all the rules governing such proceedings.

7. Heyfron v. Mahoney, 9 Mont. 497.

ousting the contestee,¹ or after remand on appeal.² No amendment at an advanced stage of the proceedings should be permitted, however, unless sufficient excuse is given for failure to amend sooner.³ If the defect in the notice or petition is jurisdictional, no amendment can be permitted after time for contesting the election has expired.⁴

Introducing New Matter.—The broad doctrine has been laid down in one decision, that no new matter can be introduced into the petition or notice by way of amendment, and that only matters consistent with the original charge can be thus added;⁵ another holds that no new cause of action can be set up by amendment after the statutory period, within which the petition must be filed, has elapsed;⁶ while another holds that a new cause of contest may be added after such period has elapsed.⁷

Amending the Answer.—Specifications in an answer may be amended if new matter is not introduced, but new matter cannot be introduced although it be shown that such matter was omitted by mistake.⁸

6. Time of Filing Notice, Petition, or Complaint—Generally.—By the statutes of the various states a party wishing to contest an election must serve the notice or file the complaint within the time prescribed by law. Otherwise the court will have no jurisdiction to proceed, and the proceeding will be dismissed.⁹

1. Election Cases, 65 Pa. St. 35, wherein the amendment alleged was not of an admitted prerequisite necessary to confer jurisdiction, nor of matter essential to the form of the petition, but of a mere specification of fact comprehended within the general terms of the complaint and belonging only to the proof.

2. Rutledge v. Crawford, 91 Cal. 526.

3. Schwarz v. Garfield County Ct., 14 Colo. 44.

4. *Ex p. Welti*, 22 Pittsb. L. J. (Pa.) 197; Butler Tp. Election, 4 Pa. Dist. Rep. 350; Acker v. Conrad, 13 Pa. Co. Ct. Rep. 97.

5. Mann v. Cassidy, 1 Brews. (Pa.) 11.

Failure to State Ground of Contest.—If the notice fails to state some substantial ground of contest, it cannot be amended. Halstead v. Rader, 27 W. Va. 818; Loomis v. Jackson, 6 W. Va. 617.

6. Batterton v. Fuller (S. Dak. 1894), 60 N. W. Rep. 1071.

7. **Adding New Causes by Amendment.**—Code Iowa, section 697, requiring the contestant of an election to file the statement of contest within twenty days after the canvass of votes, and providing that the statement shall set

forth "particular grounds of contest," does not prevent the contestant from adding other causes of contest by amendment after the twenty days have expired. Brown v. McCollum, 76 Iowa 479. See also Baker v. Long, 17 Kan. 341, where this question is adverted to, but not decided.

8. Thompson v. Ewing, 1 Brews. (Pa.) 67.

Counter Notice.—An amendment of a counter notice by striking out the names of voters whose votes were impeached for illegality, when not based on newly discovered evidence, is not authorized by a statutory provision permitting amendments to set up newly discovered evidence, nor by the common-law proceedings authorizing the court in its discretion to permit amendments calculated to promote the ends of justice. Ralston v. Meyer, 34 W. Va. 737.

9. Colorado.—Vailles v. Brown, 16 Colo. 462.

Illinois.—Zimmerman v. Cowan, 107 Ill. 631.

Indiana.—Farlow v. Hougham, 87 Ind. 540.

Kentucky.—Batman v. Megowan, 1 Metc. (Ky.) 533.

Computation of Time.—Where a statute provides that the petition shall be filed within a specified number of days from the "day" of the election, the time within which the petition must be filed commences to run from the day of the election.¹ But there is some conflict of authority as to the time when the statutory period begins to run where the statute requires the petition to be filed within a specified number of days "after election." Under some decisions the statute does not commence to run until after the result of the election is declared.² According to others it commences to run from the day of the election.³ In computing time there is

Louisiana.—Deslonde *v.* Lozano, 23 La. Ann. 794; Madison *v.* Dyer, 27 La. Ann. 305; State *v.* Jackson, 27 La. Ann. 541; State *v.* Hall, 26 La. Ann. 58.

Minnesota.—Baberick *v.* Magner, 9 Minn. 232; Borer *v.* Kolars, 23 Minn. 445.

Mississippi.—Crisler *v.* Morrison, 57 Miss. 791.

Missouri.—Castello *v.* St. Louis Circuit Ct., 28 Mo. 259; Wilson *v.* Lucas, 43 Mo. 290; Bowen *v.* Hixon, 45 Mo. 340; Higbee *v.* Ellison, 92 Mo. 13.

Nevada.—Stinson *v.* Sweeney, 17 Nev. 309.

Ohio.—Ingerson *v.* Marlow, 14 Ohio St. 568.

Pennsylvania.—*In re* McMenemy's Election, 13 Phila. (Pa.) 422.

South Dakota.—Bowler *v.* Eisenhood, 1 S. Dak. 577.

Texas.—Lindsey *v.* Luckett, 20 Tex. 516.

"Without Unnecessary Delay."—Under a statute which provides that a petition for a recount of ballots must be filed "without unnecessary delay," but which does not name any specific time, it has been held inexcusable negligence to delay until December 26, before filing a petition for a recount of ballots cast November 6. Andrews *v.* Otsego County, 74 Mich. 278.

Extension of Time.—There is some conflict of authority as to whether the time for filing a notice may be extended. An extension of time has been granted in a *Canadian* case (McLennan *v.* Chisholm, 20 Can. Sup. Ct. 38), while in *New Mexico* it has been held (Bull *v.* Southwick, 2 N. Mex. 321), that no extension of time can be granted, in the absence of express statutory provision authorizing it. In *Colorado* it has been held that an extension of time would not be granted merely because the last day on which

the petition could be filed fell on Sunday. Vailes *v.* Brown, 16 Colo. 462.

1. *In re* McMenemy's Election, 13 Phila. (Pa.) 422.

Under the *Ohio* statute regulating the election of state and county officers, the declaration of the clerk and justices, showing who were duly elected, should be certified in writing, and show the day on which the declaration was made, and the time within which an appeal may be taken by a candidate or elector is to be counted from such day. Taylor *v.* Wallace, 31 Ohio St. 151.

Computation of Time when Vote Results in Tie.—Where a canvass of votes provided for by statute showed that the election resulted in a tie, and several days later the tie was decided by lot according to the provisions of the statute, it was held that the term "canvass," as used in the statute requiring notice of contest to be served within twenty days after the canvass of votes, included the decision of the tie of votes and that the statutory period did not commence to run until after the decision of the tie. Bowler *v.* Eisenhood, 1 S. Dak. 577.

2. Thompson *v.* Ewing, 1 Brews. (Pa.) 67; Stevenson *v.* Lawrence, 1 Brews. (Pa.) 126; Deslonde *v.* Lozano, 23 La. Ann. 795.

3. Collin's Case, Brightly's Election Cases 503. See also State *v.* Tucker, 54 Ala. 205 (*overruling* Sprowl *v.* Lawrence, 33 Ala. 674, and State *v.* Ely, 43 Ala. 568).

"Close of Election."—Under a statute requiring contestor to give the opposite party notice within ten days after the close of the election, the notice is in time if given within ten days after the result is declared. Davis *v.* Maxwell, 22 La. Ann. 66.

Second Canvass.—Where the board of canvassers assumed to meet a second time and change the result of the

also a conflict of authority as to whether the first day should be excluded and the last day included, or whether the first day should be included and the last excluded.¹

Time of Day.—It has been held that contestor has until midnight of the last day in which to file his petition.²

Where Last Day Is Sunday.—If the last day within which the petition may be filed falls on Sunday, it must be filed on the preceding day; it cannot be filed on the following day.³

7. Service of Notice, Petition, or Summons.—Service of the notice, petition, or summons, in a contested election case, is a matter wholly regulated by statute.⁴

election as declared by the first canvass, the time of filing a petition of contest does not commence to run until after the recanvass. *Day v. Jones*, 31 Cal. 261.

1. First Day Excluded and Last Included.—*California.*—*Misch v. Mayhew*, 51 Cal. 514, under statute providing that the time in which any act provided by law is to be done is computed by excluding the first day and including the last day.

Colorado.—*Vailes v. Brown*, 16 Colo. 462, wherein it was held that under a statute requiring the statement to be filed "within ten days after the day when the votes are canvassed," the day when the votes are canvassed must be excluded.

Illinois.—*Zimmerman v. Cowan*, 107 Ill. 631.

Mississippi.—*Hall v. Lyon*, 59 Miss. 218.

South Dakota.—See *Bowler v. Eisenhower*, 1 S. Dak. 577.

First Day Included and Last Day Excluded.—*Kentucky.*—*Batman v. McGowan*, 1 Metc. (Ky.) 533, under a statute providing that "when a statute requires notice to be given, or any act to be done at a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding. But the day on which such notice is given, or such act is done, may be counted as one day and part of the time."

Nevada.—*Stinson v. Sweeney*, 17 Nev. 309, assuming to follow *Misch v. Mayhew*, 51 Cal. 514, but relying on the headnote of that decision, which lays down exactly the opposite doctrine from what is decided in that case. See generally, for the rules of computing time, Am. and Eng. Encyc. of Law, tit. TIME.

2. Zimmerman v. Cowan, 107 Ill. 631, it being held that a statute requiring clerks of courts to keep their offices open and attend to the duties thereof from eight o'clock A. M. to six o'clock P. M. of each working day did not render the official act of the clerk before or after those hours illegal.

3. Vailes v. Brown, 16 Colo. 462.

4. Illinois.—Under the Illinois statutes a summons in an election contest must be served as in chancery; a return showing service by leaving only, gives no jurisdiction of the person. *Greenwood v. Murphy*, 131 Ill. 604.

Summons in an election contest is properly returnable to a probate term of the County Court, *Kreitz v. Behrensmeyer*, 125 Ill. 141; and should be made returnable to the next term after its date or the next succeeding term thereafter, *Cavanaugh v. McConochie*, 134 Ill. 516.

Iowa.—In *McIntosh v. Livingston*, 41 Iowa 219, the question whether notice of appeal in proceedings to contest an election should be in writing was not decided, but it was held, where a verbal notice was given at the time the judgment of the court of contest was rendered, and the parties then agreed as to the disposition to be made of the ballot box, that the notice was, under the circumstances, sufficient.

Kentucky.—A notice of contest may be served as provided by statute, by leaving a copy at the usual place of abode of the contestee, with a person more than sixteen years old. *Broadus v. Mason*, 95 Ky. 421.

Minnesota.—Notice of contest of a municipal bond election under Gen. Laws 1893, c. 4, § 10, may be served on a member of the city council. *Truelson v. Duluth*, 60 Minn. 132.

8. Trial—*a.* TIME OF TRIAL.—Where the statute requires a court to hear and determine a contested election case at the next term after the election was held, such provision will be deemed directory only, and will not prevent a trial at a subsequent term, unless a clause is added prohibiting the trial at a later date.¹ Where such continuance is granted without the proper affidavits, and against the objection of the defendant, it was held to operate as a discontinuance.²

b. RIGHT TO JURY TRIAL.—While jury trials have been allowed in election cases in *quo warranto* proceedings,³ the right to jury trial in statutory election contests has uniformly been denied.⁴

c. NEW TRIAL OR REHEARING.—The power of courts to grant a new trial in ordinary suits will not be construed to extend to election cases, unless such cases are classed with other suits.⁵ But where the judgment of the trial court is final, it has been held that a rehearing might be granted, even after affirmance, upon certiorari.⁶

d. DISCONTINUANCE.—As a general rule it is apprehended that a contest once instituted cannot be discontinued by the contestant or petitioners, as the people have an interest in the

Mississippi.—The summons in election cases issues and is served, as in other cases, unless application is made to the circuit judge for trial in vacation, under Code 1880, §§ 151, 2608, when none is issued until the order is made. *Hall v. Lyon*, 59 Miss. 218, *distinguishing* *Crisler v. Morrison*, 57 Miss. 791, a decision arising under a former statute.

Oregon.—Under a statute providing that the contestor may give notice to the contestee of the contest within thirty days from the time the contestee shall claim to have been elected, the notice must not only be filed, but served, within that period. *Whitney v. Blackburn*, 17 Oregon 564.

Pennsylvania.—Under the Act of March 10, 1874, § 18, service of a copy of the petition is not a prerequisite to the filing and the jurisdiction of the court; it must, however, be served before a hearing. *Sailer v. Keating*, 11 Phila. (Pa.) 382.

1. *Stevenson v. Lawrence*, 1 Brews. (Pa.) 131; *Election Cases*, 65 Pa. St. 20.

2. *Keller v. Chapman*, 34 Cal. 635.

At Chambers.—Authority to try a contested election case before a judge at chambers, if not tried at a regular term, within thirty days after the election, does not prohibit the trial at the next term where it is not tried at chambers. *Whallon v. Bancroft*, 4 Minn. 109.

3. *People v. Cook*, 14 Barb. (N. Y.) 259; *Reynolds v. State*, 61 Ind. 392; *People v. Cicott*, 16 Mich. 283.

4. *Wise v. Martin*, 36 Ark. 305; *Govan v. Jackson*, 32 Ark. 553; *State v. Johnson*, 26 Ark. 281; *Corey v. Lugar*, 62 Ind. 60; *Pedigo v. Grimes*, 113 Ind. 148; *Thompson v. Ewing*, 1 Brews. (Pa.) 67; *Ewing v. Filley*, 43 Pa. St. 389; *Kneass's Case*, 2 Pars. Eq. Cas. (Pa.) 599; *State v. Lewis*, 51 Conn. 113; *Freeman v. State*, 72 Ga. 812. But see *Brown v. McCollum*, 76 Iowa 479.

"It seems well settled by the authorities that it is only in cases at common law, and perhaps such as are of similar or analogous nature, that the guarantee relied upon by the appellant applies, and that statutory proceedings and rights which did not exist at common law, are not within it." *Govan v. Jackson*, 32 Ark. 557.

Minnesota.—Under a statute providing that all matters relating to any election contest shall be heard and tried by the District Court of the proper county in the manner that civil actions are tried by the court, the District Court has jurisdiction to try such contest without a jury. *Newton v. Newell*, 26 Minn. 529.

5. *Casgrave v. Howland*, 24 Cal. 457; *Dorsey v. Barry*, 24 Cal. 449.

6. *In re Sheppard's Election*, 77 Pa. St. 295.

result.¹ If, however, such discontinuance is permissible, a party who discontinues his contest cannot renew it after a commission has been issued to his opponent.²

9. Appeal—*a*. RIGHT OF APPEAL.—The right of appeal from judgments and orders in election cases, as in other cases, exists only where granted by some constitutional or statutory provision.³ And as there are no general principles deducible from the decisions on appeal in election cases, the decisions arising in each state on the question of right of appeal have been grouped and set out in the notes.⁴

1. Mann v. Cassidy, 1 Brews. (Pa.) 43; Kneass's Case, 2 Pars. Eq. Cas. (Pa.) 570; In re Clinton County Election, 3 Pa. L. J. 166; Ex p. Burke, 22 Pittsb. L. J. (Pa.) 193. See also *People v. Holden*, 28 Cal. 139, where it was said to be very doubtful whether stipulations by the relator in an election contest to discontinue the contest without the consent of the attorney-general are binding on the people.

Withdrawing One of Several Counts.—Where the complaint contains several counts and the case goes to trial, and after the evidence is in, the plaintiff elects to proceed on one of the counts and withdraws the others, the withdrawal carries with it the evidence admitted under the counts withdrawn. *Roysdon v. Carr*, 63 Cal. 191.

2. Borgstede v. Clarke, 5 La. Ann. 291. Compare Lord v. Dunster, 79 Cal. 477.

3. Whipper v. Talbird, 32 S. Car. 1; Carmand v. Wall, 1 Bailey (S. Car.) 209.

4. South Carolina.—In South Carolina the board of state canvassers is the tribunal of last resort, and from its determination no appeal lies. Section 358 of the Code of Procedure does not confer a right of appeal, but only declares to what court an appeal from an inferior court shall be taken, how it may be made to operate as a supersedeas, and how it shall be heard. *Whipper v. Talbird*, 32 S. Car. 1; *Ex p. Whipper*, 32 S. Car. 5; *Pettigrew v. Bell*, 34 S. Car. 104; *Ex p. Mackey*, 15 S. Car. 322.

California.—A constitutional provision giving the Supreme Court appellate jurisdiction in all cases at law involving title or possession of realty, or the legality of any tax assessment, toll, or municipal fine, or in which the demand exclusive of all interest on the value of the property in controversy

amounts to two hundred dollars, gives the Supreme Court jurisdiction of appeals in contested election cases. *Knowles v. Yates*, 31 Cal. 82; *Day v. Jones*, 31 Cal. 261. For other decisions in which the right of appeal in election cases is recognized, see *Rutledge v. Crawford*, 91 Cal. 526; *Preston v. Culbertson*, 58 Cal. 211; *People v. Glenn County*, 100 Cal. 419; *Minor v. Kidder*, 43 Cal. 229.

Mississippi.—Under the Code of Mississippi 1880, § 2309, authorizing an appeal to the Supreme Court from any final judgment of the Circuit Court in a civil case, not being a judgment by confession; section 151, providing for the trial of contested election cases in vacation; and section 2608, declaring how a trial in vacation shall be obtained, an appeal lies to the Supreme Court from the decision in vacation of a contested election case. *Perkins v. Carraway*, 59 Miss. 222.

Appeal Bond.—Under the Act of March 5, 1878 (Acts 1878, p. 173), no appeal from a special tribunal which tries a contested election for a county office can be taken without an appeal bond for costs, and this is not altered by the statute (Acts of 1880, p. 125) which provides for supersedeas. *Pearson v. Wilson*, 57 Miss. 848.

Amendment.—The appeal cannot be amended in the Circuit Court by executing the bond required by the former statute, in a case where the only bond given was the one for supersedeas authorized by the latter. *Pearson v. Wilson*, 57 Miss. 848.

Maryland.—An order dismissing the petition in an election contest is final and unappealable. *Bragunier v. Penn*, 79 Md. 244. See also *Handy v. Hopkins*, 59 Md. 158; *Baltimore v. Fledderman*, 67 Md. 161.

West Virginia—Certiorari—Writ of Error.—Under the constitutional and

b. REVIEW.—As regards review on appeal, there are few if any points relating to this question which are peculiar to appeals in election cases. Thus the rule that objections not raised below will not be considered on appeal applies to appeals in election cases;¹ as does also the general rule that the court will not review disputed questions of fact.² So alleged error in the

statutory provisions of the state, in a contest for an office before the County Court or other inferior tribunal, the decision of such tribunal may be reviewed by a Circuit Court by a writ of certiorari, and the decision of the Circuit Court may be reviewed by the Supreme Court of Appeals by writ of error. *Dryden v. Swinburne*, 15 W. Va. 234, 20 W. Va. 89; *Swinburn v. Smith*, 15 W. Va. 483.

Texas.—The contest of an election authorized by the Act of May 8, 1873, regulating contested elections, and the act to amend the same approved July 20, 1876 (Gen. Laws, 13th Leg., p. 67; Gen. Laws, 15th Leg., p. 70), is not a suit, complaint or plea within section 8, article 5, of the Constitution, limiting the appellate jurisdiction of the Supreme Court to "civil cases of which the District Courts have original or appellate jurisdiction." *Williamson v. Lane*, 52 Tex. 335; *O'Docherty v. Archer*, 9 Tex. 295; *Gibson v. Templeton*, 62 Tex. 555. See also *Wright v. Fawcett*, 42 Tex. 203.

Ohio.—Under the Constitution and statutes of Ohio, a judgment of the Court of Common Pleas in a contested election case brought before it by appeal under a statute providing therefor, is reviewable in the District Court and Supreme Court by a petition in error. *Lehman v. McBride*, 15 Ohio St. 573; *Ingerson v. Marlow*, 14 Ohio St. 568.

Tennessee.—Under the Act of 1852, c. 54, the judgment of the County Court in a case contesting the election of a constable is subject to removal to the Circuit Court by appeal, and, in case that is refused, by writ of certiorari. *Dodd v. Weaver*, 2 Sneed (Tenn.) 670. See also *Hyde v. Trewwhitt*, 7 Coldw. (Tenn.) 59.

Pennsylvania.—No appeal lies from an order of the court of sessions refusing to enforce a petition in a contested election case. *Moock v. Conrad*, 155 Pa. St. 586, affirming *Acker v. Conrad*, 2 Pa. Dist. Rep. 469.

Kentucky.—In this state an appeal is allowed from the decision of the con-

testing election board to the Circuit Court of the county in which the contestant resides, and from thence to the court of appeals. *Atchison v. Lucas*, 83 Ky. 451. See also *Imboden v. Cully*, 94 Ky. 45.

Indiana.—Originally, no appeal to the Supreme Court in a contested election case would lie. *French v. Lighty*, 9 Ind. 475. But the practice is now otherwise by express statutory provision. Rev. Stat. of Indiana 1894, § 6324.

1. *State v. West*, 21 Mo. App. 309; *Crabb v. Orth*, 133 Ind. 11; *Lay v. Parsons*, 104 Cal. 661. See also *Imboden v. Cully*, 14 Ky. L. Rep. 701; *Baker v. Long*, 17 Kan. 341.

It cannot be objected for the first time on appeal that the court did not require a copy of the certificate of defendant's election, and admitted parol evidence that he held the office. *State v. West*, 21 Mo. App. 309.

A statutory provision that no question shall be considered by the court of appeals which the record does not show to have been raised below, is inapplicable to a proceeding under *Maryland Acts 1890*, c. 573, providing for an appeal from the action of the officers of registration to the Superior Court of Baltimore and to the judges of the Circuit Court, and an exception to an order directing one to be registered as a voter is sufficient in such proceeding to bring up the whole record and raise the question of the legality of the order. *Shaeffer v. Gilbert*, 73 Md. 73.

2. *Gumm v. Hubbard*, 97 Mo. 311; *Hughes v. Holman*, 23 Oregon 481; *Jones v. Glidewell*, 53 Ark. 161. See also *Shaeffer v. Gilbert*, 73 Md. 73.

Illinois.—In Illinois, where election contests are regarded in the nature of a chancery proceeding, the rule is otherwise, and it is held that to uphold a decree it must appear from the record that it is supported by the proofs. *Kingery v. Berry*, 94 Ill. 515.

Certiorari.—The *Pennsylvania* Supreme Court has no authority to re-

admission of evidence will not operate to reverse where it does not appear that such error was injurious.¹

On Reversing, the appellate court will render such a judgment as the trial court ought to have rendered, whenever the record enables it to do so.²

II. ACTIONS FOR PENALTIES AND DAMAGES—1. Who may Maintain.—Only a qualified elector has a cause of action for damages for a rejection of his vote.³

2. Remedy and Form of Action.—The remedy of an elector for refusal of election officers to receive his ballot is an action for damages.⁴ Under some statutes a penalty for neglect of duty or misconduct may be recovered from election officers by civil action,⁵ and under others either by a civil action or by indictment.⁶

Form of Action.—The usual form of action at common law by an elector to recover damages,⁷ or a penalty,⁸ is case. Under some statutes debt will lie to recover a penalty against officers of an election for neglect or misconduct in performing their duties.⁹

3. Allegations—Qualified Voter.—The declaration in an action by an elector against election officers to recover damages, or a penalty, must show that plaintiff was a qualified voter.¹⁰

view the facts on certiorari in a contested election case. *Yonkin's Appeal*, 12 Cent. Rep. 371, *affirming* *Yonkin's Election*, 2 Pa. Co. Ct. Rep. 550; *Com. v. Ramsay*, 166 Pa. St. 642.

1. *Merritt v. Hinton*, 55 Ark. 12.

When the record does not show the number of votes found to either party on a final recounting by the probate judge, the appellate court cannot intend that the counting of illegal votes for the party declared elected was an error harmless to the contestant, but must presume injury from the error. *Griffin v. Wall*, 32 Ala. 149.

Dismissal of Appeal.—Where a special statutory jurisdiction, without express power of appeal, is conferred upon the Circuit Court in the matter of a contested election of county commissioners, and an appeal is taken from an order of the Circuit Court declaring the election void and the office vacant, the Court of Appeals is not authorized to do anything more than decide the question whether the case, as tried and determined, was within the limits of the special jurisdiction conferred, and being satisfied that it was, the appeal must be dismissed. *Handy v. Hopkins*, 59 Md. 158.

2. *Griffin v. Wall*, 32 Ala. 149.

3. *Mills v. McCabe*, 44 Ill. 194; *Byler v. Asher*, 47 Ill. 101; *Blanchard v. Stearns*, 5 Met. (Mass.) 298.

4. *Hardesty v. Taft*, 23 Md. 512.

5. *Seeley v. Koox*, 2 Woods (U. S.) 368; *Carle v. People*, 12 Ill. 285; *Brooklyn v. Scholes*, 31 Hun (N. Y.) 110; *McKay v. Campbell*, 2 Abb. (U. S.) 120.

6. *Kirkpatrick v. Stewart*, 19 Ark. 695.

7. See *Byler v. Asher*, 47 Ill. 102; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114; *Harman v. Tappenden*, 1 East 555; *Drewe v. Coulton*, 1 East 555, note b; *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *Wheeler v. Patterson*, 1 N. H. 88; *Kilham v. Ward*, 2 Mass. 236; *Jeffries v. Ankeny*, 11 Ohio 372.

8. *Seeley v. Koox*, 2 Woods (U. S.) 368.

9. *Carle v. People*, 12 Ill. 285; *Kirkpatrick v. Stewart*, 19 Ark. 695.

10. *Murphy v. Ramsey*, 114 U. S. 15. See *Mills v. McCabe*, 44 Ill. 194; *Byler v. Asher*, 47 Ill. 101; *Curry v. Cabliss*, 37 Mo. 330; *Ashby v. White*, 1 Smith's Lead. Cas. 290.

Under the Massachusetts Statute the declaration must aver specifically all the facts which constitute the plaintiff's qualifications to vote at the meeting at which his vote was refused, and that before offering his vote he furnished defendants with sufficient evidence of having those qualifications. *Blanchard v. Stearns*, 5 Met. (Mass.) 298.

Effect of Refusal.—And it must be shown that the refusal to accept plaintiff's vote resulted in an exclusion of the exercise of his right of suffrage.¹

Malice and Corrupt Motive.—Although there are a number of decisions which maintain a contrary view,² the better rule, and the one supported by the weight of authority, is that in an action by an elector against election officers for rejecting his vote, in order to recover damages,³ or a penalty,⁴ or in an action against election officers to recover a penalty for neglect of duty or misconduct,⁵ it is necessary to allege that the refusal of defendants was knowingly wrongful, malicious, and prompted by corrupt motives.⁶

III. OFFENSES AGAINST ELECTION LAWS⁷—1. What Indictment must

1. *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494.

2. *Anderson v. Millikin*, 9 Ohio St. 568; *Osgood v. Bradley*, 7 Me. 411; *Blanchard v. Stearns*, 5 Met. (Mass.) 298; *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Kilham v. Ward*, 2 Mass. 236; *Jeffries v. Ankeny*, 11 Ohio 372; *Moore v. Kessler*, 59 Ind. 152, wherein it is said: "The acts of a board of canvassers are ministerial; and if they unlawfully fail to perform them, or perform them unlawfully, whereby a person is injured, they will be liable; and it is immaterial whether they acted maliciously, purposely, or by mistake;" *Lincoln v. Hapgood*, 11 Mass. 350, wherein the reasoning of the court was as follows: "The selectmen of a town cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption, or some wicked and base motive. If, then, a civil action does not lie against them, the party is deprived of his franchise without any relief, and has no way of establishing his right to any future suffrage. Thus a man may be prevented, for his life, from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections. * * * Now, if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right; and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights, and restoring himself to the

rank of an active citizen." See also *Long v. Long*, 57 Iowa 497, in which the defendant was allowed to plead, in mitigation of damages, that he made an honest mistake of law.

3. *Bridge v. Oakey*, 2 La. Ann. 968; *Ashby v. White*, 1 Bro. Parl. Cas. 47; *Drewe v. Coulton*, 1 East 555, note *b*; *Cullen v. Morris*, 3 Stark. 577; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114; *Isaacs v. McNeil*, 44 Fed. Rep. 32; *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *Friend v. Hamill*, 34 Md. 298; *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 497; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 712; *Moran v. Rennard*, 3 Brews. (Pa.) 601; *Weckerly v. Geyer*, 11 S. & R. (Pa.) 35.

Concurrence in Refusal by Other Judges.

—It should be alleged that the refusal was concurred in either by the other judge, or by the sheriff in case the judges disagreed. *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494.

4. *Seeley v. Koox*, 2 Woods (U. S.) 368.

5. *Kirkpatrick v. Stewart*, 19 Ark. 695.

6. An allegation, in a petition against a sheriff who refused to permit a legal voter to vote when he had a right to do so, "that the defendant knowingly and wilfully, and with an unlawful intention, refused to receive the plaintiff's vote," states a good cause of action. *Morgan v. Dudley*, 18 B. Mon. (Ky.) 713.

7. **Jurisdiction.**—United States courts have jurisdiction of offenses committed against laws governing the election of federal officers. *Ex p. Clarke*, 100 U. S. 399; *Ex p. Siebold*, 100 U. S. 371; *Van Buren v. U. S.*, 36 Fed. Rep. 77.

But they have no jurisdiction of an offense against election laws which do not affect the election of federal of-

Show—*a. ILLEGAL VOTING*—(1) *Designation of Offense*—*Want of Proper Qualification*.—Although there are some decisions to the contrary,¹ the weight of authority is that it will not, in general, be sufficient, in cases of indictment for voting without legal qualification, to charge generally that the defendant voted illegally, without specifying in what the illegality consisted. The indictment should inform the defendant of the particular disqualification charged against him,² because the defendant might otherwise be taken by surprise and be wholly unprepared to make his defense, however just and valid it might be,³ and because the general charge of illegality amounts to no more than a conclusion of law, and presents no issuable facts.⁴ It has been held, however, that a defect in failing to state the particular disqualification is waived by failure to demur, and that an indictment insufficient in this regard is good after verdict.⁵

ficers. *U. S. v. Morrissey*, 32 Fed. Rep. 147.

1. *Com. v. Shaw*, 7 Met. (Mass.) 52; *State v. Marshall*, 45 N. H. 281; *State v. Douglass*, 7 Iowa 413, in which it was held that under a statute which provides that if any person, knowing himself not to be qualified, vote at any election authorized by law, he shall be punished, an indictment following the language of the statute and charging that defendant voted, knowing that he was not qualified, is sufficient without further alleging in what the want of qualification consists. See also *U. S. v. Quinn*, 8 Blatchf. (U. S.) 48.

2. *Gordon v. State*, 52 Ala. 308; *State v. Moore*, 27 N. J. L. 105; *Quinn v. State*, 35 Ind. 485; *Pearce v. State*, 1 Sneed (Tenn.) 63; *People v. Standish*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 111; *Gallagher v. State*, 10 Tex. App. 469; *State v. Symonds*, 57 Me. 148; *People v. Neil*, 91 Cal. 465; *Com. v. Huber*, 13 Lanc. Bar. (Pa.) 139. See also *State v. Tweed*, 27 N. J. L. 111; *U. S. v. Hirschfield*, 13 Blatchf. (U. S.) 331; *State v. Haynorth*, 3 Sneed (Tenn.) 64.

In an indictment for illegal voting an allegation that the defendant "did * * * unlawfully and knowingly vote at said election, he, the said defendant, not being then and there a qualified voter of said county," does not sufficiently describe the offense. *Pearce v. State*, 1 Sneed (Tenn.) 63.

Disqualification by Reason of Age.—An indictment stating that the defendant, not being twenty-one years of age, voted at a general election in the state, is sufficient; but a mere general accu-

sation of illegal voting, without specifying in what the illegal voting consisted, is insufficient. *Gordon v. State*, 52 Ala. 308.

Disqualification by Reason of Sex.—An indictment charging that defendant, at a general town election held at a certain time and place in this state, for certain officers, voted, "then and there being a female and a person not duly qualified to vote at such election," sufficiently shows that the alleged disqualification was that the defendant was a female. *People v. Barber*, 48 Hun (N. Y.) 198.

Disqualification by Reason of Crime—Desertion.—Where the basis of a prosecution for illegal voting is that defendant had forfeited his right to vote by reason of his desertion from the United States army, the crime of desertion must be specifically set forth, otherwise the indictment will be insufficient. *State v. Symonds*, 57 Me. 148.

Burglary.—An allegation that the defendant was convicted of burglary is a sufficient charge of legal disqualification to vote. *Gallagher v. State*, 10 Tex. App. 469.

3. *Pearce v. State*, 1 Sneed (Tenn.) 67.

"A charge so general and so indefinite is inconsistent with the well-settled rules of criminal pleading, and must of necessity embarrass, if not fatally prejudice, the defendant in making his defense." *State v. Moore*, 27 N. J. L. 109.

4. *Quinn v. State*, 35 Ind. 485; *People v. Neil*, 91 Cal. 465.

5. *State v. Bruce*, 5 Oregon 68. In this case the court said: "By his silence and acquiescence, the defendant

Voting in the Name of Another.—Where the offense charged is that the defendant voted or attempted to vote in the name of another, the same particularity in specifying the offense is required as in cases of indictments for illegal voting by reason of disqualification.¹

Voting More than Once.—An indictment which charges that defendant voted twice at an election, and cast two separate and distinct ballots which were accepted by the election officer, sufficiently charges the offense of voting twice.²

(2) *Description of Intent.*—As regards words descriptive of intent, such as “wilfully,” “knowingly,” and “illegally” or “unlawfully,” etc., it will, in general, be sufficient to follow the words of the statutes.³ The words of the statute, however, should be followed;⁴ or, at least, words identical in meaning with those of the statute.

(3) *Authority for Election.*—An indictment for illegal voting need not allege the specific authority for the election.⁵

virtually says: ‘I understand the nature and cause of the accusation against me, and am ready to meet it upon the issues of fact raised by my plea of not guilty.’ * * * To hold that every minor defect in an indictment may for the first time be taken advantage of after trial upon the merits, would do violence not only to the spirit but to the letter of our code of criminal practice, and would result in entailing upon the public unnecessary expense, and in many instances in thwarting the ends of justice.” But see *Com. v. Huber*, 13 Lanc. Bar (Pa.) 139.

1. See *Blitz v. U. S.*, 153 U. S. 308; *U. S. v. Seaman*, 23 Fed. Rep. 882.

Under Rev. Stat. of U. S., § 5511, which makes it an offense to knowingly personate and vote or attempt to vote in the name of another, “at any election for representative or delegate in Congress,” an indictment charging that defendant knowingly voted in the name of another “at an election for representative in Congress” is insufficient where such election was for both state and federal officers, because it does not show that defendant may not have voted for state officers only, and because the act of voting in the name of another for a state officer at a general election is not an offense under the statutes. *Blitz v. U. S.*, 153 U. S. 308; *U. S. v. Seaman*, 23 Fed. Rep. 882. *Contra*, *U. S. v. McBosley*, 29 Fed. Rep. 897.

2. *State v. Patterson*, 116 Ind. 49. See also *State v. Boyington*, 56 Me. 512.

Where a city charter provided for a general city election, to be held in such places in each ward as the com-

mon council should designate, an indictment for voting twice at such election—once in each of two wards—sufficiently charges defendant with voting twice at the same election, if it alleges that defendant voted in two wards on the same day. The election, in being held in each of several wards, constitutes but one election. *State v. Welch*, 21 Minn. 23; *State v. Davis*, 22 Minn. 423.

3. *Hamilton v. People*, 57 Barb. (N. Y.) 625, where it was held that the word “unlawfully” was all that is necessary to be used under the statute.

State v. Haynorth, 3 Sneed (Tenn.) 64, holding that an indictment for illegal voting need not allege that the offense was committed “knowingly,” and that the word “illegally,” as used in that statute, implied that the party had or was chargeable with knowledge of the facts rendering his vote illegal.

Surplusage.—The use of the words “knowingly, wilfully, and corruptly,” not contained in the statute, is mere surplusage, and does not vitiate the indictment. *Hamilton v. People*, 57 Barb. (N. Y.) 625.

4. *U. S. v. Watkins*, 6 Fed. Rep. 152, in which it was held that an indictment for voting illegally in contravention of Rev. Stat. U. S., § 5511, should allege that the defendant “knowingly” so voted, and that, too, although the possession of such knowledge by him is a mere question of law.

5. *Gallagher v. State*, 10 Tex. App. 469; *State v. Marshall*, 45 N. H. 281.

Allegations of Authority Considered Sufficient.—An allegation that the legal voters were convened according to the

(4) *Authority of Officers.*—Nor is it necessary to allege specifically the authority of the officers of the election.¹

(5) *Names of Candidates.*—It is not necessary to allege the names of the candidates, nor that candidates for any particular office were voted for.²

(6) *Purposes of Election.*—The indictment should describe the election, or the purposes for which it is held, with sufficient certainty to enable the court on conviction to pronounce the proper judgment.³

constitution and laws of the state, in legal town meeting, for the choice of town officers, was held sufficient without further stating that it was called by warrant of the selectmen. *State v. Bailey*, 21 Me. 62.

An indictment alleging that the election "was authorized by law," sufficiently shows authority for the election. *State v. Douglass*, 7 Iowa 413.

In an indictment for illegal voting at a town meeting, it is sufficient to allege that such meeting "was duly holden," without stating how or by what authority it was warranted. *State v. Marshall*, 45 N. H. 281.

An averment that a "town meeting was then and there duly held" for the election of certain officers, is sufficient to authorize proof that it was held according to the constitution and laws of the state. *State v. Boyington*, 56 Me. 512.

An indictment which charges that the illegal voting was done at a municipal election of the city of S., held under a statute (set out in the indictment) and in accordance with law and the statutes in such cases made and provided, to elect officers of said city, shows "with all, if not more than all, the precision necessary," that the election was lawfully held. *State v. Welch*, 21 Minn. 22.

1. *Gallagher v. State*, 10 Tex. App. 469; *State v. Randles*, 7 Humph. (Tenn.) 9; *State v. Douglass*, 7 Iowa 413.

A charge that certain persons were judges of the election is a sufficient averment that they were duly made and appointed judges. *State v. Randles*, 7 Humph. (Tenn.) 9.

In an indictment for illegal voting, an averment that defendant voted at a certain election authorized by law, then and there holden, further implies that it was holden by the proper officers. *State v. Douglass*, 7 Iowa 413;

Gallagher v. State, 10 Tex. App. 469.

2. *State v. Minnick*, 15 Iowa 123; *Gallagher v. State*, 10 Tex. App. 469; *Wilson v. State*, 52 Ala. 299.

3. *Carter v. State*, 55 Ala. 181; *Gallagher v. State*, 10 Tex. App. 471; *Hoskey v. State*, 9 Tex. App. 202; *Com. v. Desmond*, 122 Mass. 12.

What Is a Sufficient Description.—An indictment for illegal voting which alleges that the defendant unlawfully deposited his ballot as a vote "at a general election," does not sufficiently describe the election or its purposes. *Carter v. State*, 55 Ala. 181.

In an allegation of illegal voting, the words "the second day of September, A. D. 1879, being then and there the day on which an election was then and there held at the precinct No. 1, of said county and state, and the said precinct being then and there the voting precinct of the said George Wells and the said Julius Hoskey," are not sufficiently descriptive of the election held. *Hoskey v. State*, 9 Tex. App. 202.

An allegation that the vote "was for city attorney and other officers then and there to be chosen at said election," sufficiently alleges the purpose of the election. *Gallagher v. State*, 10 Tex. App. 469.

An indictment for illegal voting, which alleges that "the meeting of the qualified voters of the various wards" of a city was holden on a certain day, for the annual election of municipal officers, and that the defendant, "at ward one" in said city, on that day, "at the election aforesaid," committed the offense charged, sufficiently describes the election. *Com. v. Desmond*, 122 Mass. 12.

An indictment alleging that defendant voted twice "at a certain corporation election, then and there being holden and authorized to be holden by the laws of the state," does not suffi-

(7) *Averment of Place*.—The indictment should also allege with certainty the place of voting.¹ And if there is a variance between the pleading and proof, as to the place of election, the variance will be fatal to a conviction.²

(8) *Averment of Time*.—Usually, it is apprehended, an indictment should state with precision and certainty the day on which the offense charged is claimed to have been committed.³

b. REFUSING LEGAL OR ACCEPTING ILLEGAL VOTES—Purpose of Election.—An indictment for refusing to receive legal votes should state the purposes of the election.⁴

Right to Vote.—So the right to vote of the party whose vote was refused must be alleged, and for this purpose it will be sufficient to state that he was a duly qualified elector,⁵ or “qualified voter.”⁶ And it should further be stated that defendant knew of the voter’s right.⁷

Receiving Illegal Votes.—Where the offense charged is that defendant received and accepted illegal votes, the purposes for which the election is held must be stated,⁸ but it is not necessary to state the name of the person for whom the vote was cast.⁹ It must also be charged that the illegal vote was accepted and received corruptly and with a knowledge that it was illegal.¹⁰ It is not

ciently describe the election. *Lane v. State*, 39 Ohio St. 312.

1. *State v. Fitzpatrick*, 4 R. I. 269; *Gallagher v. State*, 10 Tex. App. 471.

Sufficient Designation of Place.—An allegation that the election was “held and authorized by law within and for the corporation of the city of Weatherford” is sufficient. *Gallagher v. State*, 10 Tex. App. 471.

Indictment Containing Two Counts.—Where an indictment contained two counts, which laid the two votings alternately in order of time in Providence and North Providence, and the jury could not determine from the proof in which town the last or illegal voting took place, it was held that they could not return a verdict of guilty upon either or both of the counts. *State v. Fitzpatrick*, 4 R. I. 269.

2. *State v. Fitzpatrick*, 4 R. I. 269.

3. *State v. Day*, 74 Me. 220.

But in *State v. Patterson*, 116 Ind. 45, where an indictment returned November 3, 1886, charged defendant with illegal voting at a general election for governor on November 4, 1886, it was held that judicial notice would be taken that there was no election on November 4, 1886, but that there was an election on November 4, 1884, less than two years before the indictment, and that the imperfection in stating the

time was no ground for quashing the indictment, because it showed that it related to a past transaction, and because the averments were repugnant and time not the essence of the offense.

4. *Tipton v. State*, 27 Ind. 492; *Cantwell v. State*, 27 Ind. 505.

5. *People v. Burns*, 75 Cal. 627, wherein it was held that where the indictment alleged that the person whose vote was refused was “a duly qualified elector of the said city and county,” such allegation was sufficient, and that it was not necessary to further allege that he was registered on the precinct register.

6. *Com. v. Youlls*, 5 Kulp. (Pa.) 231.

7. *State v. Daniels*, 44 N. H. 383.

“It must be alleged that they do so corruptly, with a knowledge of all the facts and in violation of a known duty, for in that the essence of the offense consists.” *State v. Daniels*, 44 N. H. 383.

8. *U. S. v. Morrissey*, 32 Fed. Rep. 147.

9. *Kirkpatrick v. Stewart*, 19 Ark. 695.

10. *State v. Small*, 10 Me. 109; *Byrne v. State*, 12 Wis. 519. See also *Kirkpatrick v. Stewart*, 19 Ark. 695.

Thus in *Maine*, on an indictment under Act 1821, c. 115, § 8, against one of the wardens of the city of Portland, for receiving at a general elec-

necessary, in an indictment against one judge of an election, to state whether or not the other judges were willing to accept the vote illegally cast.¹

c. GIVING OR ACCEPTING BRIBES—Giving.—An indictment for bribing a voter, which charges that the person bribed is a legally qualified voter, that the election was duly and legally held, that defendant bribed such voter by giving him a stated consideration, that he was thereby influenced and voted for a certain candidate to fill a designated office, is sufficient.² So an indictment which follows the words of the statute creating and defining the offense, and which further contains averments of time, place, manner, and occasion of committing the offense, is sufficient.³

Accepting Bribes.—An indictment for accepting a bribe which states the purpose and time of the election, place of voting, acceptance and amount of bribe, and that defendant, in consideration of such amount, voted for a certain person to fill a designated office, has been held sufficient.⁴

d. INTERFERENCE WITH VOTER.—An indictment for hindering or conspiring to hinder an elector from voting must set forth specifically the acts which constitute the offense charged; it will not be sufficient to allege generally defendant's hindering or conspiring to hinder an elector from voting.⁵

tion the vote of a person whose name was not on the list of voters, it was held to be necessary to charge that the act so committed was unreasonable, corrupt, or wilfully oppressive. *State v. Small*, 10 Me. 109.

An indictment which charges in distinct terms that defendant knowingly and wilfully received the vote of one who he knew was not a resident of, or registered in, the voting precinct, sufficiently charges a violation of defendant's duty. *U. S. v. Doherty*, 25 Fed. Rep. 28.

Duplicity.—A count in an indictment charging that the inspectors of the election did knowingly receive and sanction the reception of an illegal vote is not objectionable for duplicity, for where the statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as a distinct crime when committed by several persons or at different times, they may, when committed by the same persons at the same time, be coupled in one count as constituting one offense. *Byrne v. State*, 12 Wis. 519.

Assisting Voter to Cast Illegal Vote.—An indictment of an inspector for assisting a voter to cast an illegal vote

need not allege the particular acts constituting the aid or assistance, as they are mere matters of evidence to make out the offense at the trial. *U. S. v. Doherty*, 25 Fed. Rep. 28.

1. *Com. v. Gray*, 2 Duv. (Ky.) 373.

2. *Com. v. Selby*, 87 Ky. 594.

An allegation that an election was held at East Portland Precinct, was held equivalent to an allegation that an election was held in such precinct. *U. S. v. Johnson*, 2 Sawy. (U. S.) 482.

Legality of Election.—An allegation that an election was held in a certain precinct on the day prescribed for holding such elections is sufficient; it will be presumed under the circumstances that such election was legal. *U. S. v. Johnson*, 2 Sawy. (U. S.) 482.

Attempt to Bribe.—A charge that defendant knowingly offered to give O. a bribe, the said O. being then under twenty-one years of age, was held to mean that defendant knew O. was under twenty-one years when he offered him the bribe. *U. S. v. O'Neill*, 2 Sawy. (U. S.) 481.

3. *People v. Smith* (Gen. Sess.), 6 N. Y. Crim. Rep. 470.

4. *Hensley v. Com.* (Ky. 1888), 9 S. W. Rep. 129.

5. *U. S. v. Belvin*, 46 Fed. Rep. 381; *U. S. v. Cruikshank*, 92 U. S. 542.

Joinder.—As hindering voters at an election is a misdemeanor only, it is permissible to join in the same count charges for hindering and conspiring to hinder at the same time and place.¹

e. FRAUDULENT REGISTRATION.—Where the offense charged is that of fraudulent registration, or of procuring a fraudulent registration of a voter, in violation of Rev. Stat. U. S., § 5512, the acts done by the accused, in and about his registration, which resulted in a fraudulent registration of him by the inspectors,² or

Acts of Advocacy or Support.—An indictment based on U. S. Rev. Stat., § 5520, for conspiracy to prevent by force, etc., a citizen lawfully authorized to vote, from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of Congress, need not set out the acts of advocacy and support which the conspiracy was formed to prevent. *U. S. v. Goldman*, 3 Woods (U. S.) 187.

1. *U. S. v. Belvin*, 46 Fed. Rep. 381; *U. S. v. Cruikshank*, 92 U. S. 542.

An indictment which charges generally that defendant hindered certain voters from voting, is not aided by the further allegations that the hindering was by means of challenging voters, or that defendant did "consume the time for conducting the election by putting frivolous interrogations" to certain persons named who offered to vote, or that defendant "did unlawfully create disorder by pushing, and doing and saying many other disorderly, improper, and illegal things to the persons offering to vote." These allegations give no precision to a general charge of preventing and obstructing voters, and fail to cure this fault. *U. S. v. Belvin*, 46 Fed. Rep. 381.

Sufficient Charge Illustrated.—An indictment which charges in the first count that the defendants conspired to intimidate B., a negro, in the exercise of his right to vote for a member of the federal Congress, and that in the execution of that conspiracy they beat, bruised, wounded, and maltreated him; and in the second count that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises, sufficiently describes the offense embraced within the provision of the Rev. Stat., U. S., §§ 5508, 5520. *Ex p. Yarbrough*, 110 U. S. 651.

Duplicity.—Where the plaintiff, in an action under the Act of May 31, 1870,

16 Stat. at L. 140, for damages for preventing him from voting, alleges in the same count or cause of action that defendant prevented him from voting for several different officers, and that defendant refused his vote, refused to swear him as to qualifications, etc., his pleading is bad for duplicity, upon special demurrer or motion to strike out. These different acts are distinct causes of action, under the statute, and should be alleged in separate counts or statements. *McKay v. Campbell*, 2 Abb. (U. S.) 120.

2. *U. S. v. McCabe*, 58 Fed. Rep. 557; *U. S. v. Hirschfield*, 13 Blatchf. (U. S.) 330.

An indictment alleging in the words of the statute that defendant "fraudulently registered," is insufficient. *U. S. v. McCabe*, 58 Fed. Rep. 557.

An indictment for fraudulent registration, which charges in one count that defendant, "having no lawful right to register, fraudulently and wilfully did register," and in another count that he "had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien and had not been admitted to become a citizen of the United States," is insufficient in pointing out the fraud and failing to state facts showing that defendant was not entitled to register. *U. S. v. Hirschfield*, 13 Blatchf. (U. S.) 330.

An indictment for fraudulent registration, in falsely stating defendant's place of residence, is insufficient if it does not allege that the statement was made to the inspectors of election at time of registration. *U. S. v. Jacques*, 55 Fed. Rep. 53.

Taking False Oath of Qualification.—An indictment for taking a false oath of qualification as a voter must allege that the defendant offered to vote, or was challenged, or was informed by an inspector of the qualifications of an elector; and the occasion of the administration of the oath must be spe-

the acts done by the accused with intent to procure the fraudulent registration of a voter, must be stated.¹ The indictment must also disclose the election district in which the fraud charged was committed, where the laws of the state regulating the registration of voters are different in different parts of the judicial district in which the offense was committed.²

f. BETTING ON ELECTION.—An indictment for betting on an election should state the purpose for which the election bet on was held,³ and the date of the election.⁴ The indictment must also show that the defendant would either gain or lose something of value on the result of the election.⁵

Time of Making Bet.—It will be sufficient if the indictment charge that the bet was made before the result of the election was known.⁶ And an indictment charging that the bet was made before the election, will be sustained by evidence that the bet was made after the election but before the result was known.⁷

Amount Bet.—Although it is the usual⁸ and better practice⁹ to state the amount bet, it has been held unnecessary to do so.¹⁰

cifically set forth. *Humphreys v. State*, 17 Fla. 381.

1. *U. S. v. Brown*, 58 Fed. Rep. 558.

An indictment under Rev. Stat. U. S., § 5512, which charges that defendant, in order to secure registration of one B., wrote the name of the said B. in the registration book, is not bad for failure to aver that B. was an actual person. The necessary inference from the language of the indictment is that B. was a real and not a fictitious person. *U. S. v. O'Connor*, 31 Fed. Rep. 449.

2. *U. S. v. Brown*, 58 Fed. Rep. 558; *U. S. v. McCabe*, 58 Fed. Rep. 557.

3. *Bellair v. State*, 6 Blackf. (Ind.) 104.

An indictment for betting on an election, which charges that defendant bet property of a specified value on the result of an election held "in the sixth congressional district in the state of Missouri, on the first Monday in August, A. D. 1854, between one J. and W., who were then and there running as candidates to represent the said congressional district in the state of Missouri, in the Congress of the United States of America," sufficiently charges the purpose of the election. *State v. Ragan*, 22 Mo. 459.

4. *Lewellen v. State*, 18 Tex. 538; *Sherban v. Com.*, 8 Watts (Pa.) 212.

A charge that defendant, on the 1st of August, 1844, "bet money upon the result of an election ordered and held in Fayette county, according to law, for the election of a clerk of the District Court of Fayette county in

the state of Texas," does not sufficiently specify the time of the election. *Lewellen v. State*, 18 Tex. 538.

A charge that defendant bet that R. would be elected governor of Pennsylvania, under the constitution and laws of that state, on the 9th of October in the year 1838, sufficiently alleges the time of the election. *Sherban v. Com.*, 8 Watts (Pa.) 212.

5. *Wagner v. State*, 63 Ind. 250, wherein it was held that an indictment for losing money by betting on an election, which alleged the purchase by defendant of a chattel at its alleged value, to be paid for at that price only in the event of the election of the candidate named to a particular office at a certain election, was insufficient, because in no event could defendant lose any sum whatever upon the result of the bet described in the indictment.

6. *Miller v. State*, 33 Miss. 356. See also *State v. Griggs*, 34 W. Va. 78; *State v. Snider*, 34 W. Va. 83. *Contra*, *State v. Mahan*, 2 Ala. 340.

7. *Miller v. State*, 33 Miss. 356.

8. *State v. Griggs*, 34 W. Va. 78; *State v. Snider*, 34 W. Va. 83; *Sherban v. Com.*, 8 Watts (Pa.) 212; *State v. Ragan*, 22 Mo. 459; *State v. Banfield*, 22 Mo. 461; *Miller v. State*, 33 Miss. 356.

9. *State v. Bridges*, 24 Mo. 353.

10. *State v. Bridges*, 24 Mo. 353.

Variance.—So it has been held that, where the amount bet is stated in the indictment, a variance between the

Person with Whom Bet is Made.—Although there is a decision to the contrary,¹ it is not necessary, according to the weight of authority, to state in express terms that the defendants bet with each other.² It will be sufficient if such is obviously the fair intent and meaning of the charge.³

Joinder.—It is not permissible to join in one count of an indictment against several persons the distinct and separate offenses of betting on an election and of holding stakes.⁴

g. NEGLIGENCE OR REFUSAL TO PERFORM OFFICIAL DUTY—Authority of Officers.—In an indictment for neglect of, or refusal to perform, an official duty, it has been held sufficient to allege generally that defendant was "duly and lawfully designated and qualified" as an election officer and "then and there was and acted as such;"⁵ or that the defendants "were then and there the judges of said election," without alleging the lawful appointment.⁶

Neglect of Duty.—The indictment must state the duty which devolved on defendant, and his refusal or neglect to perform it.⁷

Intent.—Whether the indictment should state the intent with which the act was committed, must depend largely on the statute under which the indictment is drawn and also on the question whether the act is one of omission or commission. It has been

pleading and proof as to such amount will not vitiate the indictment. *Com. v. McAtee*, 8 Dana (Ky.) 30.

1. *Lewellen v. State*, 18 Tex. 538, a case where two persons were jointly indicted for betting on an election. The court said: "If it was intended to charge the defendants with having made a wager together, it would seem it should have been so averred; if with having jointly made a wager with some other person, it should have been stated with whom; or if with some one to the jurors unknown, it should have been so charged."

2. *State v. Bridges*, 24 Mo. 353; *State v. Smith*, 24 Mo. 356; *State v. Griggs*, 34 W. Va. 78; *State v. Snider*, 34 W. Va. 83.

A joint indictment which alleges that G. and F. bet on an election, though it does not expressly allege that they bet with each other, will be considered to mean that they bet with each other, and therefore sufficient. *State v. Griggs*, 34 W. Va. 78.

3. *State v. Bridges*, 24 Mo. 353.

4. *State v. Bridges*, 24 Mo. 353.

5. *Hall v. People*, 90 N. Y. 498. In this case it was held unnecessary to allege specifically that defendant took the oath of office and received his certificate of appointment.

6. *State v. Randles*, 7 Humph. (Tenn.) 9, where the offense charged was a failure to return poll books certified and to deposit the same with the clerks of the Circuit and County Court, as required by statute.

7. See *U. S. v. Vigil* (N. Mex. 1893), 34 Pac. Rep. 530; *U. S. v. Dwyer*, 56 Fed. Rep. 464.

Failure to Make Returns.—An indictment for neglect or refusal to make and return a certificate of election as provided by statute need only allege the duty required of defendant and his refusal to perform it. It is not necessary to allege further that, because of his wrongdoing, the other election officers were prevented from performing their duties, and that voters were prevented from voting for that reason. *U. S. v. Vigil* (N. Mex. 1893), 34 Pac. Rep. 530.

Refusal to Answer Inquiry.—Where the offense charged consists in a violation of Rev. Stat. U. S., § 5523, consisting in a refusal to answer a lawful inquiry of the supervisors of the election in the verification of a registration list, it must be shown that inquiries were made of defendant at the place assigned by him in such list as his place of residence. *U. S. v. Davis*, 6 Fed. Rep. 682.

said that none of the acts of omission denounced by Rev. Stat. U. S., § 5515, require an averment of intent to support the indictment.¹ In one decision under this statute it has been held sufficient, in an indictment for neglect or refusal of an election officer to make returns, to allege that the act was done knowingly; and not necessary to further allege that the act was committed wilfully and maliciously.² So, in another decision, it has been held that an indictment of election officers for failure to properly guard the ballot boxes need not allege any wrongful intent.³

h. FRAUDS OF ELECTION OFFICERS.—Where election officers are indicted for frauds committed in the discharge of their official duties, the office which they held must be stated.⁴ It will not be sufficient to allege generally that they committed fraud in the discharge of such duties; there should be a specific averment of the facts constituting the fraud charged.⁵

If the indictment is for fraudulently changing or altering ballots, it must allege specifically what changes were

1. U. S. *v.* Jackson, 25 Fed. Rep. 548.

Reason for Rule.—"It is only where the legislature accompanies its prohibition of particular conduct with a declaration that the inhibited act shall be done with a specified intent, that that intent need be either specifically averred by the indictment or specifically proved on the trial. In other cases the wrongful intent inheres in the act itself, is charged by an averment of the doing of the act, and is proved by evidence showing that the act was done. It consists in a violation of the statute, and proves itself when the violation is shown. * * * It [the statute] proceeds upon the idea that the performance of every duty devolved upon the officers of an election is necessary to secure a fair election, and that any refusal, neglect, or violation of that duty knowingly is criminal, and shall be declared and punished as such by this statute. * * * There is a class of offenses denounced by this statute which require the specific intent urged by this demurrer, but they are, as any critical examination will disclose, acts of commission and not omission. Not all the acts of commission denounced require the specific intent, and not one of omission denounced requires it." U. S. *v.* Jackson, 25 Fed. Rep. 548.

2. U. S. *v.* Vigil (N. Mex. 1893), 34 Pac. Rep. 530.

3. U. S. *v.* Jackson, 25 Fed. Rep. 548, holding that under a state statute providing that the judges shall not suffer the ballot box to be out of their pres-

ence or the sight of at least two of their number until every vote is counted; and Rev. Stat. U. S., § 5515, providing that every officer of an election, at which any federal representative is voted for, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state, shall be punished; an indictment for a neglect to perform the duty required by the state statute need not allege that the omission of such duty was with an intent to affect the election.

Allegation of Wilfulness.—Gen. Laws of Texas 1892, c. 13, provides that any elector who declares that he is unable to prepare his ballot "shall, upon request, receive the assistance of two of the judges in the preparation thereof," and makes it an offense for any judge to "wilfully disregard any of the provisions of this act, or to negligently fail to enforce any of its provisions," but does not specify how or where the assistance shall be rendered. It was held that an indictment which alleged that one judge of the election, acting alone, prepared ballots for electors at a table at which election officers sat, from slips handed him by the electors, was insufficient where it failed to charge that defendant wilfully disregarded his duty or negligently failed to perform it. U. S. *v.* Dwyer, 56 Fed. Rep. 464.

4. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

5. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

made,¹ and the mode and means of the alleged change.² If the indictment is for making a false return of votes cast for certain candidates, the indictment must show the number of votes actually cast and wherein the return was false.³ And it has been held that where the falsification of a list of voters consists in adding to the list the names of persons who did not actually vote, their names should be stated.⁴

Where the offense charged is falsification of the poll book by recording votes in favor of one candidate when requested by the electors to record them in favor of another, it is not necessary to state whether such electors were or were not legal voters.⁵ If the indictment charges the suppression of ballots, the acts constituting the suppression must be specifically set forth, and the indictment must also affirmatively show that the election returns had been duly delivered to defendant.⁶

1. *Hunter v. People*, 52 Ill. App. 367.

2. *Hunter v. People*, 52 Ill. App. 367.

In an indictment under section 7061, Rev. Stat. Ohio, as amended February 17, 1881 (78 Ohio L. 30), it is not necessary to set out a copy of the poll book or tally sheet on which the offense was committed; nor is the purport thereof required. It is sufficient to describe it by the designation "poll book" or "tally sheet," and to aver that the defendant wrongfully and fraudulently changed, altered, erased, or tampered with a "name," "word," or "figure" contained in such poll book or tally sheet, as the facts may require, setting forth the nature and character of the alteration made; and that it was done with the intent to defeat, hinder, or prevent a fair expression of the will of the people at an election. *State v. Granville*, 45 Ohio St. 264.

3. *Com. v. Eckert* (Ky. 1892), 20 S. W. Rep. 253.

Duplicity.—Under a statute making it a felony for an inspector of an election to make false statements and certificates of the result of such election, knowing the same to be false, an indictment in which each count alleges that the accused did wilfully make, certify, and deliver to the officer entitled to receive it, a false statement and certificate of the votes received, is not bad for duplicity; for although each of the acts alleged is by the statute made criminal, yet when taken together they constitute but one complete act. *Boland v. People*, 25 Hun (N. Y.) 423, affirmed 90 N. Y. 678.

Conspiracy to Make False Return.—In

an indictment under the *Pennsylvania* Act of June 29, 1881 (Brightly's Purdon 761), for making a false return, a count will be sustained which charges a conspiracy to commit the act. *Com. v. Boyle*, 14 Pa. Co. Ct. Rep. 561.

An indictment charging in several counts respectively a conspiracy with certain persons for fraudulently conducting an election, conspiracy with such persons to fraudulently act in order to make a false return of the votes, conspiracy with such persons to fraudulently act as election officers in order to cheat and defraud, conspiracy to fraudulently act as election officers to make a false count of the votes cast, and conspiracy to cheat and defraud at the election, is good. *Com. v. Hunter*, 2 Pa. Dist. Rep. 707.

Allegation as to Requirement by Law to Keep List.—If an indictment charges that defendant, "being required to keep a list of the persons then and there voting, and to swear to said list as correct, did then and there add to said list," it is not necessary to state in addition that the list was one which "they were required by law to keep." *U. S. v. Bader*, 16 Fed. Rep. 117.

4. *Com. v. Miller*, 2 Pars. Eq. Cas. (Pa.) 480. Compare *Binger v. People*, 21 Ill. App. 367, where it was held that an indictment charging the defendant, as judge of an election, with having altered and defaced ballots legally voted at such election, need not contain the names of the electors whose ballots were alleged to have been altered.

5. *Com. v. Duff*, 87 Ky. 586.

6. *U. S. v. Kelsey*, 42 Fed. Rep. 882.

1. INTERFERENCE WITH ELECTION OFFICERS.—Where the offense charged is the prevention of the canvass of votes the specific act constituting the prevention must be stated.¹ And if the offense consists in the ejectment of the election officers from the polls, *scienter* is a necessary ingredient of the offense and must be expressly and particularly charged.²

2. Joinder of Defendants.—All the inspectors of an election may be joined in the same indictment.³ This, however, is unnecessary.⁴ If the officers of an election act in different capacities they cannot be joined in the indictment.⁵

Allegation that Act was Done "Knowingly and Wilfully," Necessary.—Under a state statute making it an offense for any person to wilfully suppress ballots, and a federal statute making it punishable for any officer of an election to knowingly do any act unauthorized by law, with intent to affect the election, an indictment of an election officer for suppressing ballots must charge that the act was done both *knowingly* and *wilfully*. *U. S. v. Kelsey*, 42 Fed. Rep. 882.

1. *People v. Lee*, 107 Cal. 477.

An indictment which charges that defendant unlawfully carried away a ballot box containing the ballots of a voting precinct, cast for a representative in Congress, that defendant knowingly assisted in the unlawful seizure and carrying away of the ballot box, and that he advised and procured

other persons to carry away the ballot box, charges but one offense—that of interference with the officers of an election. *Connors v. U. S.*, 158 U. S. 408.

2. *U. S. v. Taylor*, 57 Fed. Rep. 391.

3. *Byrne v. State*, 12 Wis. 519.

Primary Election Officers may be jointly indicted for false returns under the Act of 1881. *Com. v. Boyle*, 14 Pa. Co. Ct. Rep. 561.

4. See *Com. v. Gray*, 2 Duv. (Ky.) 373.

5. *Com. v. Miller*, 2 Pars. Eq. Cas. (Pa.) 480, where an indictment joining the inspectors, judge, and clerks for fraudulent acts at the election was held bad, upon demurrer, for a misjoinder of parties; *U. S. v. Davis*, 33 Fed. Rep. 621, in which it was held that the duties of judges and clerks of election in Missouri being several and not joint duties, an indictment for neglect of duty would not lie.

ELEGIT.

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II. PRACTICALLY OBSOLETE, 409.

I. DEFINITION.—At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. This continued to be the law until the passage of the statute Westm. 2, 13 Edward I., by which, in the interest of trade and commerce, the writ of *elegit* was for the first time provided for. By that statute the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plow), and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative his election was entered on the roll, and hence the writ was denominated an *elegit*, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by *elegit*.¹

II. PRACTICALLY OBSOLETE.—The writ of *elegit* appears to have been frequently used in the early days of the common law and there is to be found in the old books considerable learning upon the subject.² While it was formerly in use in several of the states of this country,³ it is at this time practically obsolete, either because it has been expressly abolished⁴ or because it has fallen into disuse through the inadaptability of the remedy to modern conditions.⁵

1. The above review is taken from the opinion of the court in the case of *Hutcheson v. Grubbs*, 80 Va. 251.

2. It would be profitless to set out here old decisions and the statements of the early writers upon this subject, no longer of any practical interest. The investigator is referred, however, to 2 Tidd's Pr., §§ 1033, 1034, 1035; Coke on Litt. 289; *Underhill v. Devereux*, 2 Saund. 68*d*, note; Bac. Abr., title Executions, 349, 352; Gilb. Exec. 58; *Bristow's Case*, Moor. 36; *Fleetwood's Case*, 8 Coke 171; 1 Roll. Abr. 888; 3 Bl. Com. 419; *Walsal v. Heath*, Cro. Eliz. 656; *Arbuckle v. Cowtan*, 3 B. & P. 327; *Palmer v. Humphrey*, Cro. Eliz. 584; *Raysing's Case*, 2 Dyer 208*b*; *Heard v. Baskerville*, Hutt. 16; *Sparrow v. Mattersock*, Cro. Car. 319; *Taylor v. Cole*, 3 T. R. 295; *Stonehouse v. Ewen*, 2 Stra. 874.

3. *Alabama*.—*Morris v. Ellis*, 3 Ala. 560; *Campbell v. Spence*, 4 Ala. 543;

Dargan v. Waring, 11 Ala. 995; *Forest v. Camp*, 16 Ala. 645.

Delaware.—*Robinson v. Milby*, 2 Houst. (Del.) 138.

North Carolina.—*Ricks v. Blount*, 4 Dev. (N. Car.) 131; *Den v. Hill*, 1 Hayw. (N. Car.) 95.

Virginia.—*McCance v. Taylor*, 10 Gratt. (Va.) 580; *Price v. Thrash*, 30 Gratt. (Va.) 515; *Borst v. Nalle*, 28 Gratt. (Va.) 423; *Hutcheson v. Grubbs*, 80 Va. 251; *Avery v. Robinsons*, 4 Munf. (Va.) 546; *Wilson v. Jackson*, 5 Leigh (Va.) 102; *Stuart v. Hamilton*, 8 Leigh (Va.) 503; *Eppes v. Randolph*, 2 Call (Va.) 125; *Leake v. Ferguson*, 2 Gratt. (Va.) 433; *Taylor v. Spindle*, 2 Gratt. (Va.) 44.

4. Va. Code 1887, § 3581; *Hutcheson v. Grubbs*, 80 Va. 255.

5. *Delaware* appears to be the only state which retains the writ of *elegit*. See Rev. Code Del. 1893, p. 831; *Robinson v. Milby*, 2 Houst. (Del.) 138.

ELEVATED RAILROADS.

See article *STREET RAILWAYS*.

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CROSS-REFERENCES.

As to embezzlement from banks, see article *BANKS AND BANKING*, vol. 3, p. 251.

I. INTRODUCTORY.—This article is confined to a treatment of the practice and procedure in prosecutions for embezzlement, as distinguished from larceny at common law, the definitions of and distinctions between which are familiar. Where the attempt has been made by statute to abolish the distinctions between embezzlement and larceny, the writer has, nevertheless, looked at the substance of the offense and treated as embezzlement such misappropriations as do not come within the common-law offense of larceny.¹

1. For a full treatment of the constituents of embezzlement and larceny respectively, and of the distinctions between the two crimes, the practitioner is referred to Am. and Eng. Encyc. of Law, titles *Embezzlement* and *Larceny*, and also to the following cases: *Warmoth v. Com.*, 81 Ky. 133; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. Berry*, 99 Mass. 428; *Com. v. King*, 9

Cush. (Mass.) 284; *State v. Kortgaard* (Minn. 1895), 64 N. W. Rep. 51; *State v. Harmon*, 106 Mo. 635; *Chaplin v. Lee*, 18 Neb. 440; *State v. Trolson*, 21 Nev. 419; *Phelps v. People*, 72 N. Y. 334; *State v. Foust*, 114 N. Car. 842; *State v. Collins*, 4 N. Dak. 433; *Griffin v. State*, 4 Tex. App. 390; *Simco v. State*, 8 Tex. App. 406; *McCann v. U. S.*, 2 Wyoming 274.

II. VENUE—1. In General.—The defendant cannot be prosecuted for embezzlement in a county where the crime was not actually or in contemplation of law perpetrated.¹ Where the entire transaction constituting the embezzlement occurred in one county only, the venue, as a matter of course, should be laid in that county.²

2. County in Which the Misappropriation Took Place.—The venue may be laid in the county in which the defendant conceived the fraudulent intent of appropriating the money to his own use, and in which he actually embezzled it.³ But where the transaction extended to different counties, the jurisdiction of the county in which the act of conversion occurred is not exclusive, as will be seen hereinafter.⁴

3. County in Which Property was Intrusted and in Which Defendant Failed to Account.—The venue may be laid in the county in which the property was intrusted to the defendant and in

1. *Hill v. Taylor*, 50 Mich. 549, wherein the court says that the constitutional guaranty on this subject is too plain to be controverted, and that Comp. Laws Mich., § 7605, which authorizes embezzlement by various public agents, or by private agents under written instructions or agreements as to the disposal of property, to be prosecuted in the county where the complainant's principal place of business may be, cannot override such guaranty. *Citing Swart v. Kimball*, 43 Mich. 443, in which case, however, the prosecution was for a crime other than embezzlement.

Embezzlement of Moneys in State Treasury.—In a prosecution under Comp. Laws Mich., § 5771, denouncing embezzlement by a state officer of moneys in the treasury, money is properly regarded as in the treasury whenever and wherever it is in the official custody, or under the official control and direction of the state treasurer for the use of the state, and the venue may be laid in the county in which the capital of the state is located, notwithstanding the fact that the defendant was not personally present where the money happened to be at the time he abstracted or converted it to his own use. *People v. McKinney*, 10 Mich. 54.

2. *State v. Bailey*, 50 Ohio St. 636.

3. *Brown v. State*, 23 Tex. App. 214; *State v. Bailey*, 50 Ohio St. 636, wherein *Bradbury, C. J.*, uses the following language: "No doubt the venue may be laid in the county where the money was actually converted to the defend-

ant's use. This is generally, if not universally, maintained by the text-writers as well as by the courts, both in England and in the United States." *Citing* 6 Am. and Eng. Encyc. of Law 498. And the latter case is an authority for laying the venue in the county in which the defendant fraudulently squandered the money, notwithstanding a subsequent demand made upon him, and his refusal or failure to account in another county. In *Reg. v. Murdock*, 8 Eng. L. & Eq. 577, the defendant was a traveling salesman, and had received money for his master in the county of D. There was no evidence of what became of him until two months afterwards, when he was met by his master in the county of M, and told his master that he had spent the money. It was held that there was sufficient evidence of an embezzlement in the county of M to go to the jury. See, however, *Taylor's Case*, 2 Leach C. C. 974, wherein Lord Alvanley says that the mere spending of the money is not sufficient in itself to constitute embezzlement, because the servant is not bound to pay over the identical money received by him, but may substitute other money to the same amount.

4. *Per Bradbury, C. J.*, in *State v. Bailey*, 50 Ohio St. 636, *citing* *Cohen v. State*, 20 Tex. App. 224; *State v. Small*, 26 Kan. 209; *Campbell v. State*, 35 Ohio St. 70; *Taylor's Case*, 2 Leach C. C. 974; *Reg. v. Murdock*, 8 Eng. L. & Eq. 577, and *Reg. v. Rogers*, 3 Q. B. Div. 28.

which he refused to return the property, notwithstanding the fact that, while acting in his fiduciary capacity, he fraudulently removed the property to another county, and there converted it.¹

4. **County in Which Defendant's Duties were to be Performed.**—It sometimes happens that the prosecution may be had in the county in which the defendant's duties respecting the property were to be performed, regardless of where the misappropriation occurred.²

5. **Statutory Provisions.**—In some states statutes have been enacted respecting the venue of prosecutions for embezzlement, which, of course, should be consulted in determining whether the court has jurisdiction.³

1. *State v. Small*, 26 Kan. 209; *Campbell v. State*, 35 Ohio St. 70, in which case the defendant carried the property into another county and there squandered it, afterwards, on demand, refusing to account for it in the county in which he received it into his possession, and it was held that the venue was properly laid in the latter county. *Reg. v. Murdock*, 2 Den. C. C. 298, cited in *State v. Bailey*, 50 Ohio St. 636; *Rex v. Taylor*, 3 B. & P. 596, 2 Leach C. C. 974, R. & R. C. C. 63, citing 1 East Pl. Cr. Add. XXIV. See also *Brown v. State*, 23 Tex. App. 214, in which case defendant, as agent, received certain money in R county and carried it into B county, in which county, under the terms of his contract with his principal, it was his duty to account for such money, and there denied that he had collected any money for his principal, and refused to settle with him. It was held that the venue was properly laid in B county. But see *People v. Murphy*, 51 Cal. 376, holding that the venue should not be laid in the county where the defendant received the property unless its receipt was accompanied with the intent, at the time, upon his part, to secrete or convert the property to his own use, but that it should be charged that the embezzlement was committed in the county in which the defendant fraudulently converted or secreted the property.

Conversion of Proceeds Arising from Sale of Property.—*Georgia Statute.*—In *Fox v. Davis*, 55 Ga. 298, which was a suit for malicious prosecution, the plaintiff had been prosecuted under Code Georgia, § 4422, providing that if any bailee with whom any property may be intrusted or deposited shall fraudulently convert the same, etc.; "or, if after a sale of any of the said articles,

with the consent of the owner or bailor, such person shall fraudulently and without the consent" convert the proceeds thereof to his own use, etc. It was held that the court was without jurisdiction, unless the goods were intrusted to the defendant in the county in which he converted the proceeds arising from their sale, and that the conversion of the proceeds received by him from without the state did not sustain an indictment.

2. *State v. Whiteman*, 9 Wash. 402, in which the defendant, as the assignee of a partnership, was intrusted with its moneys and funds. It appeared that all of the transactions by which the money came into the possession of the defendant took place in the county of P, and that all of his duties growing out of the trust should have been performed in that county. Although it did not appear affirmatively that at the time he actually converted the money to his own use, and disposed of it for his own benefit, he was in the county of P, it was held that the venue was properly laid in that county, Hoyt, J., saying: "It would be a difficult matter in almost all cases for the state to show the exact location of the defendant at the time he appropriated the money to his own use, and when it is made to appear, as in this case, that his duty in reference to the money was confined to the county in which the prosecution is had, it is enough to at least *prima facie* establish the fact that the conversion was in the same county."

3. **California.**—In *People v. Garcia*, 25 Cal. 531, it was held that under Wood's Dig. Cal. 277, §§ 87 to 92, the venue might be laid in any county in which the defendant took the property. See also *Ex p. Hedley*, 31 Cal. 108, wherein the defendant, while acting in the state of Nevada as agent of an ex-

III. INDICTMENT OR INFORMATION—1. Choice between Indictment and Information.—As in other criminal prosecutions, where the offense is a felony, the defendant must be presented by an indictment, but in the United States courts, where the offense is not infamous, the prosecution may be based on an information.¹

press company, drew checks as agent on his employers at San Francisco, and, by means thereof, obtained money which he had his broker apply to the purchase of mining stock, etc. Said the court: "The offense, though commenced without this state, was consummated within it, and the offender, having been found in the state and arrested therein, is clearly amenable to its criminal justice."

Oregon—Money Intrusted without the State.—In *State v. Barnett*, 15 Oregon 77, it appeared that the defendant, having been intrusted with money without the state, feloniously denied the possession of it, and asserted that it had been stolen from him. He had carried it into U county, Oregon, and sent it to a bank in M county, directing the bank to send him a draft in care of a bank in U county. He never was in M county with the money in his possession, but cashed the draft in U county and absconded. It was held that under Cr. Code Oreg., § 16, providing that "when property feloniously taken * * * without the state, by * * * embezzlement, is brought within it, the action may be commenced and tried in any county therein into which such property may be brought," the defendant was properly indicted in M county.

Tennessee.—Under Act Tennessee, March 10, 1860, c. 131, § 3, denouncing failure of tax collectors who wilfully fail and refuse to pay into the treasury of the state moneys which they have collected, and providing that it shall be the duty of the attorney-general of the district in which such defaulting revenue collector may reside to prosecute him for such offense, the venue should be laid in the county where the tax collector resides and has his office, rather than in that in which the treasurer is required by law to keep his office. *Gibbs v. State*, 3 Heisk. (Tenn.) 72.

Texas.—Code Cr. Pro. Tex., art. 219, provides that the venue may be laid in any county in which the defendant may have taken or seised the property, and

through or into which he may have undertaken to transport it. *Cohen v. State*, 20 Tex. App. 224; *Cole v. State*, 16 Tex. App. 461; *Reed v. State*, 16 Tex. App. 586; *Brown v. State*, 23 Tex. App. 214, in which case it was held that "money" is within the term "property." Under this statute a prosecution for embezzlement of the proceeds, arising from the sale of property intrusted to the defendant for sale, cannot be had in a county in which the defendant received the property, where the goods are sold and the money is received and embezzled in another county. *Per White, J.*, in *Cole v. State*, 16 Tex. App. 461.

Delivery of Property.—In *Cohen v. State*, 20 Tex. App. 224, the defendant was a traveling salesman, and his employer shipped samples for the defendant from G to L, giving the defendant at G the baggage check for the samples. It was held that there was such a delivery of the property to the defendant at G as to authorize the venue to be laid in G, notwithstanding that the conversion took place in another county.

Averments as to Venue.—Upon the question of the sufficiency of an indictment as regards laying the venue, see *infra*, III. 11. *Averments as to Venue.*

1. *U. S. v. DeWalt*, 128 U. S. 393, holding that the offense denounced by Rev. Stat. U. S., § 5209, viz., embezzlement by officers of national banking associations, for which the punishment is imprisonment for not less than five years, nor more than ten years, is an infamous crime, and that a conviction cannot be had upon an information. *Following Mackin v. U. S.*, 117 U. S. 348; *U. S. v. Reilley*, 20 Fed. Rep. 46, holding that embezzlement by a postmaster in violation of the United States statute is not an infamous offense, and may be tried upon an information filed by leave of court. See also *State v. Harmon*, 106 Mo. 635, holding that as the offense denounced by the statute is a felony, there must be an indictment informing the defendant of the nature of the

2. Averment of Statutory Constituents—*a.* IN GENERAL.—The offense being statutory, the sufficiency of the indictment is to be tested, not by the rules of the common law, but by the requirements of the particular statute upon which it is bottomed, and the practitioner is particularly cautioned as to the danger of following forms and precedents based upon statutes other than his own.¹ It is necessary to set forth all the constituent facts and circumstances necessary to bring the accused precisely within the statutory provisions² with certainty and distinctness,³ and in such a manner as to apprise the defendant of the precise nature of the charge made against him,⁴ and to enable him to meet the facts expected to be proved.⁵

No Technical Words are necessary, as in charging common-law offenses,⁶ and it is sufficient to describe the offense in ordinary and concise language,⁷ without charging matters of

charge against him, and that he cannot be convicted on an indictment for larceny. See further, *McCann v. U. S.*, 2 Wyoming 274.

1. *People v. Johnson*, 71 Cal. 384; *State v. Roubles*, 43 La. Ann. 200; *State v. Fricker*, 45 La. Ann. 646; *State v. Trolson*, 21 Nev. 419; *People v. Hill*, 3 Utah 334; *State v. Noland*, 111 Mo. 473, wherein the court says: "It is useless to go to the English cases for precedents. The purpose of the statute is clear."

2. *State v. Govan*, 48 Ark. 76; *State v. Hunnicut*, 34 Ark. 562; *State v. Farrington*, 59 Minn. 147, wherein Mitchell, J., says that the effect of the statute is merely to do away with the necessity of a trespass, and that it does not change the rules of pleading; *Hamuel v. State*, 5 Mo. 260; *State v. Harmon*, 106 Mo. 635; *State v. Gabriel*, 88 Mo. 631; *State v. Messenger*, 58 N. H. 348; *People v. Allen*, 5 Den. (N. Y.) 76, cited in *State v. Gabriel*, 88 Mo. 631; *Gaddy v. State*, 8 Tex. App. 127; *Evans v. U. S.*, 153 U. S. 584; *U. S. v. Baugh*, 4 Hughes (U. S.) 501. See also *Reeves v. State*, 95 Ala. 31, wherein Thorington, J., says that the indictment should follow the form prescribed by law; *Johnson v. People*, 113 Ill. 99; *State v. Adamson*, 114 Ind. 216; *State v. Eames*, 39 La. Ann. 986; *State v. Stimson*, 24 N. J. L. 9; *State v. Heaton*, 81 N. Car. 542, wherein Ashe, J., says that "the indictment must state all the circumstances which constitute the definition of the offense in the statute, so as to bring the defendant precisely within it," citing *State v. McKenzie*, 42 Me. 392, and

Com. v. Hampton, 3 Gratt. (Va.) 562; *Com. v. Ketner*, 92 Pa. St. 372, holding that the indictment must rest upon some statute; *Griffin v. State*, 4 Tex. App. 390; *Taylor v. State*, 29 Tex. App. 466; *U. S. v. Mills*, 7 Pet. (U. S.) 138; *U. S. v. Britton*, 107 U. S. 655.

3. *State v. Palmer*, 32 La. Ann. 565; *U. S. v. Cook*, 17 Wall. (U. S.) 168; *Noble v. State*, 59 Ala. 73, wherein it is said that greater certainty is required than in the pleadings in civil cases.

4. *State v. Griffith*, 45 Kan. 142; *Com. v. Simpson*, 9 Met. (Mass.) 138; *State v. Stimson*, 24 N. J. L. 9; *Taylor v. State*, 29 Tex. App. 466, wherein Davidson, J., says: "An indictment must charge the particular offense for which the conviction is sought, and with such certainty as will, if it should become necessary to do so, enable the party indicted to plead a conviction or acquittal thereunder in bar of a subsequent prosecution for that offense."

5. *State v. Sweet*, 2 Oregon 127. See also *infra*, IV. *Pleading and Proof*.

6. *U. S. v. Sander*, 6 McLean (U. S.) 598; *U. S. v. Lancaster*, 2 McLean (U. S.) 431; *U. S. v. Mills*, 7 Pet. (U. S.) 142.

7. *State v. Trolson*, 21 Nev. 419; *Leonard v. State*, 7 Tex. App. 417. See also *State v. Nicholson*, 67 Md. 1, wherein it is said that certainty to a certain extent in general is all that is required.

Surplusage.—Under an indictment against a state treasurer, the general designation of the offense in the commencement of the indictment as "embezzlement of public money exceeding in amount the sum of \$100,000," is not

evidence,¹ or setting forth ingredients not contained in the statute.²

b. CHARGING THE OFFENSE IN THE LANGUAGE OF THE STATUTE.—As in prosecutions for other statutory offenses, the overwhelming weight of authority is that it is sufficient to charge the crime in the language of the statute;³ but this rule is to be limited to cases where the words of the statute themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense.⁴

Words of Equivalent Import.—But, although it is usually safe to charge the offense in the language of the statute, it is not absolutely necessary to do so, and it is sufficient if the statute is

objectionable because there is no such offense as embezzlement of public money, the word "public" being surplusage. *State v. Munch*, 22 Minn. 67.

1. *State v. Broughton*, 71 Miss. 90.
2. *State v. Comings*, 54 Minn. 359, wherein it was held unnecessary to aver a demand of the property in addition to the fact of the actual and wrongful conversion, *citing State v. New*, 22 Minn. 76.

3. *State v. Turner*, 10 Wash. 94, *citing* 6 Am. & Eng. Encyc. Law 496; *U. S. v. Mills*, 7 Pet. (U. S.) 138; *U. S. v. Britton*, 107 U. S. 655, *citing U. S. v. Cook*, 17 Wall. (U. S.) 168; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Carll*, 105 U. S. 611, and *U. S. v. Pond*, 2 Curt. (U. S.) 265; *U. S. v. Voorhees*, 9 Fed. Rep. 143; *U. S. v. Sander*, 6 McLean (U. S.) 598; *U. S. v. Patterson*, 6 McLean (U. S.) 466; *Lang v. State*, 97 Ala. 41; *Hoyt v. State*, 50 Ga. 313; *Bullock v. State*, 10 Ga. 47; *People v. Tomlinson*, 66 Cal. 344; *Thomas v. State*, 33 Fla. 464, *following People v. Tomlinson*, 66 Cal. 344; *Ker v. People*, 110 Ill. 649; *Ritter v. State*, 111 Ind. 324, wherein it is said that as a general rule it is safe to adopt and follow the terms and language of the statute; *State v. Fricker*, 45 La. Ann. 646; *State v. Walton*, 62 Me. 106, in which case Barrows, J., says that "it is not for the court to require either allegation or proof of that which the legislature have omitted in their definition of the crime, nor to carry that which is descriptive of one class of offenses into either of the others as an essential requisite;" *State v. Adams*, 108 Mo. 208, wherein the court says that the uniform rule of the court has been that an indictment for an offense created by the statute will be sufficient if the lan-

guage of the statute is substantially followed, *citing State v. Mohr*, 68 Mo. 303, *State v. Coulter*, 46 Mo. 565, and *State v. Johnson*, 93 Mo. 319; *State v. Stimson*, 24 N. J. L. 9; *People v. McHale* (Supreme Ct.), 39 N. Y. St. Rep. 758; *State v. Sweet*, 2 Oregon 127; *State v. Reinhart*, 26 Oregon 466; *State v. Newton*, 26 Ohio St. 265; *Hodges v. State*, 22 Tex. App. 415; *Brown v. State*, 23 Tex. App. 214; *Crump v. State*, 23 Tex. App. 615; *People v. Hill*, 3 Utah 334. See also *State v. Noel*, 5 Blackf. (Ind.) 548, wherein the objection was that the indictment did not charge at what time a justice of the peace received certain money with the embezzlement of which he was charged; *State v. Noland*, 111 Mo. 473, wherein the question was whether or not the intent was properly charged, *citing Ker v. People*, 110 Ill. 629, *People v. Tomlinson*, 66 Cal. 344, *Golden v. State*, 22 Tex. App. 1, and *Com. v. Bennett*, 118 Mass. 443; *U. S. v. Lancaster*, 2 McLean (U. S.) 431, wherein the indictment was based on Act U. S. March 3, 1825, § 21, denouncing the embezzlement of mail matter.

4. *Evans v. U. S.*, 153 U. S. 584; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Cook*, 17 Wall. (U. S.) 168; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Hess*, 124 U. S. 483; *Pettibone v. U. S.*, 148 U. S. 197; *In re Greene*, 52 Fed. Rep. 104, and *U. S. v. Britton*, 107 U. S. 655. See further *State v. Stimson*, 24 N. J. L. 9, wherein, although the court recognizes that ordinarily it is sufficient to charge the offense in the language of the statute, it is said that in all cases the offense must be set forth with clearness, and with all necessary certainty to apprise the party

substantially followed, or if words of equivalent import are used.¹

3. Averments Contained in Indictments for Larceny.—Although the statute provides that certain acts of conversion, etc., shall constitute larceny, an indictment for larceny is not sufficient,² but the indictment should contain all the material averments which are essential in an indictment for larceny, such as allegations concerning the property, ownership, intent, etc.,³ and may conclude with the averment “and so did steal, take, and carry away,” etc.⁴ Such conclusion, however, is not necessary,⁵ especially where the statute does not declare that the acts enumerated shall constitute larceny.⁶ But it does not vitiate the indictment, nor render it duplicitous as charging both embezzlement and larceny.⁷

accused of the offense with which he stands charged.

1. *People v. Potter*, 35 Cal. 110; *State v. Eames*, 39 La. Ann. 986; *Johnson v. People*, 113 Ill. 99, wherein Mulkley, J., says that the pleader must either charge the offense in the language of the act or specifically set forth the facts constituting the same; *State v. Heaton*, 81 N. Car. 542.

2. *Jones' Case*, 2 East P. C. 576; *State v. New*, 22 Minn. 76; *State v. Farrington*, 59 Minn. 147; *Com. v. Simpson*, 9 Met. (Mass.) 138; *Com. v. Doherty*, 127 Mass. 20, *citing* *Com. v. King*, 9 Cush. (Mass.) 284, *Com. v. O'Malley*, 97 Mass. 584, and *Com. v. Berry*, 99 Mass. 428. See also *People v. Dumar*, 106 N. Y. 502, wherein it was held that although the statute provided that larceny should consist of certain acts formerly and generally known as larceny, embezzlement, and false pretenses, respectively, the indictment must accurately and clearly charge all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense.

3. *Rex v. M'Gregor*, 3 B. & P. 106, 2 East P. C. 576, 2 Leach C. C. 932; *State v. Tracey*, 73 Md. 447; *State v. Collins*, 4 N. Dak. 433, wherein Bartholomew, C. J., says: “Embezzlement being a cognate offense with larceny, it has ever been held that the same rules with reference to the property embezzled, and the ownership thereof, and the fraudulent intent to convert the property, apply in cases of embezzlement that apply in cases of larceny.” But, as said by Fenner, J., in *State v. Fricker*, 45 La. Ann. 646, the adjudications requiring indictments to

contain the material averments necessary in larceny are based upon statutes which, after defining the acts constituting embezzlement, declare that the person guilty of such acts shall be deemed to have feloniously stolen, etc.

4. *Rex v. Johnson*, 3 M. & S. 539, wherein Le Blanc, J., says that this form has been pursued ever since the enactment of the statute; *Kibs v. People*, 81 Ill. 599; *State v. Pierce*, 77 Iowa 245; *State v. Walton*, 62 Me. 106; *State v. Butler*, 26 Minn. 90, *citing* *State v. New*, 22 Minn. 76; *State v. Gilmore*, 110 Mo. 1; *State v. Isensee*, 12 Wash. 254.

5. *State v. Reinhart*, 26 Oregon 466; *State v. Sweet*, 2 Oregon 127; *State v. Adams*, 108 Mo. 208, wherein the court says that such concluding words “merely state conclusions, which are not justified by the facts stated in the body of the indictment,” *citing* *Hamuel v. State*, 5 Mo. 261, and *Com. v. Simpson*, 9 Met. (Mass.) 141.

6. *State v. Lanier*, 89 N. Car. 517, in which case the indictment was framed under a statute which made the offense a felony and punished it as larceny without declaring that the offense should constitute larceny. An allegation in the indictment, “and so the jurors, etc., do say,” that the defendant “feloniously did steal, take, and carry away,” etc., was considered mere surplusage which might be stricken out of the instrument.

7. *State v. Adams*, 108 Mo. 208; *State v. Gilmore*, 110 Mo. 1; *State v. Isensee*, 12 Wash. 254, wherein Dunbar, J., says: “Whether it be called larceny or embezzlement can be of little aid to him in preparing his defense to the acts charged.” See also *State v. Fain*, 106 N. Car. 760.

4. The Fiduciary Relation.—It is necessary to charge distinctly the fiduciary relation existing between the defendant and the owner of the property, as that the defendant was an agent, servant, or clerk, or that the property embezzled was held by him pursuant to a trust or bailment.¹

Facts Showing the Fiduciary Relation.—There need be no direct averment in express words that the defendant was a bailee, trustee, or agent, where facts are set forth showing that he was such.²

Particulars Concerning Defendant's Fiduciary Capacity.—It is not sufficient to charge that the defendant did then and there feloniously and fraudulently embezzle certain property, naming the owner,³ but the fact that the defendant was an agent, or that he was employed by another, should be set out in ordinary and concise language,⁴

Erroneous Description as Simple Larceny.—In *Com. v. Pratt*, 137 Mass. 98, the indictment was held defective because it described the offense as having been committed in violation of Gen. Stat. Mass., c. 161, § 39, denouncing embezzlement by an officer or employee of an incorporated bank, and concluded with the allegation that the defendant had committed the crime of simple larceny, whereas the statute provided that the defendant should be deemed guilty of larceny in said bank and be punished by imprisonment not exceeding ten years, etc.; the mistake having been made of confusing the crime denounced by section 39 with that denounced in section 38, which was aimed against embezzlement by officers, agents, etc., of incorporated companies or private persons, and which declared that a person guilty thereunder should be deemed to have committed simple larceny, the crimes of simple larceny and larceny in a bank, and the penalty therefor, being altogether different.

1. *Ex p. Hedley*, 31 Cal. 108; *People v. Smith*, 23 Cal. 280; *Kibs v. People*, 81 Ill. 599; *State v. Roubles*, 43 La. Ann. 200; *Com. v. Wyman*, 8 Met. (Mass.) 247; *People v. Tryon*, 4 Mich. 665; *State v. Farrington*, 59 Minn. 147; *State v. Munch*, 22 Minn. 67; *Hamuel v. State*, 5 Mo. 260; *State v. Harmon*, 106 Mo. 635; *State v. Hall*, 126 Mo. 585; *State v. Noland*, 111 Mo. 473; *State v. Messenger*, 58 N. H. 348; *People v. Stein*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 202, *citing* *People v. Allen*, 5 Den. (N. Y.) 76; *State v. Longworth*, 41 Tex. 162; *Calkins v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 1081; *State v. Turner*, 10

Wash. 94; *McCann v. U. S.*, 2 Wyoming 274, wherein Peck, J., declared that after careful search he had been unable to find any authority for a different rule.

Statute Dispensing with Specification of Particulars.—The rule requiring a specific averment of the defendant's fiduciary character, instead of being changed, is expressly recognized by Cr. Code Ill., § 82 (Rev. Laws Ill. 1874, p. 364), providing that it shall be sufficient to allege generally an embezzlement, fraudulent conversion, or taking with such intent, of funds of such person, bank, incorporated company, etc., to a certain value or amount, without specifying any particulars of such embezzlement. *Kibs v. People*, 81 Ill. 599.

Constitutionality of Statute.—Upon the question of the constitutionality of a statute dispensing with the necessity of setting forth the fiduciary relation and its breach, reference is made to *McCann v. U. S.*, 2 Wyoming 274, wherein Peck, J., expresses the opinion that such a statute would not be upheld. This, however, is *obiter*.

2. *State v. Dodson*, 72 Mo. 283, *following* *State v. Meyers*, 68 Mo. 266; *State v. Washington*, 41 La. Ann. 778; *State v. Eames*, 39 La. Ann. 986, holding that an indictment charging that the funds were intrusted to the defendant "as treasurer," sufficiently averred that the defendant was treasurer, etc.; *Heller v. People*, 2 Colo. App. 459, *citing* with approval, *People v. Neyce*, 86 Cal. 393.

3. *McCann v. U. S.*, 2 Wyoming 274.

4. *State v. Trolson*, 21 Nev. 419; *State v. Combs*, 47 Kan. 136; *Lycan v. People*, 107 Ill. 423.

and it must be charged by whom the agency was created.¹

Nature and Scope of Employment.—It is sufficient to describe the defendant as a clerk, agent, or servant, the terms used in the statute, the prosecutor selecting the word that is most appropriate,² with-

Surplusage.—The word *accommodatum*, in an information alleging that the defendant had been intrusted with the possession of certain property as bailee *accommodatum*, has no common acceptance, and is mere surplusage which does not tend to the prejudice of the defendant. *People v. Flores*, 64 Cal. 426.

1. *State v. Stimson*, 24 N. J. L. 9. But it is sufficient to charge that the defendant, being then and there the clerk and agent of named persons, as such agent and clerk was then and there intrusted, etc. *Wise v. State*, 41 Tex. 139. See also *State v. Grisham*, 90 Mo. 163, wherein it was held that an indictment drawn under Rev. Stat. Mo., § 1322, denouncing the embezzlement of any property or valuable security, etc., by any clerk or other bailee, should allege by whom a chattel mortgage, with the embezzlement of which the defendant is charged, was delivered to him, and that it is not sufficient to aver, after describing the chattel mortgage, and stating by whom and to whom it was executed, that it was then and there delivered to the defendant as bailee.

Agent of Partnership.—In *State v. Mohr*, 68 Mo. 303, it was held that an indictment charging the defendant as agent of a partnership need only state the style and name of the partnership without giving the names of the individual partners, the decision being based, in part at least, upon *Wagn. Stat. Mo.*, 1090, § 27, declaring that no indictment shall be deemed invalid for any defects or imperfections which do not tend to the prejudice of the substantial rights of the defendant upon the merits. See also *Rex v. Leach*, 3 Stark. 70, 14 E. C. L. 165, holding that a servant in the employment of a partnership is the servant of each partner, and that if he embezzle the private money of one, he may be charged under 39 Geo. III., c. 85 as the servant of the individual partner.

2. *State v. Roubles*, 43 La. Ann. 200; *State v. Fain*, 106 N. Car. 760, wherein it was considered sufficient to charge that the defendant was employed as an agent, and as such was intrusted to re-

ceive, etc.; *People v. Treadwell*, 69 Cal. 226, wherein it was said that although the words agent and servant are not wholly synonymous, both relate to voluntary action under employment, and each embraces the idea of service, and that where the defendant is described as the agent and servant of another, it may be proved that he was an agent. See also *Lycan v. People*, 107 Ill. 423.

Agent for Hire.—When the statute denounces embezzlement by an agent for hire, it must be distinctly charged that the defendant was an agent for hire. *Terry v. State*, 1 Wash. 277.

Description of Clerk as Agent.—The word agent is not a sufficient description where the statute is directed against embezzlement by servants, bailees, and clerks. *Hamuel v. State*, 5 Mo. 260. See also *People v. Allen*, 5 Den. (N. Y.) 76, wherein an indictment was held bad which averred that the defendant, as the agent of a named person, received, etc., although this allegation was followed by a charge that the defendant, having received certain money which came to his possession by virtue of his employment as such servant, and while he was such servant, did feloniously embezzle, etc.

The Relation of Attorney and Client.—In *People v. Converse*, 74 Mich. 478, it was held that the defendant might be convicted upon evidence showing that the relation of attorney and client existed, although the indictment charged merely that the money had come into his possession by virtue of his employment as an agent. But in *People v. Tryon*, 4 Mich. 665, an indictment describing the defendant as an attorney at law, and averring that the defendant collected and received money belonging to a named person, which sum the defendant so collected and received in the capacity of an attorney at law, for, and in behalf of, and in the name of, said named person who was described as the owner of the money, was considered vicious because it did not distinctly aver that the relation of attorney and client existed between the defendant and the person described as the owner of the money.

out setting out in detail the duties of the defendant, or the purposes for which he was employed.¹

Character of the Bailment.—It is believed that, according to the weight of authority, the indictment need not set forth the purposes for which the property was intrusted to the defendant, nor, where he was a bailee, state the purposes of the bailment.²

1. *Wise v. State*, 41 Tex. 139, wherein it was considered sufficient to allege simply that the defendant was the agent of named persons, and, as such agent and clerk, was then and there intrusted, etc.; *State v. Adams*, 108 Mo. 208, wherein an averment that the defendant was the agent and collector of a certain private person, and that by virtue of his employment as agent and collector he received and took into his possession a certain described piano, was considered sufficient to meet proof that the defendant acted as agent for the sale of pianos, under a contract by which he agreed to take the instruments on consignment and sell them, and promptly remit the proceeds, whether in notes or money; *State v. Meyers*, 68 Mo. 266, holding that the contract between the defendant and his principal need not be set out; *State v. Wilson*, 101 N. Car. 730, wherein the indictment was framed under Code N. Car., § 1014, and it was held necessary to set out any breach of trust or abused confidence, "other than such as results from the relation of master and servant;" *Fleener v. State*, 58 Ark. 98, wherein an allegation that the defendant was "the agent of the Pacific Express Company at Wheatley, Ark.," was considered a sufficient description of the agency.

2. *State v. Turner*, 10 Wash. 94, *distinguishing* *Com. v. Smart*, 6 Gray (Mass.) 15; *State v. Whiteman*, 9 Wash. 402, holding that it was sufficient to allege that the defendant was assignee of named persons, and as such assignee was intrusted with moneys and funds, etc.; *People v. Hill*, 3 Utah 334, wherein the court says that it has frequently been held sufficient to charge that the defendant was the agent of the person whose property was embezzled, and that he received it as agent, without setting out in detail the nature and purpose of the agency, and that it is not perceived why a different rule should apply to a bailee than to an agent, one being no less a generic term than the other, and ex-

plains that in *Com. v. Smart*, 6 Gray (Mass.) 15, which was relied upon by the defendant, the indictment was bad because it undertook to set out the particular terms under which the property was intrusted to the defendant, and omitted a whole clause which was necessary to determine the relation which the defendant bore to the owner of the property; *Com. v. Butterick*, 100 Mass. 1, wherein it was considered sufficient to charge that bonds were delivered to the defendant in trust and confidence to be kept by him until called for; *Com. v. Concanon*, 5 Allen (Mass.) 502, in which case the indictment charged that a deed was delivered to the defendant to be delivered by him to the person to whom it was executed, and that the defendant took it and received it for the purpose of so carrying and delivering it; *Territory v. Maxwell*, 2 N. Mex. 250, holding that the indictment need not charge the object for which money was received by the defendant otherwise than by an averment that it was received in the name and for the account of a named person.

Public Officers.—An indictment alleging that the defendant was a duly qualified and active deputy county assessor, and that the money charged to have been embezzled he had received as such deputy for the use and benefit of said county, is not open to objections that it fails to state in what manner or for what purpose the defendant received the money, or how or in what manner the same was for the use and benefit of the county. *People v. Cobler*, 108 Cal. 538.

In *State v. Eames*, 39 La. Ann. 986, it was determined that, although the statute (Rev. Stat. La., § 903), provided that any officer of the state who should embezzle money "which he is authorized to collect, or which may be intrusted to his safe-keeping or disbursement, or for any other purpose," etc., an averment simply that the money was intrusted to the defendant "as treasurer of the public school

But the decisions are in conflict upon this question, and it has been maintained that such averments are necessary,¹ especially when the statute enumerates certain particular purposes for

funds," without an allegation as to the purpose for which the money was intrusted to him, was sufficient, the court saying: "It is not * * * a mere inference from the words used in the indictment, but an integral part of their essential meaning, that school funds intrusted to defendant 'as treasurer' were so intrusted for 'safe-keeping or disbursement,' within the purview of the statute."

Direct and Explicit Averment.—In *State v. Munch*, 22 Minn. 67, an indictment charging that the defendant, being then and there a person employed in the public service of the state as treasurer of the said state, and intrusted as such treasurer, etc., while it contained no direct and explicit averment that he was state treasurer, was considered sufficient, as it was impossible not to understand from the indictment that such was the fact.

Officer's Election or Appointment.—It is not necessary to set forth the various steps by which the defendant acquired his office or authority. *State v. Brooks*, 42 Tex. 62, wherein the defendant was, as deputy sheriff, collector of taxes; *State v. Nicholson*, 67 Md. 1, holding that it was sufficient to charge that the defendant was collector of state and county taxes, etc., and that as such he did collect the same, etc., without charging that the defendant had been duly appointed collector, etc., citing *Rex v. Hollond*, 5 T. R. 607, a case in which the defendant was tried for malfeasance in office; *State v. Goss*, 69 Me. 22, wherein it was held that an indictment against a collector of taxes need not charge how the defendant came into the office, and that he was duly qualified to act as collector by having taken the oath and given the bond required by law; *Steiner v. State*, 33 Tex. Crim. Rep. 291, holding that an indictment against the secretary of a city and superintendent of the city water works need not set out the facts creating the defendant secretary and superintendent. But see *State v. Flint*, 62 Mo. 393, holding that an indictment against a sheriff and county collector, stating merely that the defendant was the agent of the state

and county, was defective. The indictment should have charged when and how he was appointed, and the authority for his appointment.

Aiding Embezzlement of Public Money.—Where the statute denounces as embezzlement the aiding or participating in the act of conversion of public money by the person intrusted therewith, an indictment for aiding or participating, etc., need not charge that the defendant was a public officer or person intrusted with the money. *Brown v. State*, 18 Ohio St. 497.

1. *People v. Cohen*, 8 Cal. 42; *People v. Peterson*, 9 Cal. 313; *People v. Poggi*, 19 Cal. 600; *Carter v. State*, 53 Ga. 326; *State v. Griffith*, 45 Kan. 142, wherein Johnston, J., says: "The mere allegation that he was a bailee is too general and indefinite, and does not fairly inform the defendant of the nature and cause of the accusation made against him. The information should state who placed the property in the hands of the defendant, the purpose or use to which it was to be applied, and the time within which this purpose was to be carried out, or the time within which the property was to be returned. The details need not be set out with unnecessary particularity, but the defendant should, so far as is reasonably practicable, be informed by the information of the precise nature of the charge made against him." And the learned judge says that, although Mr. Bishop doubts the necessity for alleging the character of the bailment (*Bish. Stat. Cr.*, § 422), he cites no contrary decision. See also *State v. Munch*, 22 Minn. 67, and *Gibbs v. State*, 41 Tex. 491, in which last case the court, without expressly passing upon the question, says that it may well be conceived that the character of the consignment or bailment should be averred. In *State v. Longworth*, 41 Tex. 162, an indictment was held bad which alleged that a named person did intrust a gun to the defendant as bailee for the purpose of taking it from one named place to another named place, without any allegation whatever showing at what time or to whom the gun was to be delivered.

which property shall have been intrusted.¹

Indictment for Receiving Embezzled Property.—It has been held that in an indictment for receiving embezzled goods the facts necessary to be averred are the felonious embezzlement and the felonious receiving, and that a description of the property and the name of the owner, as well as of the person embezzling, are sufficient, without setting out the particular relation existing between the owner and the person embezzling.²

5. Defendant's Receipt of Property Embezzled.—It must be directly and positively alleged that the property came into the defendant's possession and was held by him by virtue of his being a servant, agent, bailee, trustee, or officer, as the case may be.³

1. *Sanders v. State*, 86 Ga. 717, wherein the indictment was bottomed on Code Ga., § 4424, following *Carter v. State*, 53 Ga. 326.

Carriers, Porters, etc.—When the statute is confined to carriers, porters, and others especially engaged in carrying property for hire, it is not sufficient to charge that the defendant was employed as a servant, or that he was an agent, but it must be averred that the property was intrusted to the defendant for the purpose of being carried and delivered for hire. *Johnson v. Com.*, 5 Bush. (Ky.) 430, wherein the indictment was attempted to be drawn under Rev. Stat. Ky., c. 28, art. 12, § 2; *Sanders v. State*, 86 Ga. 717; *Com. v. Williams*, 3 Gray (Mass.) 461, followed in *State v. Mims*, 26 Minn. 191, and *Territory v. Heacock*, 4 N. Mex. 354; *White v. State*, 20 Wis. 233, followed in *Territory v. Heacock*, 4 N. Mex. 354.

2. *People v. Stein*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 202, in which case the court referred to the fact that in an indictment for receiving stolen goods it is not necessary to aver the time and place of the larceny, although such an averment would be necessary in an indictment for larceny.

3. *Britton v. State*, 77 Ala. 202, holding that an indictment against a tax collector, bottomed on Code Ala. 1876, § 4266, for failure to make returns of, and to forward, "tax money in his hands," should aver that the money was at the time in the hands of the accused, as it may be that he collected it through a deputy, so as to create only a civil liability upon himself and sureties; *Grant v. State*, 35 Fla. 581, holding that an indictment founded on Rev. Stat. Fla., § 2454, denouncing the embezzlement of the proceeds of a sale

made by a bailee, should not allege merely that the defendant sold the property and converted the proceeds to his own use, but should distinctly allege that the defendant received the proceeds of the sale; *Ritter v. State*, 111 Ind. 324; *State v. Jamison*, 74 Iowa 602; *State v. Roubles*, 43 La. Ann. 200; *Com. v. Wyman*, 8 Met. (Mass.) 247; *State v. Farrington*, 59 Minn. 147; *State v. Noland*, 111 Mo. 473, holding that an indictment against a state treasurer must charge that he received the money by virtue of his office as treasurer; *Griffin v. State*, 4 Tex. App. 412; *Gaddy v. State*, 8 Tex. App. 127; *State v. Johnson*, 21 Tex. 775; *State v. Longworth*, 41 Tex. 162; *Gibbs v. State*, 41 Tex. 491; *Baker v. State*, 6 Tex. App. 344; *Taylor v. State*, 29 Tex. App. 466.

Embezzlement by Bank Officers.—In *U. S. v. Northway*, 120 U. S. 327, it was held that an indictment based upon Rev. Stat. U. S., § 5209, against an officer of a national banking association, need not charge that the moneys and funds had previously come into his possession by virtue of his office; and in *State v. Palmer*, 32 La. Ann. 565, in which case the indictment was presented against a bank officer, and was bottomed on Rev. Stat. La., § 907, it was held unnecessary to charge that the officer was in the actual custody or possession of the money.

Official Custody of State Officer.—In *People v. McKinney*, 10 Mich. 54, the indictment was bottomed on Comp. Laws Mich., § 5771, providing that if any officer employed in the treasury of the state "shall commit any fraud or embezzlement therein," etc. It was held unnecessary to charge that the embezzlement was committed in the

Sufficiency of Averments.—No set expressions are necessary in charging that the property came into the defendant's possession and custody by virtue of his employment, etc., but the fact must be expressly alleged and must not be left to inference.¹

treasury, and that it was sufficient to allege the embezzlement of moneys of the state while they were in the defendant's official custody, as the words "in the treasury" were not used as descriptive of locality, and the moneys which were in the official custody of the treasurer were to be considered as in the treasury; but it should be distinctly charged that the embezzlement was committed while the money was in the official custody or control of the defendant, and not merely that it had been received by him into the treasury.

1. *Gaddy v. State*, 8 Tex. App. 127, citing *State v. Johnson*, 21 Tex. 775, *State v. Longworth*, 41 Tex. 162, *Gibbs v. State*, 41 Tex. 491, and *Baker v. State*, 6 Tex. App. 344. In *State v. Longworth*, 41 Tex. 162, it was alleged that A intrusted certain property to the defendant as bailee, said property being then and there the property of the state of Texas, and being then and there in the possession of him, the said A, and that the said defendant, as bailee as aforesaid, did then and there convert, etc. The indictment was considered bad, because it did not state with certainty whether the property was at the time of the conversion in the possession of A or of the defendant. But an indictment charging that the defendant, then and there being the clerk and agent, etc., as such agent and clerk was then and there intrusted to collect, receive, etc., sufficiently shows that it was the defendant's duty as clerk to receive the money embezzled, and that it was received by him by virtue of his clerkship. *Wise v. State*, 41 Tex. 139. Averments that the defendant "having in his possession as such agent as aforesaid, and then and there having come into his possession as such agent as aforesaid," certain moneys, are sufficient. *Fleener v. State*, 58 Ark. 98. And so are allegations that the property then and there came to the "possession" of the defendant "by virtue of such employment," although the statute makes it a crime for any one to fraudulently convert property "under his care." *Ker v. People*, 110 Ill. 649. Likewise, an averment

that the defendant was collector of taxes, and that as collector he collected the taxes for the year, is good. *State v. Nicholson*, 67 Md. 1. And averments that the defendant, by virtue of his employment as aforesaid, did have, receive, and take into his possession certain money, and that it belonged to his principal and employer aforesaid, although not as specific and certain as they could have been made, sufficiently show that the defendant received the money into his possession by virtue of said employment alleged. *State v. Jamison*, 74 Iowa 602. But, under a statute providing that if any officer, etc., of any incorporated company or institution, shall convert money, etc., which shall have come into his possession or be under his care by virtue of said office, etc., it is not sufficient to allege that the defendant, being the clerk of a lodge of Odd Fellows, did receive as clerk as aforesaid, but it should be distinctly averred that it was his duty as such clerk to receive, etc., and that he received the property by virtue of his office. *State v. Johnson*, 21 Tex. 775.

Embezzlement or Larceny.—An indictment which alleges that a bank book was delivered to the defendant by the owner in trust and confidence, and with the direction that the defendant should thereby receive only the custody of it, hold it until demanded by the owner, and then deliver up and return it to him, charges the crime of embezzlement as distinguished from larceny, as it implies that the actual and legal possession, and not simply the custody, was parted with by the owner, and vested in the defendant. *Com. v. Doherty*, 127 Mass. 20, the court saying: "The limitation that the defendant should thereby receive only the custody of it was intended to exclude the inference that the defendant took any interest in the property, except as a naked bailee."

Possession at Time of Embezzlement.—In *Taylor v. State*, 29 Tex. App. 466, it was averred that the defendant did convert certain money which "had come" into his possession by virtue of his said agency and employment, etc.;

Receipt of Property from Others than the Master.—But, where property has been received from others than the defendant's employer, by virtue of his employment, it is sufficient to allege that the defendant, while he was employed, etc., did, by virtue of his employment, receive and take into his possession, etc., in the name and on account of his employer, without naming the persons from whom the property was received.¹

6. Description of Property—*a.* IN GENERAL.—The property alleged to have been embezzled must be described;² and the

and it was held, on a motion in arrest of judgment, that the indictment was not bad because it did not allege that the money was in the possession or under the care of the defendant as agent, etc., at the time the same was embezzled and converted, *distinguishing* *State v. Johnson*, 21 Tex. 775, in which case the extent and purport of the decision was that the reception of the money or property, or the care of it, as the case may be, must be by virtue of the employment or agency, and that this fact must be alleged and proved. The court, being referred to *Gaddy v. State*, 8 Tex. App. 127, in which case it was said that the indictment was defective because it did not allege "by direct averments that, at the time of the conversion, the animal was in the possession of the defendant by virtue of his agency or of the bailment," said: "This we understand to be the correct doctrine and in strict accordance with our statute defining the offense of embezzlement. But it does not follow from this that the indictment should go further and allege that the property or money that may have come into the agent's possession was in his custody at the time of the conversion. * * * These allegations meet the requirements of the statute in so far as the questions urged by the motion criticise the indictment. It is not necessary to allege that the property was in the actual possession of the agent at the time of its embezzlement. In so far as this phase of embezzlement is concerned, it is sufficiently met by the allegations that the money came into the possession of the agent and was thereafter converted by him."

1. *State v. Lanier*, 89 N. Car. 517; *State v. Broughton*, 71 Miss. 90, holding that it is unnecessary to allege the receipt of certain sums, from certain persons, and the failure of the defendant to enter the appropriate

credits in the accounts of such persons, and that it is necessary to allege only that the defendant was clerk or servant, etc., and that, by virtue of his said employment, he took into his possession and received, etc. See also *State v. Flint*, 62 Mo. 393, holding that an indictment against a county sheriff and collector, based on Wagn. Stat. Mo., ed. 1872, 459, § 14, need not state how he, the defendant, received the money. But, in *Peacock v. State*, 36 Tex. 647, it was held that an indictment against a district clerk alleging that he was then and there the legal custodian of fines within said county, and that, being in charge of certain funds as aforesaid, he did convert to his own use a large sum, etc., was bad, because it failed to state from whom the clerk received such money, or whether it was from one or several persons, and because it failed to specify what or whose money he had misapplied, as the money may have been jury funds, school funds, or any other funds belonging to the county, or, indeed, might have been his own private funds; and in *Rex v. Hodgson*, 3 C. & P. 422, 14 E. C. L. 377, it was held that the defendant was entitled to an order for a particular of charges, and that such particular ought at least to state the names of the persons from whom the money was alleged to have been received.

2. *Com. v. Merrifield*, 4 Met. (Mass.) 468, wherein Dewey, J., says that "the law particularly requires a correct description of the species of property alleged to be stolen;" *State v. Edson*, 10 La. Ann. 229, wherein Buchanan, J., says: "The goods stolen or embezzled should be described, at least in part, with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen or embezzled is the very same with that upon which the indictment was founded, and

language used should be sufficiently definite to identify the property and show that it was such as may be the subject of embezzlement.¹

b. PARTICULARITY REQUIRED IN INDICTMENTS FOR LARCENY.—The general rule is that the indictment should describe the property embezzled with the same particularity as is required in an indictment for larceny;² but no greater particularity of description is required.³

show judicially to the court that it could have been the subject-matter of the offense charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel." See also *Grant v. State*, 35 Fla. 581, wherein it was held that failure to describe the property is a fatal defect to which objection may be made at any stage of the case, and that such defect is ground for arresting the judgment, *citing* *People v. Cox*, 40 Cal. 275, *Com. v. Smart*, 6 Gray (Mass.) 15, and *State v. Thompson*, 24 N. J. L. 9, *per* Green, C. J.; *Carter v. State*, 53 Ga. 326, *per* Tripp, J.

1. *Com. v. Butterick*, 100 Mass. 1. See also *Sanders v. State*, 86 Ga. 717, wherein it is said that in determining what description of the property is necessary the court may resort to general principles and other authorities. See further the *obiter dictum* of Prince, C. J., in *Territory v. Maxwell*, 2 N. Mex. 250, to the following effect: "Some kind of description fairly accurate can usually be obtained from the person from whose possession it came to the accused, and in case of a large number of chattels, some one or more, at all events, can be described with sufficient accuracy."

Excuse for Failure to Give More Particular Description.—In some cases it is impossible to give a very exact description of the property embezzled, but the best description practicable should be given, and if the description is indefinite, a reason for not giving a better description should be stated. *Per* Liddan, J., in *Grant v. State*, 35 Fla. 581.

Knowledge Resting Solely with the Accused.—An allegation that the property is in the possession of the defendant to some extent excuses the pleader from a minute description of the property. *Leonard v. State*, 7 Tex. App. 417. See also *State v. Munch*, 22

Minn. 67, wherein Gilfillan, C. J., lays down the rule as follows: "In those cases where, necessarily, the knowledge of the characters, kinds, amounts, and values of the respective funds rests solely with the accused, there is no reason, beyond that furnished by authority, for applying the rule."

2. *Grant v. State*, 35 Fla. 581, *citing* 6 Am. & Eng. Encyc. Law 498e; *People v. Cox*, 40 Cal. 275; *State v. Thompson*, 42 Ark. 517, wherein Eakin, J., says that the necessity of describing the property with the same clearness and precision as in cases of larceny, "flowed from the idea that embezzlement was rather a species of larceny, included within enlarged boundaries of the definition, than an offense of a distinct nature;" *Com. v. Smart*, 6 Gray (Mass.) 15; *Calkins v. State*, 18 Ohio St. 366. See also *Britton v. State*, 77 Ala. 202, wherein Somerville, J., says that this is the ordinary rule.

A Statute Concerning the Description of Money and providing that where banknotes, checks, gold or silver money, or any other property of that kind, has been embezzled, a detailed description thereof need not be set forth, is inapplicable to an indictment charging the embezzlement of a different kind of property, such as tools, lumber, furniture, etc. *State v. Edson*, 10 La. Ann. 229.

3. *Com. v. Concannon*, 5 Allen (Mass.) 502; *Com. v. Butterick*, 100 Mass. 1.

Instances.—In *Com. v. Shaw*, 145 Mass. 349, it was held sufficient to describe the property embezzled as thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar of the property, etc. The word shoes was taken to mean shoes for the feet of human beings.

In *Sanders v. State*, 86 Ga. 717, it was held, under a statute which was silent as to how the property should be described, that it was sufficient to

c. MONEY.—Unless it is otherwise provided by statute, the character and denomination of money must be stated, and it is not sufficient to charge simply the embezzlement of a named number of dollars;¹ but in most states statutes have been enacted expressly providing what description of money shall be given, and providing that it shall be sufficient to allege that money was embezzled without specifying any particular coin.² Such statutes

allege the embezzlement of fifteen head of beef cattle worth twenty dollars per head.

In *Alderman v. State*, 57 Ga. 367, it was considered sufficient to describe the property as a black hog of the male sex.

In *Mayo v. State*, 30 Ala. 32, the words "certain books, letter-files, knives, bank-shears, slates, and sealing wax, to about the value of \$40," were considered as sufficiently certain and definite to meet the requirements of Code Ala., § 3503, form 36, wherein the words "promissory notes to about the amount of \$500," were prescribed as a sufficient description.

But in *State v. Edson*, 10 La. Ann. 229, a description of the property as a certain lot of furniture, a certain lot of lumber, and certain tools commonly called cabinet-maker's tools, was considered bad, *distinguishing State v. Brown*, 1 Dev. (N. Car.) 137, wherein an indictment for larceny describing the property as a parcel of oats was considered good, because the word parcel means a small bundle, and oats are put up for sale in small bundles; and in *Com. v. Merrifield*, 4 Met. (Mass.) 468, it was held that the indictment improperly described printed sheets that had been delivered to the defendant, and folded, stitched, trimmed, and bound, as printed sheets, although they were printed sheets when they were delivered to the defendant to be bound.

See also *Leonard v. State*, 7 Tex. App. 417, wherein cotton intrusted to the defendant for storage and safe-keeping was properly described as "twenty bales of lint cotton, of the value of fifty dollars per bale."

1. *Rex v. Flower*, 5 B. & C. 736, 12 E. C. L. 368; *Rex v. Furneaux, R. & R. C. C.* 335, in which case it was considered insufficient to describe the property as "one pound eleven shillings;" the foregoing cases being cited in *State v. Thompson*, 42 Ark. 517, in which case it was held insufficient to charge that

the defendant received and took into his possession "certain money to a large amount, to wit, to the amount of one hundred dollars." To the same effect are *State v. Ward*, 48 Ark. 36, *following State v. Thompson*, 42 Ark. 517; *People v. Cohen*, 8 Cal. 42, wherein it was held that the words "four hundred thousand dollars, the moneys, goods, and chattels of," etc., did not sufficiently describe the property, *followed in People v. Peterson*, 9 Cal. 313, wherein the court condemned an indictment using the words "forty pieces of gold coin usually called twenty-dollar pieces, of the value of \$800;" *People v. Cox*, 40 Cal. 275, wherein the court refused to sustain an indictment charging that the defendant received "certain money," and that he unlawfully embezzled and converted the sum of eight hundred dollars of said money, *citing People v. Jim Ti*, 32 Cal. 61, which was an indictment for larceny. See also *State v. Stimson*, 24 N. J. L. 9, wherein the money was described as nineteen thousand dollars of money.

Inability of Grand Jury to Particularize.—In *Fleener v. State*, 58 Ark. 98, an indictment was upheld which described the property as \$251.64 current money of the United States, the particular denominations and amount of which are to the grand jury unknown, *following the suggestion in State v. Ward*, 48 Ark. 36. See also *State v. Combs*, 47 Kan. 136, in which case the following description, coupled with an allegation of the inability of the grand jury to give the denomination and number of the money, was considered sufficient after verdict: "Five hundred and thirty dollars, current money of the United States, of the value of \$530," consisting of "United States national bills, commonly called greenbacks, and national bank bills, silver certificates, and gold certificates."

2. *Alabama.*—*Lowenthal v. State*, 32 Ala. 589, wherein the indictment charged the embezzlement of money to the amount of a named number of

do away with many of the difficulties which formerly attached to prosecutions for the crime of embezzlement by rendering it unnecessary to allege or to prove, in order to a conviction in any case,

dollars, and was considered sufficient, because it pursued strictly the form given by Code Ala., p. 702, form 36; *Lang v. State*, 97 Ala. 41, wherein it was held that, under Code Ala. 1886, § 3810, the sum charged to have been embezzled may be described as being about a named number of dollars. To the same effect as the latter case is the *obiter dictum* of Stone, J., in *Noble v. State*, 59 Ala. 73. But it would seem from this last case that it is not sufficient to describe the money as a named sum of dollars, "or other large sum of money."

California.—*People v. Cobler*, 108 Cal. 538, holding that under Penal Code Cal., §§ 967 and 1131, it was sufficient to describe money as a named sum of dollars, current money of the United States, without specifying the coin, denomination, or kind of money embezzled, citing *People v. Treadwell*, 69 Cal. 237, and *People v. Mahlman*, 82 Cal. 585.

Kentucky.—*Jones v. Com.*, 13 Bush (Ky.) 356, wherein the court adverted to Code Cr. Prac. Ky. (Bullitt's), § 135, providing that an indictment for larceny or embezzlement of money, or United States currency, or banknotes, may describe the same without specifying the kind, number, or denomination thereof; that case, however, being an indictment for larceny.

Louisiana.—Rev. Stat. La., § 906, provides that in prosecutions for embezzlement of banknotes, checks, bills of exchange, promissory notes, gold or silver money, or of any other property of that kind, it shall not be necessary to set forth a minute and detailed description thereof, but "a general allegation of the amount and the thing" embezzled shall be sufficient. *State v. Palmer*, 32 La. Ann. 565, wherein it was held sufficient to describe the property embezzled as "certain money, to-wit, the sum of \$47,437.34." But see *State v. Muston*, 21 La. Ann. 442, wherein an indictment charging the embezzlement of "the sum of eleven dollars," was pronounced bad, the court saying: "The indictment does not inform us in what 'the sum of eleven dollars' consisted; it is not alleged that the sum embezzled consisted

in gold or silver dollars or in currency—whether in two or more coins or treasury notes or bank bills. The defect is one of substance and not of form, and the omission vitiates the indictment."

Massachusetts.—The indictment in *Com. v. Bennett*, 118 Mass. 443, was bottomed on Gen. Stat. Mass., c. 161, § 42, providing that it shall be sufficient to allege generally the embezzlement or fraudulent conversion of money to a certain amount, without specifying any particulars of such embezzlement, and an indictment was upheld which described the property as "certain money to the amount and of the value of \$25,000." To the same effect is *Com. v. Wyman*, 8 Met. (Mass.) 247.

Minnesota.—*State v. Kortgaard* (Minn. 1895), 64 N. W. Rep. 51, wherein Gen. Stat. Minn. 1894, § 7262, was relied upon, the statute being to the same effect as Gen. Stat. Mass., c. 161, § 42.

Michigan.—*People v. Bringard*, 39 Mich. 22, decided under Comp. Laws Mich., § 7811, which is to the same effect as Gen. Stat. Mass., c. 161, § 42.

Missouri.—Rev. Stat. Mo. 1879, § 1872, provided that in every indictment in which it shall be necessary to make any averment as to any money or any note, it shall be sufficient to describe such money or note simply as money, without specifying any particular coin or note, and that such allegation shall be sustained by proof of any amount of coin or any such note, etc. *State v. Pratt*, 98 Mo. 482.

North Carolina.—Under Code N. Car., § 1020, it is sufficient to allege "the embezzlement to be of money, without specifying any particular coin or valuable security." *State v. Fain*, 106 N. Car. 760.

Texas.—Code Cr. Pro. Tex., art. 427, relative to indictments generally, provides that when it shall be necessary to describe property of any kind, a general description of the same, by name, kind, quantity, number, and ownership, if known, shall be sufficient. In *Lewis v. State*, 28 Tex. App. 140, it was alleged that the indictment need only charge the embezzlement of a named number of

the identical money mentioned in the indictment, and render valueless those authorities which announce and enforce a different theory of the law.¹

Lawful Money of the United States.—Under such statutes it need not be alleged that the money embezzled was lawful money of the United States, and it is not advisable to insert such an allegation, because it is believed that the prosecution would be under the

dollars in money, the same being then and there current money of the United States, and of the value, etc., citing *Crump v. State*, 23 Tex. App. 615; *State v. Brooks*, 42 Tex. 68, and *Bravo v. State*, 20 Tex. App. 177, the last case being an indictment for theft. See also *Taylor v. State*, 29 Tex. App. 466, holding that the term "money" includes deposits, gold, silver, copper, and other coins, bank bills, government notes, or other circulating medium current as money, and that it is sufficient to allege that the defendant did embezzle two thousand dollars, said money being of the value of two thousand dollars. But see *Block v. State*, 44 Tex. 620, wherein the court apparently ignored the foregoing statute and held that, as the statute denouncing the embezzlement of "money or property" had no clause explaining what is meant by the word "money," or what may be embraced by it, an indictment charging the embezzlement of a named number of dollars was not sustained by proof of the embezzlement of greenbacks which were either treasury notes of the United States, or notes of national banks, the witnesses being unable to say which. But the latter case, as was explained in *Lewis v. State*, 28 Tex. App. 140, does not restrict the meaning of the word "money" to metallic coins, but to the legal tender coins or the legal tender treasury notes of the United States. See also, upon this question, *Sansbury v. State*, 4 Tex. App. 99, which was an indictment for theft.

In *Wyoming*, a description of the property alleged to have been embezzled as a named number of dollars, lawful money of the United States of America, without specifying any particular coin, note, or bill, is warranted by the Crimes Act, § 143, and by Rev. Stat. Wyo., § 3254. *Edelhoff v. State* (Wyoming, 1894), 36 Pac. Rep. 627.

Constitutionality of Statute.—An indictment framed under Gen. Stat.

Mass., c. 161, § 42, describing the property as "certain money to the amount and of the value of \$25,000," is not open to the objection that it does not set forth the offense "fully and plainly, substantially and formally," as required by the Decl. Rights, Mass., art. 12. *Com. v. Bennett*, 118 Mass. 443.

Specification of Particulars at the Trial.—In *Com. v. Bennett*, 118 Mass. 443, it was held that where the indictment, as permitted by Gen. Stat. Mass., c. 161, § 42, describes the money embezzled generally by simply stating the amount of money embezzled, the defendant may apply at the trial for a specification of the particular acts relied upon by the prosecution. *Following Com. v. Wood*, 4 Gray (Mass.) 11.

Proceeds Arising from Disposition of Property.—Under a statute (Rev. Stat. Fla., § 2454) which denounces the conversion of the proceeds of property sold by a bailee, it is not sufficient to describe the property and allege that the accused fraudulently converted the proceeds thereof, but the proceeds must be described, and it must not be left to conjecture as to whether the sale was for cash or other thing of value, or for credit, or whether the proceeds consisted of money, promissory notes, or other thing of value. *Grant v. State*, 35 Fla. 581. See also *Woodward v. State*, 103 Ind. 127, holding that an indictment charging the embezzlement of moneys collected on a lottery ticket intrusted to the defendant need not describe the lottery ticket; and *State v. Butler*, 26 Minn. 90, in which case it was held that an indictment charging the embezzlement of money collected on a promissory note need only describe the note as having been made by F. B., without giving B.'s Christian name, when there is nothing to show, and there is no presumption, that the note was signed otherwise than with the initial of his Christian name as alleged in the indictment.

1. *Per Sherwood, J.*, in *State v. Pratt*, 98 Mo. 482.

necessity of proving it.¹

Banknotes and Bills.—It is sufficient to describe bank bills as being of particular denominations and of particular values, and as having been issued by a named banking company.²

d. BONDS.—It is sufficient to describe United States bonds as bonds of the United States of America for the payment of money,

1. *Watson v. State*, 64 Ga. 61, holding that such an allegation is unnecessary, but if contained in the indictment must be proven; *State v. Noland*, 111 Mo. 473, decided under Rev. Stat. Mo. 1889, § 4111, following *State v. Pratt*, 98 Mo. 482; *People v. Hearne* (Supreme Ct.), 49 N. Y. St. Rep. 406, wherein O'Brien, J., says that "an allegation as to whether it was lawful money of the United States, or other money, was entirely immaterial and unnecessary." *Edelhoff v. State* (Wyoming, 1894), 36 Pac. Rep. 627, wherein Groesbeck, C. J., points out the advisability of refraining from alleging that the money was lawful money of the United States of America, and intimates that where the money is so described the prosecution may be under the necessity of proving that the money was of the kind described.

2. *Bulloch v. State*, 10 Ga. 47, wherein the court says: "This description of the bills alleged to have been stolen * * * is sufficient * * * to inform him of the general nature of the offense of which he is accused. If a more minute description should be required, as, for instance, the date and letter of each bill, a conviction * * * would, in most cases, be impossible," citing *Rex v. Johnson*, 3 M. & S. 539, 2 Leach C. C. 1103, wherein it was held that since the statute made banknotes the subject of larceny "they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel," and that to describe them as banknotes "for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit," etc., was a larger description than the statute strictly required, and that it was not necessary to specify that they were bank of England notes in contradistinction to country banknotes; citing also *Com. v. Richards*, 1 Mass. 337, wherein an indictment for larceny was upheld which charged the stealing of "one banknote of the

value of ten dollars, of the goods and chattels of the said," etc. See also *State v. Stimson*, 24 N. J. L. 9, holding that an indictment charging the conversion of banknotes amounting to the sum of seven thousand dollars was bad, because there was no averment of the number of notes, and that an averment that the defendant did convert nineteen thousand dollars of banknotes was bad, because it contained no description either of the number or denomination of the notes.

Paper Currency may be described as a named number of bills, giving their denominations and value and stating that they are currency of the United States of America. *Gady v. State*, 83 Ala. 51, in which case it was permissible to show that greenbacks had been embezzled under an allegation describing the money as ten-dollar bills and twenty-dollar bills, currency of the United States of America, citing *Levy v. State*, 79 Ala. 259, and *Duvall v. State*, 63 Ala. 12. But see *Dotson v. State*, 51 Ark. 119, holding the following description insufficient: "Ten bills of the paper currency of the United States of America, of the denomination and value of ten dollars each; twenty bills of the paper currency of the United States of America, of the denomination and value of five dollars each; six bills of the paper currency of the United States of America, of the denomination and value of twenty dollars each," following *State v. Oakley*, 51 Ark. 112, in which case an indictment for larceny describes the property stolen as "two ten-dollar bills of United States currency." The description was considered too indefinite because "United States currency includes the gold and silver coin of the United States, the notes issued by the banks organized under the laws of the United States, the treasury notes commonly known as greenbacks, and the certificates of deposit generally called silver certificates issued by the United States," and because "it cannot be ascertained from the indictment what is

issued by authority of law, stating their denomination and value.¹

e. **EMBEZZLEMENT BY PUBLIC AND CORPORATE OFFICERS.**—In an indictment against a public or other officer, great looseness is permitted in the description of the money or funds embezzled, because of the necessity of the case, and it is unnecessary to specify with certainty the particular kind of money or funds, whether gold or silver coins, or legal tender notes, or to give the denomination of each coin or note, or to specify from whom or at what particular time the money was received, but the indictment should be certain to the extent of alleging the embezzlement of a particular sum of money.²

meant further than it was paper currency of the United States." *Citing* *Leftwich v. Com.*, 20 Gratt. (Va.) 716; *Boyle v. State*, 37 Tex. 359; *Martinez v. State*, 41 Tex. 164; *Merrill v. State*, 45 Miss. 651; *State v. Longbottoms*, 11 Humph. (Tenn.) 39; *State v. Morey*, 2 Wis. 494; *Barton v. State*, 29 Ark. 68; *State v. Ward*, 48 Ark. 36, in none of which cited cases, however, except the last, was the defendant prosecuted for embezzlement.

1. *Com. v. Butterick*, 100 Mass. 1. See also *State v. Meyers*, 68 Mo. 266, wherein, under Wagn. Stat. Mo. 1091, §§ 28, 30, no more particular description was required of bonds than "certain United States 5-20 government bonds, which were valuable securities of the value of \$5,000."

Promissory Notes.—In *Heller v. People*, 2 Colo. App. 459, it was considered sufficient to describe a note as a certain promissory note, giving its value, especially in view of the fact that the note was not in the possession of the grand jury, and an exact description could not be given.

Mortgage.—In *Com. v. Concannon*, 5 Allen (Mass.) 502, a mortgage was sufficiently described as a certain paper of writing, containing a conveyance of land, the same being then and there a deed of mortgage of certain land situated in R, in the county of N, then and there made and executed by the said C to one D, and delivered to the defendant to be carried and delivered to the said D.

Unissued Bonds.—In *Bork v. People*, 91 N. Y. 5, the defendant embezzled city bonds which had not been issued when they were received by him as city treasurer, but which were complete in form and capable of becoming effective instruments by delivery to a bona fide holder, and it was held that

they were properly described as bonds, and that they were, though unissued, property within the meaning of Act N. Y. Feb. 17, 1875, c. 19, § 1. *Following* *People v. Wiley*, 3 Hill (N. Y.) 194, wherein the indictment charged the receipt of promissory notes, knowing them to have been stolen, and the proof was that the bills had been stolen from a bank and that they were complete in form though they had never been issued.

Instruments Purporting to be the Acts of Others.—In *State v. Grisham*, 90 Mo. 163, the indictment was drawn under Rev. Stat. Mo., § 1312, denouncing the embezzlement of any deed, etc., purporting to be the act of another. It was held that the indictment should show that the instrument was not the act of the defendant, and, it appearing that the instrument had been executed by the defendant himself, the indictment was bad.

2. *Britton v. State*, 77 Ala. 202, holding that an indictment against a tax collector need only describe the amount as about a specified sum, *citing* *Lowenthal v. State*, 32 Ala. 589; *Jackson v. State*, 76 Ga. 551, which was an indictment against the president of a corporation; *State v. Smith*, 13 Kan. 274, which was an information against a county treasurer. It was held sufficient to charge specifically to what fund each portion of the total amount embezzled belonged, without describing the kinds of money embezzled, the court saying: "In transactions such as are now under consideration, * * * to suppose that the legislature, when they added the large class of public officers to those who might be amenable to the law for the offense of embezzlement, intended to require proof of the identity of the money embezzled, or a description of

Public Money.—Where the embezzlement of public money is denounced, it need not be alleged in terms that the money embezzled was public money, but it is sufficient that the fact appears from the allegations as to the defendant's office and the manner in which he received the money.¹

it, and from whom it was received, is to infer that they intended to enact a law the enforcement of which would be impossible," following *People v. McKinney*, 10 Mich. 54, which was an indictment against a state treasurer. In the last case the court, with great clearness and forcible reasoning, points out the distinction between embezzlement by clerks, agents, etc., and the embezzlement of public funds where there is no principal or employer to scrutinize the acts of the officer, and shows that it would be wholly impracticable to trace or identify the particular pieces of money or bills, or to determine whether the sums embezzled were in one shape or another. See also *State v. Munch*, 22 Minn. 67, wherein Gilfillan, C. J., says that the reasoning in *People v. McKinney*, 10 Mich. 54, is unanswerable; *State v. Ring*, 29 Minn. 78, wherein it was held that an indictment against a county treasurer, charging him with embezzlement by refusing, upon demand made by his successor in office, to pay over to the latter public moneys received by the defendant and remaining in his hands, need not allege the total amount of the defendant's receipts during his term of office; *State v. Hays*, 78 Mo. 600, holding that an indictment based on a statute (Wagn. Stat. Mo. 459, art. 3, § 41) denouncing the embezzlement by any officer, etc., of "any portion of the public moneys, or any valuable security," need only allege that the money was public money, without amplification, following *State v. Flint*, 62 Mo. 393, in which case a sheriff and collector was indicted for the conversion of money received by him belonging to the state and county revenue, and it was held unnecessary to state what particular money was embezzled, and the proportions that belonged to the state and county respectively; *State v. Knox*, 17 Neb. 683, which was an indictment against a treasurer of a school district; *State v. Carrick*, 16 Nev. 120, the decision in that case being based on *State v. Walton*, 62 Me. 109, *People v. McKinney*, 10 Mich. 54,

State v. Munch, 22 Minn. 67, *State v. Smith*, 13 Kan. 274, and *State v. Flint*, 62 Mo. 393; *Bork v. People*, 16 Hun (N. Y.) 476, wherein an indictment against a city treasurer described the money embezzled as a large sum of money, to wit, the sum of one thousand, one hundred dollars, and it was held good, approving and reiterating to a large extent the reasoning in *People v. McKinney*, 10 Mich. 54; *State v. Brooks*, 42 Tex. 62, holding that an indictment based on a statute denouncing embezzlement by an officer, etc., of "any part of such public money," need only describe the money embezzled as "the sum of one thousand dollars, money collected by him as aforesaid," etc., without giving a specific description of the money embezzled, or even of any piece thereof, citing *Riley v. State*, 32 Tex. 763; *Malcolmson v. State*, 25 Tex. App. 267, wherein Hurt, J., says: "It would be very remarkable indeed if the prosecution could, with any degree of certainty, show the character of moneys, or from whom they were received. * * * The result of such a doctrine would protect from just punishment those whose guilt could be made absolutely evident by the clearest proof."

See further *Hollingsworth v. State*, 111 Ind. 289, following *People v. McKinney*, 10 Mich. 54, *State v. Smith*, 13 Kan. 274, and *State v. Graham*, 13 Kan. 299.

1. *State v. Eames*, 39 La. Ann. 986. See also *People v. Hamilton* (Cal. 1893), 32 Pac. Rep. 526, holding that it is sufficient to charge that the moneys were received by the defendant "in his official capacity;" and *State v. Arnold* (Mo. 1886), 2 S. W. Rep. 269, wherein it was considered sufficient, after charging that the defendant had the custody of public moneys, etc., to aver that the defendant did embezzle "certain of said public moneys, to wit, the sum of twelve thousand dollars, good and lawful money, issued by virtue and authority of the laws of the United States of America, the denomination and par-

7. Allegations as to Value of Property—*a.* NECESSITY TO CHARGE VALUE.—As a general rule, in addition to describing the property, its value must be alleged;¹ unless it consists of money.²

Where Money is Described by giving the denominations and number of the coins or bills, and the same is averred to be currency of the United States of America, the court will take judicial notice of the fact that the coins or bills are of commercial value equal to that imported by their face. An allegation as to the value of the property is especially necessary where there are grades of the offense,³ or where the statute denounces the embezzlement of

ticular description of which said moneys are unknown to these grand jurors, and therefore cannot be given, of the public moneys then and there belonging to said county and state," etc.

1. *People v. Donald*, 48 Mich. 491; *State v. Stimson*, 24 N. J. L. 9, holding that, although it is immaterial what the value of the property is, and although there are no grades of the offense, the value of the property must be alleged, because the subject of the offense must possess some value; *Stephens v. State*, 53 N. J. L. 245, wherein Beasley, C. J., says that the doctrine enunciated in *State v. Stimson*, 24 N. J. L. 9, "has been the law of the state for over thirty years;" *Bork v. People*, 16 Hun (N. Y.) 476, following *State v. Stimson*, 24 N. J. L. 9; *State v. Mook*, 40 Ohio St. 588; *Henderson v. State*, 1 Tex. App. 432. See also the *obiter dictum* of Maxwell, J., in *State v. Knox*, 17 Neb. 683, to the effect that where bank bills not a legal tender have been embezzled, it is necessary to allege their value. See further *U. S. v. Greve*, 65 Fed. Rep. 488, which was an indictment bottomed on Rev. Stat. U. S., § 5209, denouncing embezzlement by officers, etc., of national bank associations.

2. "It is not necessary to state the value of coin, because every genuine current coin of the government has a fixed value by law, of which the courts will take notice." *Per Green, C. J.*, in *State v. Stimson*, 24 N. J. L. 9. To the same effect are *Gady v. State*, 83 Ala. 51, wherein it was held sufficient to describe money as "eighty dollars in money, consisting of ten-dollar bills and twenty-dollar bills, currency of the United States of America;" *Huffman v. State*, 89 Ala. 33, wherein an indictment charging the embezzlement of money to the amount of a named number of dollars, although

it did not allege the value of the money embezzled, or describe the character of the money, or even state that it was currency of the United States of America, was considered sufficient, because it followed Code Ala., § 3810, p. 270, form 39; *State v. Knox*, 17 Neb. 683, wherein Maxwell, J., says: "Where the allegation is the embezzling of thirty-five dollars in money, the amount designated expresses the value, the presumption being that it was lawful money." See also the *obiter dictum* in *Bork v. People*, 16 Hun (N. Y.) 476, to the effect that if it had been averred that the money embezzled was lawful money of the gold coinage, or silver coinage, or the legal tender notes of the government of the United States, the court should have taken judicial notice of its value. But in *Reside v. State*, 10 Tex. App. 675, an indictment describing the property embezzled as eight dollars in money, consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill, all of which were then and there a circulating medium, current as money, without stating that it was gold, silver, or current paper money of the United States, or of any other government or country, was condemned.

Value of Separate Items.—It would seem from *State v. Haskell*, 33 Me. 127, that an indictment for conversion by a carrier of property delivered to him within the state for delivery to a person in another state, under Rev. Stat. Me., c. 156, § 7, need only describe the property as sundry banknotes, checks, drafts, and other evidences of debt, of the value of a named number of dollars, without setting forth the value of each description of the property.

3. *Grant v. State*, 35 Fla. 581, wherein the indictment was framed under a statute (Rev. Stat. Fla., § 2454) which punished embezzlement in the same

property over a certain value.¹

b. SUFFICIENCY OF AVERMENTS.—There must be a direct and substantial averment of the value of the property,² but the value need not be, and usually is not, stated with accuracy.³

8. Ownership—*a. NECESSITY TO ALLEGE.*—The ownership of the property embezzled, according to the weight of authority, must be alleged with the same particularity as in an indictment for larceny.⁴ And as a general rule it must be alleged that the property was owned by the defendant's master or principal, or the person between whom and the defendant a fiduciary relation existed.⁵

manner as larceny. There being more than one grade of larceny, it was held necessary to state the value of the property in order to ascertain the penalty to be inflicted. To the same effect is *People v. Donald*, 48 Mich. 491.

1. *Stephens v. State*, 53 N. J. L. 245, wherein the indictment was bottomed on a statute (N. J. Crimes Act, § 161) denouncing the embezzlement of any money, bank bills, etc., of or above the value of twenty dollars. It was held that the money taken must be alleged to be above the value of twenty dollars.

Embezzlement of Particular Articles Punished Regardless of Value.—Where the statute provides punishment "in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken, or secreted," and by statute the punishment for stealing a horse is not dependent upon the value of the horse, an indictment for the embezzlement of a horse need not allege its value. *State v. Small*, 26 Kan. 209. See also *McDaniels v. People*, 118 Ill. 301, holding, for the same reasons, that an indictment charging the embezzlement of a railroad ticket need not allege its value, nor that it had any value.

2. *Reside v. State*, 10 Tex. App. 675.

Averment as to Amount of Injury.—An allegation that the embezzlement was to the injury of a named person in the sum of one hundred and seventy dollars is not an allegation of the value of the property embezzled. *Grant v. State*, 35 Fla. 581.

3. *People v. Bork*, 96 N. Y. 188, *per Andrews, J.* See also, *infra*, IV. *Pleading and Proof.*

4. *Rex v. Johnson*, 3 M. & S. 539, wherein Lord Ellenborough says that in alleging ownership "all the requisites must be stated which are necessary

to the constituting a larceny at the common law;" *People v. Neyce*, 86 Cal. 393; *Alden v. State*, 18 Fla. 187, wherein it is said that a motion in arrest of judgment is sustainable where the indictment is defective by reason of its giving a misnomer to the owner of the property; *Grant v. State*, 35 Fla. 581, *citing* 6 Am. & Eng. Encyc. Law 498*d*, *State v. Roubles*, 43 La. Ann. 200, and *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *State v. Tracey*, 73 Md. 447, wherein the court cites *State v. Lyon*, 45 N. J. L. 272, *Alden v. State*, 18 Fla. 187, *Rex v. Beacall*, 1 Moo. C. C. 15, and *Macgregor's Case*, 2 Leach C. C. 938, and says concerning the last case that it has been "unable to find any case throwing discredit on this decision or shaking its authority;" *Com. v. Norton*, 11 Allen (Mass.) 110; *Polkinghorne v. State* (Miss. 1890), 7 So. Rep. 347; *State v. Stimson*, 24 N. J. L. 9; *State v. Lanier*, 89 N. Car. 517; *Crane v. State*, 26 Tex. App. 482; *Peacock v. State*, 36 Tex. 647. But see *Malcolmson v. State*, 25 Tex. App. 267, holding that an indictment against a secretary and treasurer of a corporation, for the embezzlement of moneys received by him in person or through other agents of the company in behalf of the corporation, need not allege the names of the persons from whom the money was received by the defendant.

5. *Ex p. Hedley*, 31 Cal. 108; *People v. Bailey*, 23 Cal. 577; *Ricord v. Central Pac. R. Co.*, 15 Nev. 180, holding that the indictment must charge that the money was intrusted to the defendant by his employer, and that it is not sufficient to set forth his employment and charge that the money was intrusted to him because *non constat* that he was intrusted with the money by third parties without any authority from his employer; *Watson v. State*,

b. QUALIFIED OWNERSHIP.—The ownership may be laid in one who has a qualified ownership only.¹ But the ownership may also be laid in the actual owner, notwithstanding the fact that another has a qualified ownership.²

64 Ga. 61; *Lang v. State*, 97 Ala. 41, holding that, under a statute denouncing the fraudulent conversion by a bailee, an indictment alleging that the bailment was for the mutual benefit of the bailor and bailee was demurrable. See further *Griffin v. State*, 4 Tex. App. 390, in which case the indictment was based on a statute (Penal Code Tex., art. 771, as amended by Act of 1876) providing that if any clerk or agent, etc., shall embezzle, etc., any money, property, etc., belonging to his principal, employer, etc., which shall have come into his possession, or shall be under his care by virtue of his agency or employment, etc. It was alleged that the defendant, as agent of the Texas Express Company, received certain money by virtue of his said agency, but it was not charged that the money belonged to his principal, the express company, but that it belonged to a bank, and between the bank and the accused no trust or fiduciary relation whatever was averred. Said the court: "Because the indictment fails to charge any fiduciary relation between the owners of the money and the appellant, and because it fails to charge that the money belonged to the principal of the agent accused, or that the Texas Express Company had any property or interest in the money charged to have been embezzled, it is defective, and insufficient to support the offense defined in the statute."

But see *Polkinghorne v. State* (Miss. 1890), 7 So. Rep. 347, holding that an indictment charging that the defendant received property from H. & Co., as a broker, and that he sold the same and received the money therefor for and on account of H., is seemingly contradictory, but that as it may be possible that the course of business between the parties was such as that the defendant was to receive the proceeds of the sale for and on account of one member of the firm, the indictment should not be quashed.

1. *U. S. v. Burroughs*, 3 McLean (U. S.) 405; *Riley v. State*, 32 Tex. 763; *Campbell v. State*, 35 Ohio St. 70, from which it would seem that the ownership may be laid in one who

employed the defendant to collect money, notwithstanding the fact that such employer was not bound to account over to others; *People v. Treadwell*, 69 Cal. 226, holding that the ownership of a note may be laid in one who has indorsed it, where, after indorsement, the indorsee gives the indorser the possession and control of the note, to enable him to collect interest upon it or otherwise to control it.

2. *Com. v. Norton*, 11 Allen (Mass.) 110, in which case a son placed bank bills and treasury notes in the hands of the defendant to be delivered by him to his father, and it was held that the ownership was properly laid in the father, the court explaining that the defendant received the money for the sole purpose of delivering it to the father, and that an action at law would lie in the name of the father against the defendant for the money received to his use; the court also referred to *Gen. Stat. Mass., c. 172, § 12*, declaring that it shall be sufficient if it is proved on the trial that either the actual or constructive possession of the general or special property was in the person alleged to be the owner.

See further *Murphy v. People*, 104 Ill. 528. In the latter case a customer handed a coin to a barkeeper in payment for a drink, and the barkeeper delivered the same to the defendant, a bystander, to be changed. It was held proper to aver that the coin was the property of the customer, rather than of the barkeeper, the barkeeper being regarded as the agent of the customer, *distinguishing* *Fishback v. Brown*, 16 Ill. 74, in which case what was decided was simply that a party changing money for an agent, supposing him to be acting as principal, may proceed against either the agent or the principal, when he discovers him, in the event of a right of action growing out of such changing of money. "The agent was there held liable because the principal was not known and trusted, but there would not have been the slightest objection, had the party so elected, to holding the real principal liable."

Partial and Qualified Ownership of Defendant.—In *People v. Civile*, 44 Hun

c. SUFFICIENCY OF AVERMENTS.—According to some authorities an averment that the defendant, being then and there the agent, etc., of a named person, did, by virtue of such employment, then and there, whilst he was so employed, receive and take into his possession, etc., sufficiently describes the ownership;¹ but it is the safer practice distinctly to aver ownership of the property by the principal or master,² and authorities are not wanting which hold that such distinct averment is indispensable.³

(N. Y.) 497, an indictment charging that the defendant had been intrusted with a named sum, by a named person, was upheld, although the defendant was entitled to commissions out of said sum for collecting; the court saying: "He was not relieved from responsibility on account of it for the reason that it might have been appropriated to the payment of his commissions * * * as long as there was no evidence in the case establishing the fact that it had been so used."

1. *State v. Fricker*, 45 La. Ann. 646; *Reeves v. State*, 95 La. 31, wherein *Thorington, J.*, says that under general statutes of embezzlement, it is unnecessary to aver ownership of property as a fact separate and distinct from the necessary inference of such ownership based on the relation of principal and agent, and the fact that the property came to the servant's possession by virtue of his employment, citing *Washington v. State*, 72 Ala. 272.

But see *State v. Roubles*, 43 La. Ann. 200, wherein *Breaux, J.*, says: "It cannot be presumed that the prosecuting witness is the owner, because of the allegation that the defendant was entrusted with its collection by him."

2. *Per Somerfield, J.*, in *Washington v. State*, 72 Ala. 272.

3. *Rex v. McGregor*, 3 B. & P. 106, 2 East P. C. 576, 2 Leach C. C. 932, wherein the indictment alleged in effect that the defendant, then and there being the clerk of named persons, by virtue of his such employment did receive, etc., on account of the said named persons, and that the defendant afterwards, to wit, etc., fraudulently and feloniously did embezzle and secrete, etc., the said sum, and so the defendant did feloniously steal, take, and carry away the said sum from the said master and employer of him, the said defendant, on whose account

the said sum was so taken into the possession of the said defendant. It was held that the indictment was bad, because it did not directly aver that the money embezzled was the property of the master, with the certainty required in an indictment for larceny. See also *Crane v. State*, 26 Tex. App. 482, wherein *Willson, J.*, says that "it is as essential, in an indictment for this offense, to allege the ownership of the money or property converted as it is in the case of theft;" *Grant v. State*, 35 Fla. 581, wherein it was held that it is not sufficient to allege that the defendant was intrusted with the property by a named person, and that he did, without the consent of such named person, fraudulently convert the same, citing 6 Am. & Eng. Encyc. Law 498d, *State v. Roubles*, 43 La. Ann. 200, and *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121.

See further *State v. Lyon*, 45 N. J. L. 272, holding that an indictment against the clerk of a school district, founded on N. J. Crimes Act, § 148, must allege the ownership of the property with the embezzlement of which the defendant is charged, and that an averment that the defendant did "embezzle certain money, property, and securities committed to his keeping as said clerk of said school district," etc., was insufficient; *Watson v. State*, 64 Ga. 61, in which case it is intimated that an indictment alleging that the defendant was agent of a corporation, and in that capacity received of the various persons named specified amounts, is, perhaps, open to the objection that it fails to allege that the money belonged to the corporation, or that the persons paying it over to the defendant were agents of the corporation. But in *Com. v. Bennett*, 118 Mass. 443, an averment that the defendant did receive and take certain money "of the said P & W" was considered a sufficient allegation that it was money

Continued Ownership of Property.—Where the indictment alleges the ownership of the property at the time of its delivery to the defendant, and that it was delivered to him to be safely kept until called for, there is no need of any special averment that the title continued in the parties who intrusted the property to the defendant, down to the time when the embezzlement was committed.¹

d. OWNERSHIP OF PUBLIC MONEY.—In an indictment against a public officer for the embezzlement of public moneys and funds in his possession, or under his control by virtue of his office, it need not be alleged that the money was the property of another, or whose money it was, these conditions being usually omitted in statutes declaring what misappropriation or fraudulent conversion by public officers shall constitute larceny.²

e. OWNERSHIP BY CORPORATION.—An indictment charging

and property of P & W, *citing* Eastman *v.* Com., 4 Gray (Mass.) 416, which was an indictment for larceny; and in Jackson *v.* State, 76 Ga. 551, averments that the defendant was the president of a corporation and had the general management of its business and the control of its funds, and that he had in his trust, custody, and control sums of money belonging to it, were considered sufficient to make it appear that the money was intrusted to the defendant by the corporation.

1. Com. *v.* Butterick, 100 Mass. 1, *citing* Rex *v.* Johnson, 3 M. & S. 539.

2. State *v.* Walton, 62 Me. 106, wherein an indictment against a collector of taxes was based on Rev. Stat. Me., c. 120, § 7, the court saying: "As against such an officer, it is sufficient to allege and prove the fraudulent conversion to his own use of any money that comes into his possession or under his control by virtue of his office. As against a public officer the allegation of these acts and facts will suffice without going further, and without alleging that the money was the property of another, or whose money it was, or that the offender was not an apprentice, nor less than sixteen years old, or that he appropriated the money without the consent of any of the inhabitants of the municipal corporation whose officer he was."

But where the statute denounces the embezzlement of money belonging to a county, city, or town, that may have come into the custody or possession of an officer of the municipality, it is necessary to allege that the money con-

verted was owned by the county, city, or town, as was held in Crane *v.* State, 26 Tex. App. 482, in which case the indictment was drawn under Penal Code Tex., art. 103.

Money Belonging to Particular Fund.—In Brown *v.* State, 18 Ohio St. 496, an indictment against a county treasurer was bottomed on Act Ohio, April 12, 1858, § 15, denouncing embezzlement by any officer or other person charged with the collection, safe-keeping, etc., of the public money belonging to the state, or to any county, township, or organized city or village. It was held unnecessary to state particularly what several portions of the money embezzled belonged to the respective municipalities named as owners of the money, and that it was sufficient to charge that the money belonged to the several municipalities named therein, or to one or more of them. In State *v.* Hays, 78 Mo. 600, it was held that an indictment against a township trustee properly alleged that the money embezzled belonged to the school funds of a named township, notwithstanding the fact that the moneys held by the defendant were distributable among the several school districts.

See also State *v.* Spaulding, 24 Kan. 1, wherein a city clerk, according to a custom, had collected certain money for licenses and had converted the same instead of paying it over to the city treasurer, and it was held that the indictment properly charged the embezzlement of money belonging to the city rather than of money belonging to the various licensees.

the embezzlement of money belonging to an incorporated company need not set forth the charter or acts of incorporation of the company, nor need it allege that the same was incorporated under the laws of any state or foreign power.¹

f. PARTNERSHIP AS OWNER.—Where the property embezzled was owned by a partnership the Christian names of the partners need not be stated, it being sufficient to give their initials, together with their surnames.²

1. *Smith v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 236; *Stallings v. State*, 29 Tex. App. 220, wherein it was considered sufficient to describe the owner as "an incorporated company, to wit, the Singer Manufacturing Company," following *White v. State*, 24 Tex. App. 231. See also *People v. Mahlman*, 82 Cal. 585, holding that an indictment against an officer of an association need not give the names of the persons composing the association where, under the statute, he would be none the less guilty if he were a member of the association, and, as such member, a part owner of the money embezzled.

Harmless Misnomers.—In *Jackson v. State*, 76 Ga. 551, the corporation owning the property embezzled was named in its charter "Enterprise Manufacturing Company," and in the indictment it was called "The Enterprise Manufacturing Company," and it was held that there was no variance. See also *State v. Goode*, 68 Iowa 593, holding that where the money embezzled belonged to the Wabash, St. Louis & Pacific Railroad Co., the misnomer of the corporation in the indictment as the Wabash, St. Louis & Pacific Railway Co. was immaterial.

Unincorporated Club.—In *Reg. v. Tankard*, 10 R. 149 (1894), 1 Q. B. 548, the defendant had embezzled property which belonged to a club of which he was a member, which club had no legal existence as a company, association, or copartnership, and it was held that the property was properly laid in the D F Club, consisting of the said defendant and J and others.

Municipal Corporations.—An indictment against an officer of a city need not allege that the city was incorporated unless such an allegation is required by statute. *Steiner v. State*, 33 Tex. Crim. Rep. 291, wherein the indictment was drawn under Penal Code Tex., art. 786, citing *Price v. State*, 41 Tex. 215, in which case the

defendant was charged with the theft of property belonging to a railroad company, and the court said: "It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name, as was done in this case." In *People v. Potter*, 35 Cal. 110, it was held that a municipal corporation which by statute was declared to be "the mayor and common council of the city of San Jose" was improperly described as the "city of San Jose," but as the indictment alleged that the person injured was a municipal corporation in a named county, existing under and by virtue of certain statutes, the indictment was sufficient under a statute which provided that where the offense charged is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured shall not be material.

A school district which owned the money embezzled may be described by giving the number of the school district and the county to which it belonged, as indicated in the statute (Comp. Stat. Neb., c. 79, § 2) providing that every duly organized school district shall be a body corporate, and it is not necessary to set forth the steps taken to organize a school district. *State v. Knox*, 17 Neb. 683. In *State v. Hays*, 78 Mo. 600, however, it was held that an indictment against a township trustee based on Wagn. Stat. Mo. 459, art. 3, § 41, under the assumption that the county was acting under the township organization, must aver that the county was so organized. But the corporation must be given its legal, official designation. Thus, in *Alden v. State*, 18 Fla. 187, it was held that "the board of public instruction for the county of—, state of Florida," should not have been described as "the board of public instruction."

2. *State v. Butler*, 26 Minn. 90. And it was held also in this case that the

9. Method by Which the Conversion was Accomplished—*a.* IN GENERAL.—Where the statute denounces embezzlement in a particular manner, the indictment must charge that the conversion was accomplished by the method pointed out in the statute.¹

b. WORDS USED IN DESCRIBING EMBEZZLEMENT OR CONVERSION.—The act of conversion must be distinctly alleged,² and it is generally safe to allege that the defendant did embezzle, or that he did fraudulently convert, in the words of the statute,³ without averring in the body of the indictment that the defendant did feloniously steal, take, and carry away.⁴

Acts Inconsistent with Trust.—It would seem that where the indict-

partnership itself might be described as the firm of "J S R, Sons & Co.," without giving R's Christian name, there being nothing to show and no presumption that the name given was not the firm name, and the whole of it.

1. *State v. Clarkson*, 59 Mo. 149, wherein the indictment was bottomed on Wagn. Stat. Mo., ed. 1872, 459, § 41, denouncing the investment of public funds by any state officer, etc., in any kind of property or merchandise, etc.

Aiding and Advising Embezzlement.—In *U. S. v. Mills*, 7 Pet. (U. S.) 138, the defendant was indicted under Act U. S. March 3, 1825, § 24, for advising, procuring, and assisting the embezzlement of mail matter by a mail carrier, the indictment charging that the defendant did then and there procure, advise, and assist S to secrete, embezzle, and destroy a letter, etc., with which the said S was intrusted, the said S being at the time of such procuring, advising, and assisting, then and there a person employed as a carrier of the mail, etc. It was held that a distinct, substantive, and independent averment of the fact that the mail carrier did in fact commit the offense of robbing the mail is not necessary, and that the indictment sufficiently set out that the offense had been committed by S.

2. *State v. Farrington*, 59 Minn. 147; *Com. v. Smart*, 6 Gray (Mass.) 15, wherein the indictment, after describing the property and alleging that it had been intrusted to the defendant, charged that the defendant "feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded," etc., and was considered insufficient, because of the apparently undesigned and accidental omission to state that the property was embezzled and converted.

3. *Reeves v. State*, 95 Ala. 31, wherein Thorington, J., says that the word "embezzle" has "a technical meaning, and that meaning suggests the character and scope of the proof required to sustain the charge. It involves two general ingredients or elements: First, a breach of duty or trust in respect of money, property, or effects in the party's possession, belonging to another; secondly, the wrongful or fraudulent appropriation thereof to his own use." See also *U. S. v. Lancaster*, 2 McLean (U. S.) 431, which was an indictment under Act U. S. March 3, 1825, § 21, for the embezzlement of mail matter. It was held that an allegation that the defendant did secrete and embezzle, etc., technically charged the offense, the court saying: "The word embezzle is a significant word; it is used in the statute and means to steal by breach of trust, which is a most appropriate term, and more descriptive of the offense than any other."

Words Included in Word "Embezzle."—Under a statute providing that any servant, clerk, etc., who shall "wrongfully use, dispose of, conceal, or otherwise embezzle," etc., it is sufficient to use the word "embezzle" alone, without charging that the defendant used, disposed of, and concealed, since the word "embezzled" means all that the other words do, and something more. *State v. Wolff*, 34 La. Ann. 1153.

Acts Alleged Disjunctively.—An indictment alleging that the defendant did fraudulently convert the property for his own use *or* otherwise dispose of the same, although it follows the words of the statute, is bad, because of the use of the disjunctive, and also because it is uncertain as to the other disposition of the property. *Sanders v. State*, 86 Ga. 717.

4. *Rex v. Johnson*, 3 M. & S. 539.

ment sets forth that the property was delivered to the defendant in trust, or for a particular purpose, it is not sufficient to allege merely that the defendant did embezzle, or that he did convert, but the acts of the defendant that were inconsistent with the trust confided in him should be specifically set forth.¹

Embezzlement by Mere Agent or Servant.—Where, however, the defendant has received property merely as the agent of the owner, or in trust merely to deliver or pay it to the owner, no other description of the offense than that he did embezzle, etc., or that he did convert to his own use, etc., is necessary.²

Statutes Dispensing with Particulars.—In some states it is provided by statute that the particulars of the embezzlement need not be given.³

c. APPROPRIATION TO OWN USE.—An indictment charging in the words of the statute that the defendant did wrongfully use, dispose of, conceal, and embezzle, is sufficient, without the use of the words “appropriate to his own use,” since embezzlement means appropriation to one’s own use.⁴

1. *State v. Brandt*, 41 Iowa 593, wherein the statute denounced conversion “to his own use in any way whatever,” and it was considered insufficient to charge merely that the defendant did convert to his own use, etc., and that the manner in which the money was converted should be alleged, so as to enable the court to determine whether, in legal contemplation, there had been an unlawful conversion or not; *People v. Cohen*, 8 Cal. 42; *State v. Griffith*, 45 Kan. 142, wherein Johnston, J., says that “acts of the defendant that were inconsistent with the trust confided to him,” should be alleged. See also *State v. Longworth*, 41 Tex. 162, in which case, the defendant having been intrusted with property for the purpose of taking it from one named place to another named place, the fact that the defendant did not deliver the same in accordance with the terms of the bailment was not sufficiently charged by an averment merely that he did then and there convert to his own use, etc. See further *Hoyt v. State*, 50 Ga. 313, wherein it was held that, under an indictment making a general charge of fraudulent conversion, the prosecution may prove that the defendant had converted money intrusted to him, but that it is not permissible to show that the accused had reported to the bailor special payments as having been made to particular persons, in the performance of his duty as bailee, and that

such payments were not in fact made to the amount so reported, or to show that there were no such persons as those to whom the payments were reported to have been made. Such facts should be specially alleged.

2. *Hoyt v. State*, 50 Ga. 313; *State v. Munch*, 22 Minn. 67.

Objection Not Available on Motion in Arrest.—The objection that the act of conversion is not sufficiently set forth is available, if at all, on an exception or demurrer, and not on motion in arrest. *Gibbs v. State*, 41 Tex. 491.

3. *Com. v. Butterick*, 100 Mass. 1, wherein the indictment, although no particulars of the embezzlement were given, was upheld under Gen. Stat. Mass., c. 161, § 42, providing that it shall be “sufficient to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with such intent;” *Ker v. People*, 110 Ill. 646, wherein the indictment was bottomed on Cr. Code Ill., § 82. See also *Goodhue v. People*, 94 Ill. 37.

4. *State v. Wolff*, 34 La. Ann. 1153. See further *Com. v. Leisenring*, 11 Phila. (Pa.) 389, 32 Leg. Int. (Pa.) 160. The indictment was drawn under a statute (Penal Code Pa. 1860, § 117) denouncing the failure of an officer of a corporation to cause a full and proper entry of the money received by him to be made in the books and accounts of the company, and it was considered sufficient to charge the receipt of money in an official capacity,

d. WANT OF OWNER'S CONSENT.—It need not be alleged that the misappropriation was without the consent of the owner, where want of consent is not by statute made an ingredient of the offense.¹ But it is otherwise where the statute provides that the conversion must have been without the consent of the owner.²

e. DEMAND AND REFUSAL TO PAY.—It is necessary to allege a demand made upon the defendant to pay the money or return the property, and his refusal to do so, only when the statute makes such demand and refusal elements of the crime.³

and the fraudulent omission to have it entered in the books and accounts of the company, without charging to whose use, whether his own or another's, the defendant appropriated the money. But see *U. S. v. Britton*, 107 U. S. 655, wherein the indictment was against an officer of a national banking association, and was based on Rev. Stat. U. S., § 5209, denouncing the embezzlement and misapplication of funds, etc. It was held that the statute intended misapplication for the use and benefit of the defendant and some company and person other than the banking association, and that the indictment was bad, because it charged mere maladministration of the officers of the bank rather than conversion of its moneys and funds to the defendants' use or to the use of some one else.

Conversion to Use of Partnership.—A conversion to the use of the firm of which the accused is a member is to his own benefit, and "to his own use" as alleged in the indictment. *Carr v. State*, 104 Ala. 43.

1. *State v. Walton*, 62 Me. 106, wherein the indictment was bottomed on a statute denouncing embezzlement by a public officer of money in his possession, or under his control by virtue of his office. See also *Alderman v. State*, 57 Ga. 367, wherein it was held under Code Ga., §§ 4422, 4424, that an indictment for larceny, after trust, charging that the defendant did fraudulently convert the goods intrusted to him to his own use, need not charge that the act was done without the consent of the owner and bailor, and to his injury, and without paying him on demand the full value thereof, because the clauses of the statute relative to such ingredients apply to other dispositions of the goods than to the bailee's fraudulent conversion to his own use.

2. *State v. Foster*, 11 Iowa 291, wherein an allegation that the defendant did embezzle and fraudulently convert to his own use was insufficient; *State v. Mims*, 26 Minn. 191, wherein the indictment was bottomed on Gen. Stat. Minn., c. 95, § 230, as amended by Laws of 1876, c. 55, and it was considered insufficient to charge that the defendant did feloniously embezzle and convert to his own use by then and there using and disposing of the money intrusted to him to his own use and benefit; *State v. Longworth*, 41 Tex. 162, in which case an allegation that A intrusted an article which was the property of the state of Texas to the defendant, and that the defendant did then and there convert the same to his own use, without the consent of the owner, was held bad.

3. In the following cases no such averment was necessary: *Wallis v. State*, 54 Ark. 611; *Snell v. State*, 50 Ga. 219, following *McCoy v. State*, 15 Ga. 205; *State v. Flournoy*, 46 La. Ann. 1518, wherein the indictment was bottomed on Rev. Stat. La., § 905, *distinguishing* *State v. O'Kean*, 35 La. Ann. 901, wherein the question was as to the necessity of proving failure of the accused to pay over the money on demand, and following *State v. Fricker*, 45 La. Ann. 646, and *State v. Roubles*, 43 La. Ann. 200, wherein such an allegation was not insisted upon; *State v. Porter*, 26 Mo. 201; *Edelhoff v. State* (Wyoming, 1894), 36 Pac. Rep. 627, *citing* *State v. Tompkins*, 32 La. Ann. 623; *Wallis v. State*, 54 Ark. 611; *State v. New*, 22 Minn. 76; *Hollingsworth v. State*, 111 Ind. 289.

But in *State v. Munch*, 22 Minn. 67, wherein the indictment was against a state treasurer, failure to pay over the money to his successor in office on demand being an essential ingredient of the offense (Const. Minn., art. 9, § 12; Gen. Stat. Minn., c. 9, § 6), it was

f. THE INTENT.—The indictment must with certainty and precision charge the defendant with acts of commission or omission, under the circumstances and with the intention mentioned in the statute;¹ but where the statute does not in specific words make criminal intent an element of the offense, further than it is necessarily included in the words “embezzle, convert to his own use, or make way with and secrete,” fraudulent intent need not be charged in so many words.²

considered insufficient to aver that the defendant did embezzle, etc., by wholly neglecting to account for the money and to pay over the same, or any part thereof, to his successor in office.

1. *Per* Green, C. J., in *State v. Stimson*, 24 N. J. L. 9; *Peacock v. State*, 36 Tex. 647, wherein the indictment was bad, although the omission to charge the fraudulent intent was accidental, the averment being that the defendant did unlawfully misapply and convert, “with fraudulent [*sic*] then and there to feloniously appropriate the same;” *U. S. v. Britton*, 107 U. S. 655, holding that an indictment against an officer of a national banking association, based on Rev. Stat. U. S., § 5209, should aver an intent to injure and defraud.

Intent to Deprive or Defraud.—Under a statute (Penal Code Minn., § 415) which reads that “a person who with the intent to deprive or defraud the true owner,” etc., it is sufficient to allege that the defendant did convert and appropriate with intent to deprive, without alleging that it was done also with intent to defraud. *State v. Comings*, 54 Minn. 359.

2. *State v. Trolson*, 21 Nev. 419, wherein the indictment was framed under a statute providing that any person, or any agent, etc., who shall steal or appropriate money, etc., intrusted to him, “in any manner or for any other purpose than that for which the same was deposited or intrusted, shall be guilty of embezzlement.” It was sufficient to charge that the defendant did appropriate said sum of money to his own use and for his own benefit, and did appropriate the same in a manner and for purposes other than that for which the same was intrusted to him, etc., and that he thereby did embezzle said sum of money, without charging that the defendant appropriated the money wilfully, feloniously,

and with intent to use the same; *citing* the following cases: *State v. Wolff*, 34 La. Ann. 1153; *State v. Combs*, 47 Kan. 136; *State v. Noland*, 111 Mo. 473; *Leonard v. State*, 7 Tex. App. 435; *Halsted v. State*, 41 N. J. L. 589; *State v. Hopkins*, 56 Vt. 260; *State v. Kroeger*, 47 Mo. 530; *State v. Stimson*, 24 N. J. L. 9; *State v. Flint*, 62 Mo. 393; *McKane v. State*, 11 Ind. 195, and *Riley v. State*, 32 Tex. 763. In *State v. Noland*, 111 Mo. 473, the indictment was bottomed on Rev. Stat. Mo. 1889, § 3555, which did not in specific words make criminal intent an element in the offense further than it was necessarily imputed in the words “convert to his own use,” and “shall make way with or secrete.” It being averred that the defendant did unlawfully, fraudulently, and feloniously convert to his own use and embezzle, an objection that the indictment was insufficient because it did not charge the intent with which the defendant converted the money to his own use was overruled. See further *State v. Combs*, 47 Kan. 136, wherein an allegation that the defendant “did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete,” was upheld, notwithstanding failure to charge intent in so many words, the court saying: “It was hardly necessary to allege that the money was embezzled and converted with the intention to embezzle and convert the same. It is difficult to conceive how he could have honestly and innocently embezzled and stolen the money intrusted to him.”

Fraudulent Embezzlement and Conversion.—In *State v. Jamison*, 74 Iowa 602, an allegation that the defendant did wilfully, unlawfully, feloniously, and fraudulently embezzle and convert was not considered open to the objection that it failed to state that the conversion was fraudulent.

Feloniously.—The word “embezzle” means to appropriate feloniously, and it need not be alleged that the act was feloniously done;¹ but it is unquestionably the safest practice to charge that the embezzlement or conversion was felonious.²

g. PECULIAR AVERMENTS IN INDICTMENTS AGAINST PUBLIC OFFICERS.—It is not sufficient to charge a wilful, fraudulent, and felonious conversion simply, under a statute denouncing embezzlement by a public officer, where failure to pay over the money that has come to his hands, when lawfully required to do so, is an ingredient of the offense, but such fact must be alleged.³ And

Intent to Deprive Owner of Property —
Texas.—It is no part of the description of the offense of embezzlement that the indictment should allege, as in theft, that it (the property) was taken with the intent to deprive the owner of the property or its value, and to appropriate it to the benefit of the taker. *Per* Winkler, J., in *Leonard v. State*, 7 Tex. App. 417.

See also *Gibbs v. State*, 41 Tex. 491, in which case the defendant was charged with converting to his own use, with intention of depriving the owner of the value of the property. It was held that the objection that it was not charged that the intent was to deprive the owner of the property, if available at all, should have been made by exception or demurrer, and not by motion in arrest.

Washington Statute.—Under Code Wash., § 1244, declaring that the information shall be sufficient if the necessary facts are so stated that a man of common understanding can determine the offense with which he is charged, an information averring that the defendant did unlawfully, fraudulently and feloniously convert to his own use, and did fail to account, etc., is not open to the objection that it fails to allege that the defendant converted to his own use with intent to defraud the owner of the property. *State v. Whiteman*, 9 Wash. 402.

New Jersey Statute.—Where, by statute (N. J. Crimes Act, § 148), embezzlement by an officer of the state or of any public or private corporation, “with intent to defraud the state,” etc., is denounced, the indictment must allege an intent to defraud, and a charge that the defendant did embezzle, etc., and did unlawfully and fraudulently dispose of, etc., is not sufficient, as the words “fraudulently dispose of” have no signification broader than the word

“embezzle.” *State v. Lyon*, 45 N. J. L. 272.

1. *U. S. v. Greve*, 65 Fed. Rep. 488; *People v. Garcia*, 25 Cal. 531. See also *U. S. v. Lancaster*, 2 McLean (U. S.) 431, wherein the indictment was against a post-office employee, and was bottomed upon Act U. S. March 3, 2815, § 21, the words of the statute being that if any person, etc., “shall steal, or take” any mail matter that may have come into his possession. It was sufficient to allege that the defendant did unlawfully take. See further *State v. Hill*, 91 N. Car. 561, wherein it was held that as the statute did not fix the grade of the crime, or declare it to be a felony, the offense was merely a misdemeanor, and that it was sufficient to charge that it was committed “wilfully, knowingly, and corruptly,” omitting the word “feloniously.” See *contra*, *Stropes v. State*, 120 Ind. 562, holding that an indictment against a public officer for failure to pay over moneys remaining in his hands to his successor in office should allege that the defendant feloniously failed to pay over such money.

2. *Per* Priest, J., in *U. S. v. Greve*, 65 Fed. Rep. 488.

3. *Hemingway v. State*, 68 Miss. 401, wherein the statute (Code Miss., § 2787) read that if any officer, etc., shall unlawfully convert, etc., and shall not, when lawfully required to pay over such money, immediately do so, etc., and it was held that the indictment should charge both an unlawful conversion and also failure to pay over the money converted when required; *State v. Hebel*, 72 Ind. 361, wherein it was held that an indictment bottomed on 2 Rev. Stat. Ind. 1876, p. 250, should allege that the defendant, upon a proper demand, after his term of office had expired, had fraudulently failed or refused to account for and

it must be alleged that the money was withheld for the length of time denounced by the statute.¹

Where the Offense Is Failure to Pay Over the Money to the Defendant's Successor in office, the indictment must directly aver that the defendant's term of office had expired when the money was demanded of him.² But the failure of the defendant to pay over money to his successor in office need not be charged when the same is not expressly made an ingredient of the offense.³

pay over the money to his successor in office; *Com. v. Lewis* (Ky. 1889), 12 S. W. Rep. 266, wherein the indictment was against a county judge who, by virtue of his office, was the custodian of money collected by him for vacant land, and it was held necessary to charge, not only that the defendant had used the money for his own benefit, but that he had failed and refused to account for it, or to pay it over at the time, in the manner, and for the purpose required by law; *State v. Parsons*, 54 Iowa 405, wherein it was held that an indictment against a treasurer of an independent school district, bottomed on Rev. Stat. Iowa 1860, § 4243, should charge that the defendant failed to account for money or funds which he was alleged to have converted, *following* *State v. Brandt*, 41 Iowa 600; *State v. Adamson*, 114 Ind. 216, in which case the indictment was against an administrator, and was bottomed on Rev. Stat. Ind. 1881, § 1952, denouncing as embezzlement failure to pay over "when legally required by the proper person or authority," and it was held insufficient to charge merely that the defendant had fled from the state and secreted himself, and had failed to pay over the money in his hands to one of his sureties, upon being demanded of by the surety to do so. See also *State v. Hunnicut*, 34 Ark. 562, wherein it was held that an indictment charging a county treasurer with failure to pay over the money which he had been by order of the court required to pay over to his successor was insufficient under the statute, because failure to pay over where there had been no conversion or misapplication of the money was not, of itself, sufficient to constitute the offense, *followed* in *State v. Govan*, 48 Ark. 76.

1. *State v. Nicholson*, 67 Md. 1. But in this case an indictment charging that the defendant, as collector of

taxes, on a named day, received, etc., and that he did then and there unlawfully and wilfully detain the said sum in his possession, and did neglect to pay the said sum into the treasury of the state for the space of six months after he had so, as aforesaid, collected and received the said amount, was not open to the objection that it did not charge the detention of the money six months after the same was collected.

2. *State v. Hebel*, 72 Ind. 361, in which case averments that a named person had been elected to the office, and that after being commissioned and having qualified he entered and took possession of the office, and then and there demanded the money of the defendant, were not considered equivalent to an allegation that the defendant's term had expired, and that such other person's had begun, when the demand was made, as, for aught that was shown, premature possession of the office may have been taken by the defendant's alleged successor. But in *People v. Rogerson*, 4 Utah 231, an indictment against a collector of taxes, charging that the defendant, as such collector, feloniously and wilfully refused to pay to the county treasurer of B county, then and there being a public officer thereof, was not open to the objection that it failed to show that there was a county treasurer qualified and authorized to receive the money.

Statement of Accounts by Public Officer.—Where a statute (Act Ark. July 9, 1868, as amended by Act Feb. 20, 1883, § 1 *et seq.*; Gantt's Dig. 1371), denouncing embezzlement by state and other officers, makes his failure or omission to pay the amount found due by him upon settlement an ingredient of the offense, such fact must be alleged. *State v. Govan*, 48 Ark. 76, *following* *State v. Hunnicut*, 34 Ark. 562.

3. *State v. Noland*, 111 Mo. 473, wherein the indictment was bottomed on Rev. Stat. Mo., § 3555, denouncing

h. RECEIVING EMBEZZLED PROPERTY.—An indictment for receiving embezzled property need not charge the facts constituting the embezzlement by which the property was unlawfully procured in the first instance.¹

10. Time of Commission of Offense.—The indictment must allege the time at which the offense was committed, but the exact time need not be alleged, and it is sufficient to show that the offense was committed within a period not covered by the statute of limitations.²

fraudulent conversion, or failure to pay over money to his successor in office, *distinguishing* State *v.* Porter, 26 Mo. 201, which was a prosecution for failure to pay over money; State *v.* Clarkson, 59 Mo. 149, wherein the statute (Wagn. Stat. Mo., p. 459, § 41) denounced conversion to his own use by any state officer, etc., and also the use by him of public money by way of investment, etc.

Loaning Public Money.—An indictment framed under a statute denouncing the loaning of public money without authority of law should not charge the offense merely in the words of the statute, but should state the person or persons to whom the money was loaned. State *v.* Brandt, 41 Iowa 593.

Negating Repayment of Money as Allowed by Statute.—In State *v.* Nicholson, 67 Md. 1, the indictment was framed under a statute denouncing the neglect by a collector of taxes to pay money into the treasury of the state for the space of six months, and providing punishment, unless the amount for which the defendant is a defaulter be sooner paid. It was held that it need not be averred that the money was still detained by the defendant, for the reason that the payment of the money before or after the finding of the indictment is a matter to be set up by way of defense.

Negating Good Cause for Default.—An indictment under Code Ala. 1876, § 4266, which makes it an embezzlement for any tax collector to fail to make return of the tax money in his hands, as provided by law, "except for good cause," need not negative the existence of an excuse for his failure to make return. Britton *v.* State, 77 Ala. 202.

1. People *v.* Stein, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 202; Hodges *v.* State, 22 Tex. App. 415, citing Brothers *v.* State, 22 Tex. App. 447,

where it was held that in an indictment for receiving stolen property it is not necessary to allege the elements of the theft, but that it is sufficient to follow the language of the statute.

2. State *v.* Lyon, 45 N. J. L. 272. In Jackson *v.* State, 76 Ga. 551, an allegation that the defendant, on the first day of November, 1882, etc., did then and there embezzle, steal, etc., by receiving and depositing the money aforesaid in certain banks, at divers times and in divers sums, and by checking out the same as president of the corporation which owned said money, and converting it to his own private use, was considered sufficiently certain as to the time when the offense was committed.

In State *v.* Noel, 5 Blackf. (Ind.) 548, the indictment was found at the March term, 1840, and charged that the defendant had certain money in his hands on the 1st of January, 1840, and that he failed to pay it over within sixty days from the time at which he received it, in violation of his duty under the statute. An objection that the indictment did not show that the offense was committed within two years before the finding of the bill—the period limited by statute—was overruled, the court saying: "The fair construction of this language is that the failure took place after the first of January, and consequently within the limit prescribed by the statute."

California Statute.—Penal Code Cal., § 955, provides that the precise time at which the offense was committed need not be stated. People *v.* Bidlemah, 104 Cal. 608.

Indictment Prematurely Found.—Under a statute (Act Ga. Dec. 14, 1871) making it a criminal act for one who legally receives money or property belonging to the state to fail to pay or deliver the same to the treasurer within ten days after demand, an

Time of Receiving Property.—The time at which the defendant received the property with the embezzlement of which he is charged need not, it seems, be stated.¹

Proving Time as Laid.—And in some states it is expressly provided by statute that the time need not be proved as laid.²

11. Averments as to Venue.—The indictment must show that the offense was committed in the county in which the grand jury was organized;³ but this is sufficiently done by an averment that the defendant in the county aforesaid did then and there embezzle, steal, etc.⁴

indictment returned by the grand jury five days after the demand therein is alleged to have been made, is bad. *Hoyt v. State*, 50 Ga. 313.

1. *State v. Noel*, 5 Blackf. (Ind.) 548, in which case the indictment charged a justice of the peace with failure to pay over money received by him for seminary purposes as required by the statute, and it was held immaterial that the indictment did not set forth the time at which he received the money. Said the court: "The offense consists in retaining money belonging to the seminary fund more than sixty days after its reception. The indictment alleges that on a particular day the money was in the hands of the defendant as a justice of the peace, and that he neglected to pay it over to the proper agent within sixty days after he had received it. In describing the offense, the indictment has adopted substantially the language of the statute, and in this instance we think that is sufficient."

Allegations and Proof.—Upon the necessity of proving the time as laid in the indictment, see *infra*, IV. 2. *Time*.

2. *People v. Bidleman*, 104 Cal. 608, holding that under Penal Code Cal., § 955, providing that the precise time at which the offense was committed need not be stated, where it is charged that the offense was committed on or about December 31, 1891, and before May 1, 1892, it may be shown that the defendant received money March 7, 1892, for which he never accounted; *State v. New*, 22 Minn. 76, holding under a similar statute (Gen. Stat. Minn., c. 108, § 7) that under an indictment charging the commission of the offense August 20, 1873, it may be shown that the offense was committed July 25, 1873. See also *State v. Kortgaard* (Minn. 1895), 64 N. W. Rep. 51, in which case it was held under a

statute (Gen. Stat. Minn. 1894, § 7262) providing that the indictment may allege generally the embezzlement of money without specifying any particular, and that "on the trial evidence may be given of any such embezzlement committed within six months next after the time stated in the indictment," that evidence might be given of an act of embezzlement committed on the day stated in the indictment, and also of any other acts of embezzlement committed within six months next after that date, the court refusing to concur in the construction put upon the statute by the defendant, *viz.*, that if the state introduced evidence of an act of embezzlement committed on the day alleged in the indictment it would be confined to evidence of embezzlement committed on the particular day.

3. *People v. Horton*, 62 Hun (N. Y.) 610.

4. *Jackson v. State*, 76 Ga. 551; *Com. v. Concannon*, 5 Allen (Mass.) 502, holding that an indictment charging that a named person of D, in the county of N, at D, in the county of N, did deliver to the defendant certain property to be delivered by the defendant to a named person at B, in the county of S, and that the defendant did then and there take and receive said property into his possession, and that the defendant afterwards at D, in the county of N, and before the said property was by him delivered, etc., at B, in the county of S, feloniously did embezzle and fraudulently convert the same to his own use, etc., charged the commission of the offense in the county of N. But an indictment charging that the defendant, in a named county, on a day named, was agent of a named person, and that as such agent he was then and there intrusted with a certain sum of money, and that thereafter, on a day

Indictment for Receiving Embezzled Property.—An averment as to the time and place when and where the embezzlement was committed is not necessary in an indictment for receiving embezzled property, knowing the same to have been embezzled.¹

12. Duplicity and Misjoinder—*a.* IN GENERAL.—The indictment must not be duplicitous, and it is improper to charge the defendant with several offenses in the same count, even where the several offenses are each embezzlement.² But it is permissible to charge several separate and distinct offenses in separate counts where all of the offenses are of the same general character.³ Thus there is no misjoinder where the indictment charges in several counts different acts of embezzlement,⁴ where it appears upon the face

named, the defendant did unlawfully convert the same to his own use, is bad, because it does not state where the offense was committed; *State v. Mayberry*, 9 Wash. 193. To the same effect as the last case is *People v. Horton*, 62 Hun (N. Y.) 610.

Indictment against Collector of Taxes.—In *People v. Rogerson*, 4 Utah 231, an indictment describing the defendant as the collector of taxes of B county, and charging that he neglected and refused to pay over money which he collected as taxes, was equivalent to an averment that he neglected and refused to make payment in B county, in which county he had his office and it was his duty to make payment, and was considered good.

Missouri Statute.—In *State v. Arnold* (Mo. 1886), 2 S. W. Rep. 269, the indictment was found against a collector of state and county revenue of a named county of the state of Missouri, and, after setting out the defendant's official capacity, charged that the defendant then and there had in his custody and control certain money, and that he did then and there unlawfully, fraudulently, and feloniously make way with and convert to his own use, etc., and it was held that the venue was sufficiently laid, under Rev. Stat. Mo., § 1813, providing that it shall not be necessary to state any venue in the body of the indictment, but the county named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same.

1. *People v. Stein*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 202.

2. *Com. v. Mentzer*, 162 Pa. St. 646; *State v. Hodges*, 45 Kan. 389. See also *State v. Palmer*, 32 La. Ann. 565, in which case the indictment was du-

plicitous because it joined in the same count the offense denounced by Rev. Stat. La., § 907, *viz.*, embezzlement by a bank officer, and also the offense denounced by section 905, of wrongfully using, disposing of, and concealing money intrusted to the defendant by virtue of his employment by another as servant, clerk, broker, etc.

But in *State v. Lillie*, 21 Kan. 728, it was held that an indictment charging the defendant with the embezzlement of notes received by him as "agent, servant, employee, and bailee," did not charge two separate and distinct crimes, one of embezzlement as an agent, servant, and employee, and another of embezzlement as bailee, under sections 88 and 90 respectively, of Laws 1873, pp. 177, 178, since the word "bailee" was merely surplusage, as the person could not hold property as an agent, servant, and employee, without also holding it in the capacity of a bailee, and it was immaterial whether or not he could have been convicted of embezzlement as a bailee under section 90.

3. *State v. Hodges*, 45 Kan. 389, wherein the indictment contained eight different counts, some of which charged actual embezzlement and the others that the defendant secreted and made way with the property with intent to convert the same.

4. *Bullock v. State*, 10 Ga. 47, wherein the only difference between the counts was that some of them charged the defendant with stealing bank bills as the cashier of a bank after a trust delegated, while others charged him with stealing the same without being employed in any official capacity, and it was considered immaterial that the punishment for one offense

of the indictment that the language of each count is identical as regards the time, place, persons, and property, and where it is apparent that the purpose of the prosecutor is to convict the defendant of one offense only, according as the proof may develop.

b. **SUCCESSIVE ACTS CONSTITUTING ONE OFFENSE.**—Where the accused has been guilty of a series of peculations, an indictment charging the embezzlement of the entire amount, and setting out with minute particularity the circumstances attending the transaction from its commencement to its consummation, is not open to the objection that it charges more than one offense.¹ In

was not less than two years nor more than seven, while the punishment for the other offense was not less than one year nor more than five years; *State v. Spaulding*, 24 Kan. 1, a case where each count charged the embezzlement of the same money at the same time, and as the property of the same party, the only difference being in the relation which the defendant was charged to have sustained to the party whose property was embezzled, the allegations being varied to meet proof that the defendant was an officer, an agent, a bailee, or a clerk; *State v. Bailey*, 50 Ohio St. 636, wherein one indictment charged the embezzlement of goods which the defendant had received as a traveling salesman, and the other the embezzlement of money produced by the sale of the goods, the court saying: "The law permits this multiplication of counts in an indictment, where each states, though with variations of detail, the same offense, to prevent that failure of justice which might follow if the prosecution should be confined to a single count, and the proof should vary from the allegations of that count in some essential particular." To the same effect as the foregoing cases are *State v. Gilmore*, 110 Mo. 1; *Heller v. People*, 2 Colo. App. 459, wherein one count charged embezzlement by the defendant as an agent, and the other count charged him as bailee; *State v. Bancroft*, 22 Kan. 197, wherein one count charged that the defendant, as agent of a corporation, embezzled, etc., and the other that the defendant, as agent of the corporation, failed, neglected, and refused to pay over and account, etc.; *U. S. v. Brent*, 17 Int. Rev. Rec. 53 (3 Abb. Nat. Dig. 655); *State v. Malim*, 14 Nev. 288.

Preliminary Examination.—In *State v. Spaulding*, 24 Kan. 1, the indictment contained several counts, each

charging the embezzlement of the same money at the same time, and as the property of the same party, the only difference between them being in the relation which the defendant was charged to have sustained to the party whose money was embezzled. In one he was called an officer, in another a clerk, in another an agent, in another a bailee, etc. The fact that the complaint upon which he had a preliminary examination contained but one charge against him, *viz.*, as an officer, was considered immaterial.

1. *Jackson v. State*, 76 Ga. 557. See also *State v. Broughton*, 71 Miss. 90, wherein an indictment charged a clerk with the embezzlement of moneys received by him for his employer's custody, and the same was not considered duplicitous because it unnecessarily alleged the receipt by him of certain sums from certain persons, and his failure to enter the proper credits in the accounts of such persons, with intent to defraud his employer and the said persons from whom the money had been collected; *Gravatt v. State*, 25 Ohio St. 162, which is also an authority for charging in one count the embezzlement of money and property received by the defendant at different times, from different persons, for his employer. See further *People v. Hill*, 3 Utah 334, in which case the indictment alleged that the defendant was intrusted as bailee with two certificates of deposit, and that the money was collected thereon by the defendant, and that the money was intrusted to him as bailee by the bank and by the owner of the certificates, to be carried from the bank to the owner, and concluded with an averment that the defendant, being so, as aforesaid, intrusted as bailee with said certificates and said money, did fraudulently and feloniously convert the same and the

like manner, the taking or embezzlement of several articles may be charged in a single count.¹

c. WHEN THE COPULATIVE MAY BE USED.—The word “embezzlement” includes conversion to his own use, and where the statute provides that any one who shall embezzle *or* convert to his own use, etc., the indictment is not duplicitous because it avers that the defendant did embezzle *and* convert to his own use, nor is it duplicitous where other words included in the word “embezzle” are used in addition to that word.² But it is not permissible

proceeds thereof to his own use. It was held that the indictment was not duplicitous, that all the acts were part of one and the same transaction, and that the only substantive offense charged was embezzlement of the money.

Indictment against Public Officers.—

An indictment charging that the defendant was a tax collector from the first Monday in January, 1883, at 12 o'clock M., to a like day and time on the 5th of January, 1885, that as said tax collector he, on the 5th day of January, 1885, collected certain public money, and upon that day and five days thereafter, and ever since then, refused and omitted to pay it over, stated but a single offense, and did not charge an offense to each of the five days after the 5th day of January, 1885. *People v. Otto*, 70 Cal. 523.

Unnecessary Statement as to How Defendant Used Money.—In *State v. King*, 81 Iowa 587, an indictment

against a county treasurer was not duplicitous because it alleged that the defendant expended the money in his private business, used it in paying his private debts, and permitted others to expend it in their private business, the gist of the offense being the unlawful conversion, and it being mere surplusage to state how he used the money.

Moneys Belonging to the State and County.—In *People v. De La Guerra*, 31 Cal. 416, an indictment against a tax collector was not duplicitous, although the moneys collected by the defendant were required to be paid into the county treasury, and when so collected and paid were to be apportioned between the state and county. To the same effect is *People v. Otto*, 70 Cal. 523.

Loans to Different Persons.—Under Code Wis., § 4300, providing that the indictment must charge but one offense, it is not permissible, in an in-

dictment for unlawfully loaning public moneys, to allege loans to different persons, as each loan should constitute a separate offense. *State v. Brandt*, 41 Iowa 593, *per* Miller, C. J.

1. *State v. Pierce*, 77 Iowa 245, wherein an indictment alleging the embezzlement of two pianos was not duplicitous, although it charged that the conversion occurred then and there, referring to the time fixed in the indictment, to wit, between the 21st day of August and the 1st day of December; and the addition of the words “at various days between said dates,” was considered as mere surplusage, and as adding nothing to the indictment.

Embezzlement of Different Articles Distinct Felonies.—In *Heineman v. State*, 22 Tex. App. 44, an indictment charging in one count the embezzlement of a horse, a gun, and a pistol was duplicitous because, by the statute, embezzlement was punishable in like manner as theft, and the punishment for the theft of a horse was greater than that for the theft of other property, the two offenses being separate and distinct felonies.

2. *State v. Wolff*, 34 La. Ann. 1153; *State v. Palmer*, 32 La. Ann. 565, *citing* *Com. v. Hall*, 4 Allen (Mass.) 305; *Com. v. Eaton*, 15 Pick. (Mass.) 273; *State v. Dale*, 8 Oregon 229, wherein an indictment against a tax collector, based on a statute (Cr. Code Oregon, p. 414, § 559) denouncing embezzlement or refusal to pay over, etc., was not considered duplicitous, although it charged that the defendant “did * * * embezzle and convert to his * * * own use * * * and * * * neglected and refused to pay over,” etc.; *People v. Otto*, 70 Cal. 523, wherein it was held permissible to charge that a tax collector had “omitted and refused” to pay over certain money, etc., as refusal to pay money includes omission

to use the conjunctive where to do so would result in charging the defendant with the commission of repugnant acts.¹

d. EMBEZZLEMENT AND LARCENY.—The offenses of embezzlement and larceny belong to the same class of crimes, and it is permissible to join counts charging embezzlement with counts charging larceny;² but there must be no attempt apparent from

to do it; *U. S. v. Sander*, 6 McLean (U. S.) 598, wherein an indictment based on Act U. S. March 3, 1825, § 22, providing punishment for any person who "shall secrete, embezzle, or destroy," any mail matter, was upheld, although it alleged that the defendant "did secrete and embezzle;" *Bork v. People*, 91 N. Y. 5, wherein an indictment charged in a single count that the defendant did feloniously and unlawfully obtain, receive, and convert, and dispose of the property described in the indictment, although the statute (Act N. Y. Feb. 17, 1875, c. 19, § 1) used the disjunctive in describing the offense; *State v. Hodges*, 45 Kan. 389, holding that an indictment charging that the defendant did convert to his own use and embezzle with intent feloniously to embezzle was not duplicitous because of the addition in the same count of an averment that he did then and there feloniously make way with and secrete with intent fraudulently and feloniously to embezzle and convert to his own use, since the latter charge was mere surplusage, it being impossible that the defendant could have committed the offense of actual embezzlement without also attempting and intending to commit the offense, and it being also impossible that he could have committed the offense without also converting the property to his own use and attempting and intending so to convert it; *Com. v. Mentzer*, 162 Pa. St. 646, wherein it was held permissible to charge, in an indictment against a public officer, that the defendant did embezzle and convert to his own use, and did fail to pay over, the acts charged being successive steps in but one taking of the same public money, there being no question that the two acts charged were not parts of the same transaction.

1. *State v. Flint*, 62 Mo. 393. The indictment was presented against a sheriff and county collector, and was based on Wagn. Stat. Mo., ed. 1872, 459, § 14, providing that if any officer shall

convert to his own use, or shall use by way of investment, or secrete, any portion of the public money, etc. An averment that the defendant "did convert to his own use by way of investment in property and merchandise, and make way with and secrete," was bad, because these acts cannot be done with the same money; the court saying: "Where a statute * * * enumerates the offenses, or the intent necessary to constitute such offenses, disjunctively, the indictment must charge them conjunctively where the acts are not repugnant. * * * Where the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment will be good without them, they may be rejected as surplusage. * * * If the money was invested in property or merchandise, it could not be made way with or secreted in the sense of the statute. The defendant should have been informed upon which of these substantive charges he was called upon to answer." To the same effect is *McCann v. U. S.*, 2 Wyoming 274, wherein a charge that the defendant did embezzle and steal was bad, because embezzlement and stealing are dissimilar crimes, one of which negatives the possibility of the other.

2. *Rex v. Johnson*, 3 M. & S. 539; *Butler v. State*, 91 Ala. 87, citing *Mayo v. State*, 30 Ala. 32, and *Wooster v. State*, 55 Ala. 217; *Heller v. People*, 2 Colo. App. 459; *State v. Lincoln*, 49 N. H. 464; *Stephens v. State*, 53 N. J. L. 245, wherein Beasley, C. J., says: "These two various offenses, as they are of the same general nature, and are triable in the same mode, may be united as the subjects of a single indictment, each of them being charged in a separate count." See also *Griffith v. State*, 36 Ind. 406, wherein Downey, J., declares that the joinder of counts for embezzlement and larceny "is but the exercise of a prudent foresight in anticipation of a possible variance in the evidence from the allegations of the indictment;" *Murphy v. People*, 104

the indictment to convict the accused of two or more offenses growing out of separate transactions.¹

e. EMBEZZLEMENT AND FALSE PRETENSES.—In like manner, embezzlement and obtaining property by false pretenses are kindred crimes and may be charged in separate counts in the same indictment.²

f. ELECTION BETWEEN COUNTS.—Where counts charging separate acts of embezzlement, or embezzlement and a kindred offense, are properly joined in the same indictment, the court will rarely compel an election.³ The motion to compel an election must be made before the state has rested,⁴ and is addressed to the discretion of the court.⁵ Where the defendant would encounter serious embarrassment in the full and fair exhibition of his defense if the prosecution were allowed to reply upon more than one count in the indictment, the court should compel an election.⁶

Ill. 528; *Mayo v. State*, 30 Ala. 32, *citing* *Rex v. Johnson*, 3 M. & S. 539, and *Johnson v. State*, 29 Ala. 62; *Ker v. People*, 110 Ill. 646; *State v. Owen*, 78 Mo. 367; *State v. Porter*, 26 Mo. 201; *State v. Harmon*, 106 Mo. 635, in which last case *Gantt*, P. J., says: "Our statute permits the joining of larceny and embezzlement in the same indictment, and this practice has been sustained by this court since *State v. Porter*, 26 Mo. 201."

1. *Butler v. State*, 91 Ala. 87, *citing* *Mayo v. State*, 30 Ala. 32, and *Wooster v. State*, 55 Ala. 217; *State v. Lincoln*, 49 N. H. 464.

2. *State v. Lincoln*, 49 N. H. 464, wherein *Foster*, J., says: "We think it is quite apparent that the purpose of the prosecuting officer in this case was to charge the respondent with but one criminal transaction; but the offense was described in different ways, for the purpose of meeting the evidence as it might transpire on the trial, and to avoid the escape of a guilty party through the loophole of a mere technicality. There is no objection to this form of criminal pleading, under proper rules and restrictions." See further *Heller v. People*, 2 Colo. App. 459, in which case a *nolle prosequi* was entered as to the counts charging larceny and the obtaining of property by false pretenses.

3. *State v. Noland*, 111 Mo. 473, wherein the court, after reviewing many cases, arrived at the following conclusion: "It is well settled that it is entirely proper, and, indeed, the uniform practice, to insert several

counts, charging the felony in different ways, with a view to meet the varying phases of the evidence, and the court will not in such cases compel an election, and will sustain a general verdict;" *citing* *State v. Houx*, 109 Mo. 654, *People v. McKinney*, 10 Mich. 54, *Mayo v. State*, 30 Ala. 32, *Goodhue v. People*, 94 Ill. 37, *Com. v. Holmes*, 137 Mass. 248, and *State v. Tuller*, 34 Conn. 280. See also, to the same effect, *Griffith v. State*, 36 Ind. 406; *State v. Lincoln*, 49 N. H. 464; *Butler v. State*, 91 Ala. 87; *State v. Bailey*, 50 Ohio St. 636; *State v. Harmon*, 106 Mo. 635; *State v. Porter*, 26 Mo. 201.

4. *Hemingway v. State*, 68 Miss. 401.

5. *State v. Bailey*, 50 Ohio St. 636, wherein *Bradbury*, C. J., says that the discretion of the trial court in this respect, as in most other instances of the exercise of discretion, should be deemed judicial and not arbitrary; *Com. v. Pratt*, 137 Mass. 106, *citing* *Com. v. Sullivan*, 104 Mass. 552, *Com. v. Smith*, 162 Mass. 508, *Com. v. Slate*, 11 Gray (Mass.) 60, *Com. v. Bennett*, 118 Mass. 443, and *Com. v. Pratt*, 137 Mass. 98; *Hemingway v. State*, 68 Miss. 401; *Stephens v. State*, 53 N. J. L. 245; *State v. Lincoln*, 49 N. H. 464.

6. *State v. Lincoln*, 49 N. H. 464, wherein *Foster*, J., says: "In one count he [the defendant] is charged with embezzling the money of B & F, which came lawfully into his possession as their agent. In the other count it is charged that he was not their agent at all, but by means of a false pretense of agency he obtained the

IV. PLEADING AND PROOF—1. In General.—In the absence of any statutory provision to the contrary the defendant must be proved guilty of the specific offense charged in the indictment;¹ but in some states it has been provided that it shall be sufficient to allege generally an embezzlement of money to a certain amount,

money. In order to prove the charge of embezzlement, the government must establish the fact of the agency, and in order to defend against the charge of obtaining money by false pretenses, the respondent may be required to admit and to prove that he was the agent of B & F."

1. *Com. v. Wyman*, 8 Met. (Mass.) 247, in which case it was determined that Rev. Stat. Mass., c. 133, § 10, is not applicable to a prosecution against a bank officer under chapter 126, section 27, but to prosecutions against "a clerk, agent, or servant," only. See also *State v. Kortgaard* (Minn. 1895), 64 N. W. Rep. 51, in which case it was contended by the defendant that if the state desires to avail itself of the provisions of Gen. Stat. Minn. 1894, § 7262, it cannot introduce evidence in support of the substantive offense of an act of embezzlement committed on the day alleged in the indictment; and the court said: "Our construction of the statute is that it permits the state to introduce evidence of an act of embezzlement committed on the day stated in the indictment, and of any other acts of embezzlement committed within six months next after that date." And in the latter case it was held that the statute applied to a prosecution of a bank officer, the court distinguishing *Com. v. Wyman*, 8 Met. (Mass.) 247, and pointing out that in the latter case the court arrived at the legislative intent from the position which the section occupied in the statutes, and from the existence of other provisions expressly and solely applicable to embezzlement by bank officers. See further the statutes that have been enacted in different states dispensing with the particularity that had formerly been required in the description of money, etc., *supra*, III. 6. c. *Money*.

Proof of Series of Acts.—"Embezzlement may, and most often does, consist of many acts done in a series of years, and the fact at last disclosed that the employer's money and funds are embezzled is the crime against which the statute is leveled." In such cases "the

body of the crime consists of many acts done by virtue of the confidential relations existing between the employer and the employee," and the prosecution will not be compelled to elect. *Per Scott, J.*, in *Ker v. People*, 110 Ill. 627. See also, to the same effect, *State v. Noland*, 111 Mo. 473; *Gravatt v. State*, 25 Ohio St. 162, in which case the evidence tended to show that the defendant had collected several sums of money at different times and from different persons for his employer, but showed one conversion only, and not a distinct and independent conversion of each sum; *Campbell v. State*, 35 Ohio St. 70, in which case the court explained that a motion to compel an election was properly refused because the jury might well have found "that no part of the moneys collected by the defendant had been appropriated to his own use until after the several sums had been received, and that the whole amount was converted and appropriated by the same act." See further *West v. People*, 137 Ill. 189; *Goodhue v. People*, 94 Ill. 37; *State v. Crimmins*, 31 Kan. 376; *Mayo v. State*, 30 Ala. 32; *State v. Harmon*, 106 Mo. 635; *Brown v. State*, 18 Ohio St. 496; *Stockwell v. State*, 27 Ohio St. 563; *Bainbridge v. State*, 30 Ohio St. 264; *Edelhoff v. State* (Wyoming, 1894), 36 Pac. Rep. 627. In the last case the evidence showed that the defendant, by virtue of his employment, had collected monthly various sums of money from different persons, and at each month, instead of remitting the amounts collected, he had failed to account for the same and had reported that he had not collected the same. The court held that the offenses were separate and distinct and were not dependent on each other and that the offense was not a continuing one; and although the defendant did not demand an election and did not request an instruction confining the jury to the evidence of a single act, a general verdict finding the defendant guilty of the embezzlement of the aggregate of the amounts collected by him was set aside.

without specifying any particulars of such embezzlement, and that on the trial evidence may be given of any such embezzlement committed within a stated time next after the time stated in the indictment. Under statutes so providing the prosecution is not confined to evidence of an act of embezzlement committed on the day named in the indictment.

2. **Time.**—It is not necessary to prove that the offense was committed at the time laid in the indictment.¹

3. **The Defendant's Fiduciary Capacity.**—The averment of the relation in which the defendant stands to the person injured by his wrongful act is a material one, and failure to prove such averment is fatal.²

1. *Per* Reed, J., in *State v. Lyon*, 45 N. J. L. 272, wherein it is said that, although the time need not be proved as stated, it is necessary to allege the time so as to show that the offense is not barred by the statute of limitations.

See also *State v. Cushing*, 11 R. I. 313, holding that the day of the commission of the offense as laid in the indictment is not material, and that the state is at liberty to prove its commission upon any day anterior to that on which the indictment was found.

2. *McCrary v. State*, 81 Ga. 334; *Bartow v. People*, 78 N. Y. 377, holding that an indictment charging the defendant with the embezzlement of moneys received by him as treasurer of a savings institution was not supported by evidence that the money was received by him as cashier of a bank; *Pullam v. State*, 78 Ala. 31, holding that where different sections of the statute created separate and distinct offenses, differing as to the relation in which the defendant stands, and where the word "agent," which is employed in both sections, applies to different classes of persons, one indicted under one section cannot be convicted upon proof of the crime denounced in the other section; *McNish v. State*, 88 Ga. 499, following *Carter v. State*, 53 Ga. 326, in which case it was alleged that the property was intrusted for the purpose of applying the same to the sole use and benefit of the said owner, and it was held that such averment was not sustained by proof that the property was delivered to the defendant for the purpose of selling the same, and, after satisfying himself out of the proceeds of the sale for his services, paying the surplus to

the owner, and *McCrary v. State*, 81 Ga. 334. See also *Hamuel v. State*, 5 Mo. 260, holding that where the defendant is charged with having embezzled property received by him as a bailee, and the evidence shows that he received it as a mere servant, the variance is fatal.

In *Lee v. Com.* (Ky. 1886), 1 S. W. Rep. 4, the defendant was indicted for the embezzlement of funds which had come to his hands by virtue of his office as treasurer of an association. The proof was that the embezzlement had been committed by him before he became treasurer, and that when he was elected treasurer he reported that he had in his hands the money which he had previously embezzled. It was held that the variance was fatal, and that the jury should have been instructed that if he accounted for all the funds received by him after he was elected treasurer they should find him not guilty.

Description of Attorney as Agent.—An allegation that the money came into the defendant's possession as agent of the owner is supported by evidence that the defendant acquired possession of the property as attorney of the owner. *State v. Brame*, 61 Minn. 101.

Change of Fiduciary Relation.—Under an indictment based on Act U. S. March 3, 1825, § 22, for the embezzlement of mail matter in the custody of a mail carrier, or in the post office before it shall be delivered to the person to whom it is directed, evidence that the defendant was authorized to receive the mail matter and that he embezzled it after its receipt by him as agent of the addressee will not support a conviction. *U. S. v. Sander*, 6 McLean (U. S.) 598.

4. The Property Embezzled.—A conviction of embezzlement will not be sustained where there is a material variance between the description in the indictment of the property embezzled and the proof.¹

Description of Money.—Where the indictment charges the conversion of a sum of money comprising greenbacks, gold certificates, silver certificates, and national banknotes, it is permissible and sufficient to show that the money was paper money and that it was one or the other of the four kinds of bills described in the indictment.²

Receipt by Defendant through Hands of Agent.—Where it is alleged that the property was delivered to the defendant by a named person, it may be proved that the defendant received the property from another person, who took it from such named person, and, acting as agent for the defendant, delivered it to the latter. *State v. Hinckley*, 38 Me. 21.

De Facto Officer.—One indicted as an officer may be convicted upon proof that he was an officer *de facto*. *State v. Goss*, 69 Me. 22, wherein the defendant was indicted as a collector of taxes.

1. Embezzlement of Money.—Under an indictment which charges a county treasurer with the embezzlement of money, it is not permissible to show the embezzlement of county orders by the unauthorized sale thereof. *Goodhue v. People*, 94 Ill. 37. And under an indictment charging the conversion of banknotes and of money, a conviction cannot be had for converting a check. *Carr v. State*, 104 Ala. 43. See also *Jackson v. State*, 76 Ga. 551. But where a draft which the defendant indorsed, presented, and cashed was simply the means by which he acquired possession of the money, there is no prejudicial error in admitting the draft in evidence. *State v. Brooks*, 85 Iowa 366.

Embezzlement of Chattels.—Where a hog is described as a black male hog, proof that it is marked constitutes no variance. *Alderman v. State*, 57 Ga. 367.

Proceeds Arising from Sale of Property.—Under an indictment charging the embezzlement of property the defendant cannot be convicted of embezzlement of the proceeds arising from its sale where the statute (*Pasch. Dig. Tex.*, art. 2421) makes the embezzlement of property, and of the proceeds arising from the sale of the property, separate and distinct offenses.

Baker v. State, 6 Tex. App. 344. See also *State v. Dodson*, 72 Mo. 283, holding that where the embezzlement of horses was charged, evidence showing the embezzlement of the proceeds of the sale of the horses was inadmissible.

Embezzlement of Check.—In *Dotson v. State*, 51 Ark. 119, under a count charging that the defendant received a check in payment for property of which he was the bailee, and that he embezzled such check, it was held that the defendant could not be convicted upon evidence that he collected the check and embezzled the money paid to him on the check, the court explaining that the check "was only a means to enable him to collect the purchase-money, and it was in the line of his duty * * * to collect it."

2. Wallis v. State, 54 Ark. 611. See also *Gerard v. State*, 10 Tex. App. 690, holding that where money embezzled is described as one hundred and fifty-five dollars, current money of the United States, it is necessary to prove such descriptive averments as to the value and character of the money; and *Lewis v. State*, 28 Tex. App. 140, holding that under an indictment charging the embezzlement of money the state must prove the embezzlement of either legal tender coins or legal tender treasury notes, citing *Block v. State*, 44 Tex. 620, and *Sansbury v. State*, 4 Tex. App. 99.

Surplusage.—According to some authorities, where the indictment unnecessarily alleges that the money converted was lawful currency of the United States, such allegation must be proven. *Watson v. State*, 64 Ga. 61. See also *Edelhoff v. State* (Wyoming, 1894), 36 Pac. Rep. 627, wherein it is suggested by Groesbeck, C. J., that it would have been better to have proved such unnecessary allegations, the court, however, reserving its opinion upon the question. But see *contra*,

Allegations as to Number, Quantity, and Value.—The prosecution is not held to strict proof as to the number, quantity, or value of the articles, whether the indictment charges the embezzlement of money or of other property.¹

5. Ownership of Property.—Where, pursuing the safer practice, ownership is alleged separately and distinctly from the necessary inferences of ownership based on the fiduciary relation of the defendant, such averment is material and must be proved.²

People v. Hearne (Supreme Ct.), 49 N. Y. St. Rep. 406, the court saying that such "allegation * * * was entirely immaterial and unnecessary."

1. *Rex v. Johnson*, 3 M. & S. 539, wherein it was held that under an indictment charging the embezzlement of nine banknotes, it was not incumbent upon the prosecution to prove that more than one banknote had been embezzled; *Jackson v. State*, 76 Ga. 551, wherein it was held sufficient to prove the embezzlement of a part of the money charged to have been embezzled; *State v. Ring*, 29 Minn. 78, wherein it was held that under an indictment against a county treasurer, charging that during his term of office he received money of the county to an amount exceeding a sum of dollars named, and that on a named date he had in his possession such named number of dollars, etc., the state might show that during his term of office, and prior to the date named, the defendant had received a larger sum than that specified; *U. S. v. Fish*, 24 Fed. Rep. 585, holding that the charge of embezzling a named sum is proved by showing the embezzlement of a larger sum; *Com. v. Hussey*, 111 Mass. 432, wherein, under an indictment charging the embezzlement of notes of the value of sixty-five dollars, the defendant was convicted upon proof that the notes were of the value of seventy dollars. And the contention of the defendant in the last case that, because the notes were described merely as divers promissory notes, a more particular description of which was to the jurors unknown, the amount and value were a part of the description of the offense and were essential to its identity, was considered untenable; the court saying: "No attempt is made to give the number or denominations of the notes, but it was necessary to state that they had a value, in order that they should be subjects of larceny; and in the case of notes current as money,

the amount and value would ordinarily be synonymous terms. Except on the ground of variance, the defendant cannot object that less is charged against him than was proved. If proof of less than the amount and value charged is not a variance, it is difficult to see why proof of more should be. If the indictment had contained a more particular description, the proof must have been limited accordingly. But it was not necessary to give a more particular description, for that given was already sufficient to support a judgment; and the allegation that a more particular description was unknown to the grand jurors was therefore an immaterial allegation, and proof that a more particular description was in fact known to them did not create a fatal variance between the indictment and the proof."

2. *Livingston v. State*, 16 Tex. App. 652; *Brady v. State*, 21 Tex. App. 659; *Reeves v. State*, 95 Ala. 31, wherein *Thorington, J.*, says: "It has been held, under general statutes of embezzlement, that it is unnecessary for the indictment to aver ownership of the property as a fact separate and distinct from the necessary inference of such ownership based upon the relation of principal and agent, and the fact that the property embezzled came to the servant's possession by virtue of his employment; but if alleged it must be proven strictly," following *Washington v. State*, 72 Ala. 272. ✓

Idem Sonans.—*Johnson* and *Johnston* are substantially the same names, or at least *idem sonans*, and an indictment laying the ownership in *Johnson* is supported by evidence of ownership in *Johnston*. *Truslow v. State*, 95 Tenn. 189.

Ownership in Bank or Depositor.—Where a general deposit is made in a bank and the relation of debtor and creditor exists between the banker and the depositor, the money belongs to

Property Received from Others on Account of Owner.—An allegation that the property was received in the name and for the account of a named person, or that it was intrusted to the defendant by his employer, is supported by proof that it came to the defendant from the hands of other persons for and on account of the person named in the indictment.¹

6. Embezzlement and Larceny.—Under an indictment charging embezzlement the defendant cannot be convicted of larceny, and *vice versa*,² since the two offenses are radically different, and the

the bank, and a conviction cannot be had under an indictment alleging that the banker converted to his own use money which came into his possession by virtue of his employment as the agent of the depositor, the money being laid as the property of the depositor. *Carr v. State*, 104 Ala. 43.

Partners as Owners.—Where an indictment against an officer of a national bank, under Rev. Stat. U. S., § 5209, charges the misapplication of funds of the bank by an alleged credit upon the books of the bank to a partnership of which the defendant and one W were then and there members, proof that there were additional members of said partnership does not constitute a variance. *U. S. v. Fish*, 24 Fed. Rep. 585.

Transfer of Ownership Pending Defendant's Control over Property.—In *State v. Collins*, 4 N. Dak. 433, the testimony for the prosecution showed that the title to the property passed out of the person in whom it was alleged to be at the time the property was intrusted to the defendant five days after it was so intrusted, but there was no showing whether the act of conversion was prior or subsequent to the date when the title was thus transferred. It was held that there was an utter absence of proof that the property at the time of the embezzlement belonged to the person named in the indictment as its owner, *distinguishing* *Com. v. Buterick*, 100 Mass. 1.

1. *Territory v. Maxwell*, 2 N. Mex. 250, in which case there was evidence that the defendant had given receipts, and had signed them in the name of the person in whom the ownership was laid in the indictment; *Ex p. Ricord*, 11 Nev. 287, wherein Beatty, J., quotes from the dissenting opinion of Norton, J., in *People v. Bailey*, 23 Cal. 577, as follows: "I think money received by a clerk who is intrusted by his em-

ployer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer." The opinion of the majority in the last case was that, under Cr. Code Cal., § 2380, providing that if any clerk, etc., "shall be intrusted by his master or employer," etc., no one could be guilty of embezzlement unless he received the money or property directly from the hands of his master or employer, and that when the money was collected by authority of the master from third persons, and fraudulently converted by the servant, the case did not come within the meaning of the statute. See also, to the same effect as *Ex p. Ricord*, 11 Nev. 287, *Ricord v. Central Pac. R. Co.*, 15 Nev. 180.

2. *Rex v. Murray*, 5 C. & P. 145, 24 E. C. L. 247, 1 Moo. C. C. 276, *cited* in *Com. v. Berry*, 99 Mass. 428; *Pullam v. State*, 78 Ala. 31; *Johnson v. People*, 113 Ill. 99; *Kibs v. People*, 81 Ill. 599, *distinguishing* *Welsh v. People*, 17 Ill. 339, and *Stinson v. People*, 43 Ill. 397, in each of which cases it was held that the evidence authorized the jury in finding that the defendant obtained possession of the property in the first instance with a felonious intent; *State v. Wingo*, 89 Ind. 204, wherein the defendant was indicted for larceny, and the conviction was not sustained, although the evidence showed an offense under the statute denouncing embezzlement which would probably have been larceny but for the statute; *Warmoth v. Com.*, 81 Ky. 133, *citing* *Johnson v. Com.*, 5 Bush (Ky.) 430; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. King*, 9 Cush. (Mass.) 284, *following* *Com. v. Simpson*, 9 Met. (Mass.) 138, in which last case the indictment, without averring any fiduciary capacity, alleged that the defendant did with force and arms embezzle and feloniously steal, take, and carry away prop-

facts which constitute the one cannot be employed to establish the other, as will be particularly pointed out hereinafter in considering the constitutionality of statutes authorizing a conviction, notwithstanding such variance.¹

Counts for Larceny and Embezzlement.—But where the indictment contains a count for larceny and a count for embezzlement, if the proof sustain either, the conviction will be sustained.²

Statutes providing that upon the trial of any person indicted for embezzlement he may be convicted of larceny, and *vice versa*, have been enacted in some states, but according to the weight of authority they are unconstitutional.³

V. INSTRUCTIONS.—The court, as in other cases, should enlighten the jury by furnishing them with information and knowledge touching the elements and ingredients necessary to constitute the

erty which was alleged to be in the possession of another, and it was held that the word "embezzle" was surplusage, that the indictment charged larceny merely, and that evidence of embezzlement would not support a conviction; *Com. v. Berry*, 99 Mass. 428, citing *Rex v. Murray*, 5 C. & P. 145, 24 E. C. L. 247, 1 Moo. C. C. 276; *State v. Gabriel*, 88 Mo. 631, following *State v. Arter*, 65 Mo. 653, and citing *People v. Allen*, 5 Den. (N. Y.) 76, *Hall v. State*, 3 Coldw. (Tenn.) 125, and *State v. Stone*, 68 Mo. 101; *State v. Williams*, 35 Mo. 229; *State v. Broderick*, 70 Mo. 622, wherein the rule stated in the text is conceded in the absence of any statute to the contrary; *State v. Harmon*, 106 Mo. 635, wherein the court says that "anything which is indictable at common law as larceny, should never be indictable under the statute providing a punishment for embezzlement, and *vice versa*," citing 6 Am. & Eng. Encyc. Law 455; *Fulton v. State*, 13 Ark. 168; *Kibs v. People*, 81 Ill. 599; *People v. Salorse*, 62 Cal. 139; *People v. Cruger*, 102 N. Y. 510, reversing 38 Hun (N. Y.) 500; *Nichols v. People*, 17 N. Y. 114, reversing *People v. Nichols*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 579; *Griffin v. State*, 4 Tex. App. 412, overruling *Riley v. State*, 32 Tex. 763; *Huntsman v. State*, 12 Tex. App. 619; *Simco v. State*, 8 Tex. App. 406, which recognizes the rule stated in the text in the absence of any statute to the contrary, citing *Calloway v. State*, 7 Tex. App. 585; *McCann v. U. S.*, 2 Wyoming 274. See also *People v. Dumar*, 106 N. Y. 502, holding that under an indictment charging larceny,

the defendant cannot be convicted of obtaining property by false pretenses, the reasoning being equally applicable to the question whether a conviction of embezzlement may be had under an indictment charging larceny.

1. *Per Dewey, J.*, in *Com. v. Simpson*, 9 Met. (Mass.) 138. *Per Peck, J.*, in *McCann v. U. S.*, 2 Wyoming 274.

2. *Murphy v. People*, 104 Ill. 528.

3. *State v. Harmon*, 106 Mo. 635, wherein the court, after most careful deliberation, arrived at the conclusion that such a statute (*Rev. Stat. Mo. 1889, § 3947*) is unconstitutional, pointing out the five following distinctions between larceny and embezzlement, *viz.*: That larceny can be committed by any person capable of committing crime, while embezzlement can only be committed by a person sixteen years of age; that larceny is an offense at common law, while embezzlement is purely a statutory crime; that in charging larceny no allegation of any fiduciary relation is necessary, while in embezzlement no indictment is good without such an allegation; that in larceny the thief obtains possession of the goods by stealth and without holding any relation of trust to the owner, while in embezzlement, under the statute, he must have obtained possession by virtue of his employment; and that there can be no larceny without trespass or felonious caption, while there can be no embezzlement unless the defendant is in lawful possession of property of his employer; overruling *State v. Broderick*, 70 Mo. 622, so far as that case is a contrary authority, and pointing out that in that case the

offense charged, and the quantum of evidence required to sustain a conviction.¹

Distinction between Embezzlement and Larceny.—Where there is evidence tending to show that the defendant has committed the offense of larceny, the court should lay before the jury the distinctions

question was not raised, and the court was not asked to measure the statute by the constitution, and *citing* *State v. Gabriel*, 88 Mo. 631; *Fulton v. State*, 13 Ark. 168; *Com. v. Simpson*, 9 Met. (Mass.) 138; *Baker v. State*, 6 Tex. App. 344, and *Huntsman v. State*, 12 Tex. App. 619. In the last case the court held that the defendant could not be convicted of embezzlement under an indictment for theft, notwithstanding the provision of Code Cr. Pro. Tex., art. 714, subd. 6, that theft should include swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code, and was of the opinion that such a procedure would be in violation of his constitutional right to demand the nature and cause of the accusation against him, and of the provision of the constitution that no person should be held to answer for a criminal offense amounting to felony unless on indictment, *overruling* *Whitworth v. State*, 11 Tex. App. 414. *Simco v. State*, 8 Tex. App. 406, went no further than that where the offense was committed prior to the enactment of the statute, an indictment charging theft was not supported by evidence of embezzlement, *citing* *Calloway v. State*, 7 Tex. App. 585. See also *State v. Owen*, 78 Mo. 367, wherein the constitutionality of the statute was not determined.

Contra.—In *State v. Williams*, 40 La. Ann. 732, it was held that a statute (Rev. Stat. La. 1056) providing that on an indictment for larceny the defendant may, if the proof warrant it, be found guilty of embezzlement, is not in conflict with constitutional provisions (Const. La. 1879, arts. 5, 8) that prosecutions shall be by indictment or information, and that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation, the court saying: "The defendant was not taken by surprise, because he was bound to know the law, which informed him that on an indictment for larceny, if the facts proved warranted

it, he could be found guilty of embezzlement." And in *State v. Poland*, 33 La. Ann. 1161, it was held that, although the terms of the statute covered only the case of a person indicted as a clerk or servant, or person employed for the purpose or in the capacity of a clerk, or servant, or depository, the defendant might be found guilty of larceny, although he was prosecuted for embezzlement as an agent; and that, although the statute provided that the defendant shall not be guilty, but that the jury shall be at liberty to return as their verdict that the defendant is "not guilty of embezzlement, but is guilty of larceny," a verdict finding him guilty of larceny, and omitting to find him not guilty of embezzlement, is sufficient.

1. *Per* Bermudez, C. J., in *State v. O'Kean*, 35 La. Ann. 901.

But an instruction intended merely to inform the jury upon the question of venue, and not to define the offense, need not lay before the jury all the elements necessary to constitute embezzlement. *People v. McKinney*, 10 Mich. 54.

Definition of Money.—Where the embezzlement of money is charged, the legal signification of the word "money" is a part of the law of the case, and the court should explain its meaning to the jury. *Lewis v. State*, 28 Tex. App. 140.

Distinction between Embezzlement and Secretion with Intent to Embezzle.—Where a statute defines two offenses, one the actual embezzlement of public funds, and the other the taking and secreting of public moneys with intention to embezzle, and the indictment charges that the accused did actually embezzle, and does not charge that he took or secreted with intent to embezzle, it is error to give instructions in which this distinction is not observed, and in which the jury are directed to convict if it should be shown sufficiently that the accused did certain fraudulent acts with intent to embezzle. *Goodhue v. People*, 94 Ill. 37.

between embezzlement and larceny, and should instruct the jury that a conviction cannot be had upon proof of larceny.¹

The Intent.—The jury should have all the facts submitted to their judgment upon the question of intent and should be instructed that if the defendant had no intent to injure or defraud as charged in the indictment, he should be acquitted.² But an instruction that if the jury find from the evidence that the defendant unlawfully, fraudulently, and feloniously converted to his own use, etc., he should be found guilty, is not erroneous as ignoring the criminal intent.³

1. *Johnson v. People*, 113 Ill. 99; *State v. Arter*, 65 Mo. 653. In the latter case, however, the defendant was indicted for larceny, and the converse of the proposition stated in the text was laid down; namely, that the court should not have given an instruction authorizing a verdict of guilty upon proof that the defendant had committed embezzlement. See further, on this question, *supra*, IV. *Pleading and Proof*.

2. *People v. Galland*, 55 Mich. 628; *People v. Bauman* (Mich. 1895), 63 N. W. Rep. 516; *Reeves v. State*, 95 Ala. 31; *State v. Harmon*, 106 Mo. 635, in which last case the indictment in separate counts charged larceny and embezzlement, and Gantt, P. J., said that "it is the duty of the court to define the offense and let the jury ascertain the fact or intent, and measure the defendant's guilt accordingly."

See also *Reeves v. State*, 95 Ala. 31, where it is held that "the fraudulent intent which is a necessary ingredient * * * is the fraudulent intent with which the money or property is appropriated to the use of the party charged;" and that where the embezzlement must necessarily have been in and upon the receipt of money drawn by the defendant on a check, so that the receipt of the money and the appropriation thereof were one and the same act, instructions are not vicious because they limit the question of fraudulent intent to the time of the receipt by the defendant of the money which he is charged to have embezzled.

Intent to Deprive Owner of Ownership.—In *State v. Pratt*, 98 Mo. 482, it is said that it is better to charge as in larceny that the intent must have been to deprive the owner of his "ownership therein;" but that an instruction that the defendant should be found guilty if the act was committed with felonious

intent to deprive the owner of the use of the property absolutely, while open to criticism, is not so objectionable as to authorize a new trial.

Where the Statute Is Silent as to the intent otherwise than it is expressed by the words "with intent to embezzle or convert to his own use," an instruction following the language of the statute is sufficient. *State v. Adams*, 108 Mo. 208, wherein the indictment was bottomed on Rev. Stat. Mo. 1889, § 3551. See also *People v. Cobler*, 108 Cal. 538.

Intention Presumed from Unlawful Conversion.—In *State v. Noland*, 111 Mo. 473, the jury were instructed that they could find the intent from the unlawful conversion, and it was held that the defendant had no possible complaint, because at his instance instructions had been given expressly requiring the jury to find that the defendant not only unlawfully, wilfully, and feloniously converted the money, but also that he had done it "with the intent at the time to convert it to his own use," and the jury were instructed also that "feloniously meant a wrongful act wilfully done." But in *State v. Smith*, 13 Kan. 274, it was held error to instruct the jury that when funds have reached the hands of a public officer and the same are not forthcoming when properly or legally demanded, the illegal conversion of such funds is to be presumed.

3. In *State v. Manley*, 107 Mo. 364, followed in *State v. Noland*, 111 Mo. 473, in which case the court says that the words "fraudulently, unlawfully, and feloniously converted" in and of themselves supplied the idea of intentional and wilful wrongdoing, and no additional formula was needed to impress on the jury the difference between an accident in bookkeeping, or a mistake made in good faith, or by over-

Reasonable Doubt.—As in other criminal prosecutions the defendant is entitled to an instruction as to reasonable doubt.¹

VI. THE VERDICT AND JUDGMENT.—The Verdict must be responsive to the indictment.²

The Judgment must adjudge the defendant guilty and name the offense of which he is guilty.³

sight, and an intentional and wilful misappropriation of trust funds.

1. *Reeves v. State*, 95 Ala. 31.

2. *State v. Reonnals*, 14 La. Ann. 276, holding that a verdict finding the defendant guilty of a breach of trust is not responsive. In *State v. New*, 22 Minn. 76, the following was considered a sufficient verdict: "The jury in this case find the defendant, T N, guilty. We also find the value of the property embezzled to be forty dollars."

Special Verdict.—In *Huffman v. State*, 89 Ala. 33, a special verdict finding "the defendant guilty of embezzlement of a sum of money less than twenty-five dollars" was considered bad, because it did not state that the money embezzled was the property of the person named in the indictment, or that the embezzlement was committed in the county laid in the indictment, which were material ingredients of the offense. See also *People v. Bork*, 96 N. Y. 188, in which case the defendant was indicted under a statute (Act N. Y. 1875, c. 19) which provided (section 1) that the defendant should be punished by imprisonment for a term not less than three years nor more than ten years, or by a fine not exceeding five times the loss resulting from the fraudulent act, and (section 3) that the jury might find and state as their verdict the amount of loss resulting from the offense. It was held that a general verdict of guilty, unaccompanied by any finding as to the amount of loss, was sufficient, and authorized the court, in sentencing the defendant to the penitentiary, in the absence of any request by the defendant, to direct a special finding.

3. *Keeller v. State*, 4 Tex. App. 527;

State v. Weydeman, 3 Wash. 399, holding that a judgment sentencing the defendant as for conviction of petit larceny is erroneous, although the statute provides that any one committing the offense shall be deemed guilty of larceny, and although the statute denouncing larceny provides that there shall be grand larceny and petit larceny. But in *Simco v. State*, 8 Tex. App. 406, it was held that a judgment adjudging the defendant guilty of theft might be reformed.

Several Crimes Charged in Separate Counts.—Where the defendant is found guilty of four different charges set forth in four separate counts of the information, the court may sentence him for each crime, although the aggregate of the punishment inflicted upon him exceeds the punishment prescribed for any one of the offenses. *State v. Hodges*, 45 Kan. 389. See also *Stephens v. State*, 53 N. J. L. 245, in which case the defendant was charged in separate counts with embezzlement and larceny. See further *Com. v. Butterick*, 100 Mass. 1, in which case the defendant was charged with several acts of embezzlement in different counts, and the court said that it was unnecessary to show that the different articles were misappropriated by separate acts or at different times, in order to justify a conviction on each of the counts. "In this respect," said the court, "the law of larceny and embezzlement is alike. And it is an ancient and well established rule that the taking of divers articles at one time may be treated as constituting a distinct larceny of each article stolen." To the same effect as the last case is *Com. v. Pratt*, 137 Mass. 98, and *Com. v. Sullivan*, 104 Mass. 552.

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CROSS-REFERENCES.

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I. DEFINITIONS.—Eminent domain is the ultimate right of the sovereign power to appropriate the private property of the citizen, without his consent, to public purposes;¹ subject to the

1. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 641; *Symonds v. Cincinnati*, 14 Ohio 173; *Trombley v. Humphrey*, 23 Mich. 471. In *Woodmere Cemetery v. Roulo*, 104 Mich. 595, the right of eminent domain is defined as "the rightful authority which

exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand."

conditions that the public necessity, convenience, or welfare require such appropriation, and that just compensation be made to the owner for the property taken.¹ The legal proceedings by which this right is enforced are commonly called *condemnation proceedings*, and form the subject-matter of this article.

II. GENERAL NATURE OF CONDEMNATION PROCEEDINGS—1. Are Special Proceedings.—While it is true that proceedings to condemn property to public use involve the exercise of judicial power,² and are subject to judicial review and supervision,³ still they are not actions but special proceedings,⁴ conducted by a temporary tribunal selected for the occasion.⁵

2. Must be Authorized by Statute—*a. GENERAL RULE.*—In the absence of a constitutional provision on the subject the mode of exercising the right of eminent domain is within the discretion of the legislature, untrammelled by any limitation except that the purpose be a public one, and that just compensation be paid or tendered to the owner of the property taken.⁶ The power to institute these proceedings is an attribute of sovereignty, and lies dormant until called into action by a legislative enactment.⁷

1. For Further Definitions see title EMINENT DOMAIN in American and English Encyclopædia of Law.

2. *State v. Neville*, 110 Mo. 345.

3. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378. When the sovereign power attaches conditions to the exercise of the right of eminent domain, the inquiry whether the conditions have been observed is a matter of judicial cognizance. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444, *quoting Milwaukee, etc., R. Co. v. Faribault*, 23 Minn. 167; *North Missouri R. Co. v. Gott*, 25 Mo. 540.

4. *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455. So held under N. Y. Code Civ. Pro., § 3240, providing for costs in special proceedings. *Matter of New York, etc., R. Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 123.

The propriety of the exercise of the right of eminent domain is a political or legislative and not a judicial question; and the manner of its exercise by the legislature, except as to the matter of compensation, is unrestricted. They are not bound to submit it to a judicial tribunal, but may exercise it themselves, or delegate it to a jury, commission, or any other body they see fit. Condemnatory proceedings in the exercise of the right, and the assessment of damages inci-

dent to it, are not civil actions or causes within the meaning of the constitution, but special proceedings, only *quasi-judicial* in their nature. *State v. Rapp*, 39 Minn. 65.

5. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378.

In *Michigan* the inquiry, in proceedings to condemn lands for railroads, is as to an appraisal or estimate of values and a determination of the necessity of the proposed taking for public purposes. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378.

In *Vermont* the proceedings in laying out highways and assessing land damages are assimilated to session proceedings and are not according to the course of the common law; and the proceedings to assess land damages, when land is taken for a railroad, are of the same character. *Courser v. Vermont Cent. R. Co.*, 25 Vt. 476.

6. *Secombe v. Milwaukee, etc., R. Co.*, 23 Wall. (U. S.) 108, 49 How. Pr. (U. S. Supreme Ct.) 75; *Musick v. Kansas City, etc., R. Co.*, 114 Mo. 309. See, for a full discussion of this doctrine, Am. and Eng. Encyc. of Law, title EMINENT DOMAIN.

7. *Matter of Thomson*, 86 Hun (N. Y.) 405.

Where, therefore, a state or a corporation seeks to exercise the right, it

b. POWER MUST BE GIVEN IN EXPRESS TERMS.—The taking of private property against the will of the owner being in derogation of the property rights of the citizen, the authority to take it, conferred by law, must not be implied or inferred, but must be given in express language.¹ The proposed use for which the land is to be taken must be clearly embraced within the legitimate object of the power conferred by the statute,² and if there remains a doubt as to the extent of the power, after reasonable intendments in its favor, such doubt will be solved adversely to the claim.³ The statute will be strictly construed in favor of the landowner,⁴ but it will be so construed, if possible, as to effectuate its chief and manifest object,⁵ and to support rather than deny its validity.⁶

3. Strict Compliance with Statute Essential.—Condemnation proceedings are purely statutory and in derogation of common right, and the statutory authority must be strictly pursued, and every condition or other prerequisite to the exercise of the jurisdiction observed.⁷ The fact that all the essential pro-

cesses must be able to point to a statute conferring it. *Matter of Thomson*, 86 Hun (N. Y.) 405; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483; *Syracuse v. Stacey*, 86 Hun (N. Y.) 441.

Repeal of Statute.—A remedy having been provided by statute, proceedings were instituted under it, but during their pendency the statute was repealed. The court held that the remedy was thereby taken away, and any further proceeding to enforce it was illegal. *Com. v. Beatty*, 1 Watts (Pa.) 382.

1. *Schmidt v. Densmore*, 42 Mo. 225. The grant of power must be express, or arise by necessary implication from the language of the grant. *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453; *Cogswell v. New York*, etc., R. Co., 103 N. Y. 10, 12 Civ. Pro. Rep. (N. Y.) 222.

2. *Syracuse v. Benedict*, 86 Hun (N. Y.) 343.

3. *New York*, etc., R. Co. v. *Kip*, 46 N. Y. 546; *Petition of Providence*, etc., R. Co., 17 R. I. 324; *Pueblo*, etc., R. Co. v. *Rudd*, 5 Colo. 270, 10 Am. & Eng. R. Cas. 404.

4. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121.

This rule is especially applicable to delegations of the power of the legislature to private corporations. *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483.

The right of expropriation should only be enforced by inches and upon

conclusive proof of the necessity upon which it rests. *Jefferson Co. v. Hazard*, 7 La. Ann. 182.

In *Binney's Case*, 2 Bland (Md.) 99, the court says (p. 129): "An act of this sort deserves no favor; to construe it liberally would be sinning against the right of property."

5. *Bellona Co.'s Case*, 3 Bland (Md.) 442.

6. *Charles Street Ave. Co. v. Merryman*, 10 Md. 536; *Pittsburg v. Scott*, 1 Pa. St. 309.

7. *Reed v. Ohio*, etc., R. Co., 126 Ill. 48, 36 Am. & Eng. R. Cas. 234.

California.—*Sherman v. Buick*, 32 Cal. 242; *Curran v. Shattuck*, 24 Cal. 427; *Stanford v. Worn*, 27 Cal. 171; *Damrell v. San Joaquin County*, 40 Cal. 154; *Dalton v. Azusa Tp.*, 49 Cal. 222; *Ventura County v. Thompson*, 51 Cal. 577; *Hill v. Ventura County*, 95 Cal. 239.

Colorado.—*Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193.

Georgia.—*Mobley v. Breed*, 48 Ga. 44.

Illinois.—*Chicago*, etc., R. Co. v. *Chicago*, 132 Ill. 372; *Highway Com'rs v. Newby*, 31 Ill. App. 378; *Chicago*, etc., R. Co. v. *Smith*, 78 Ill. 96; *Hercules Iron Works v. Elgin*, etc., R. Co., 141 Ill. 491.

Iowa.—*Walters v. Houck*, 7 Iowa 72.

Louisiana.—*New Orleans v. Soh*, 16 La. Ann. 393; *Jefferson City v. Delachaise*, 22 La. Ann. 26.

requisites of the statute have been complied with, and all the statutory steps taken, must appear on the face of the proceedings or they will be void,¹ and the burden is upon the condemning party to show a strict compliance with the law.² Every requisite of the statute having the semblance of benefit to the landowner must be strictly complied with,³ and so must that portion of it in which the public have a general interest.⁴ Extreme accuracy and the utmost strictness are essential;⁵ any material departure from the statutory mode of procedure will render the proceedings void,⁶

Michigan.—Toledo, etc., R. Co. v. Munson, 57 Mich. 42, 20 Am. & Eng. R. Cas. 410.

Missouri.—Lind v. Clemens, 44 Mo. 540; St. Louis v. Gleason, 89 Mo. 67, 93 Mo. 33; Orrick School Dist. v. Dorton, 125 Mo. 439.

New Jersey.—State v. Jersey City, 25 N. J. L. 309.

New York.—Matter of Buffalo, 78 N. Y. 362, 16 Hun (N. Y.) 497; New York Cable Co. v. New York, 104 N. Y. 1, affirming 40 Hun (N. Y.) 1.

North Carolina.—Porter v. Durham, 98 N. Car. 320; Dargan v. Carolina Cent. R. Co., 113 N. Car. 596, 57 Am. & Eng. R. Cas. 536.

Ohio.—Cincinnati v. Sherike, 47 Ohio St. 217.

Oregon.—Oregonian R. Co. v. Hill, 9 Oregon 377.

Pennsylvania.—Philadelphia, etc., R. Co. v. Lawrence, 10 Phila. (Pa.) 604.

South Dakota.—Lewis v. St. Paul, etc., R. Co., 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612.

Texas.—Galveston, etc., R. Co. v. Mud Creek, etc., Co., 1 Tex. App. Civ. Cas., § 393.

West Virginia.—Doddridge County v. Stout, 9 W. Va. 703; Fork Ridge Baptist Cemetery Assoc. v. Redd, 33 W. Va. 262; Charleston, etc., Bridge Co. v. Comstock, 36 W. Va. 263.

Taking the Jurisdictional Steps.—In all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the statute must be strictly followed, and especially must every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, be precisely observed. Detroit Sharpshooters' Assoc. v. Highway Com'rs, 34 Mich. 36.

Following Formal Requirements.—Every condition prescribed in the grant must be complied with, and the

proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential. Vreeland v. Jersey City, 54 N. J. L. 49.

Following the Chronological Order.—By conforming to the provisions of the statutes, corporations may acquire a title in fee to lands necessary for their purposes against the will of the owners. But corporations must conform to such provisions before they can acquire any title or rights thereto. A fair construction of those laws will require a chronological fulfilment of their provisions. Matter of New York, etc., R. Co., 62 Barb. (N. Y.) 85.

1. Kroop v. Forman, 31 Mich. 144; Anderson v. Pemberton, 89 Mo. 61; Fore v. Hoke, 48 Mo. App. 254; Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107.

The sheriff's return must show that all the requisitions of the statute have been complied with. Harper v. Lexington, etc., R. Co., 2 Dana (Ky.) 227.

2. Mobley v. Breed, 48 Ga. 44.

3. Mitchell v. Illinois, etc., R., etc., Co., 68 Ill. 286; Sharp v. Johnson, 4 Hill (N. Y.) 92; Syracuse v. Stacey, 86 Hun (N. Y.) 441.

4. Wayne v. Caldwell, 1 S. Dak. 483. As strict a compliance with the act is required by those claiming damages as by the public making the condemnation. Lincoln v. Colusa County, 28 Cal. 662.

5. Matter of New York Cent., etc., R. Co., 70 N. Y. 191; Blize v. Castlio, 8 Mo. App. 290.

6. Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 44 Am. & Eng. R. Cas. 43; Detroit, etc., R. Co. v. Detroit, 49 Mich. 47; Shaffner v. St. Louis, 31

and all persons acting under them will be trespassers.¹

Substantial Compliance.—In some jurisdictions a substantial compliance with the statute, nothing fundamental being omitted,² and the proceedings being sufficiently certain in their character to prevent surprise, or such as are not misleading, is all that the law requires.³

4. Exclusiveness of Statutory Remedy.—The general rule is that the mode of procedure pointed out by the statute must be pursued, to the exclusion of all other remedies,⁴ both on the part of the condemning party⁵ and on that of the landowner.⁶

Mo. 264; *Matter of House Ave.*, 67 Barb. (N. Y.) 350. In all cases of public improvements, where private property is to be taken without the owner's consent, at the demand of a local corporation, it is essential to inquire whether all the requisitions of the statute have been complied with. And courts cannot allow any essential departure from them, without jeopardizing private rights, which have no adequate protection except in our courts. *Matter of Flatbush Ave.*, 1 Barb. (N. Y.) 286.

1. *Stewart v. Wallis*, 30 Barb. (N. Y.) 344. See also *infra*, VII. 14. *e. Noncompliance with Statutory Conditions.*

2. *Town v. Blackberry*, 29 Ill. 137.

3. *Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334; 12 Am. R. Rep. 382 (*followed* in *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448); *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

It cannot be objected that all the requirements of the statute were not observed, when the owner himself instituted the proceedings, and every act done was with his knowledge and consent. In such a case the question of the want of power cannot arise. *Trickey v. Schlader*, 52 Ill. 78.

4. *Allen v. Wilmington, etc., R. Co.*, 102 N. Car. 381; *Lafayette, etc., R. Co. v. Smith*, 6 Ind. 249; *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648.

This results from the well-settled rule that when a statute gives a right and creates a liability which did not exist at common law, and at the same time points out a specific method by which the right can be asserted and the liability ascertained, that method must be strictly pursued. *Cole v. Muscatine*, 14 Iowa 296.

5. *Decatur County v. Humphrey*, 47

Ga. 565; *Barnard v. Haworth*, 9 Ind. 103; *Fremont, etc., R. Co. v. Mattheis*, 35 Neb. 48.

Previous Charter Provisions Abrogated.

—Such a statute, upon its passage, defines and controls the power of railway companies in respect to the acquisition of rights of way, whatever may have been the provisions of their original charters in that regard. *Wisconsin Cent. R. Co. v. Cornell University*, 52 Wis. 537; 10 Am. & Eng. R. Cas. 108; *Sherman v. Milwaukee, etc., R. Co.*, 40 Wis. 645; *Allen v. Wilmington, etc., R. Co.*, 102 N. Car. 381.

6. *California.*—*Harper v. Richardson*, 22 Cal. 251.

Indiana.—*Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. White Water Valley Canal Co.*, 4 Ind. 431.

Maine.—*Hamor v. Bar Harbor Water Co.*, 78 Me. 127.

Massachusetts.—*Stevens v. Middlesex Canal*, 12 Mass. 466; *Tower v. Boston*, 10 Cush. (Mass.) 235.

New York.—*Calking v. Baldwin*, 4 Wend. (N. Y.) 667; *Heiser v. New York*, 104 N. Y. 68.

Pennsylvania.—*McKinney v. Monongahela Nav. Co.*, 14 Pa. St. 65; *Spangler, etc., Co.'s Appeal*, 64 Pa. St. 387; *White v. McKeesport*, 101 Pa. St. 394; *Wagner v. Salzburg Tp.*, 132 Pa. St. 636.

Tennessee.—*Mitchell v. Franklin, etc., Turnpike Co.*, 3 Humph. (Tenn.) 456.

South Carolina.—*Fuller v. Edings*, 11 Rich. (S. Car.) 239.

Texas.—*Keller v. Corpus Christi*, 50 Tex. 614.

Wisconsin.—*Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; *Smith v. Gould*, 59 Wis. 631.

United States.—*Kaukauna Water*

Exceptions to the Rule.—Where the condemning party has no vested right to a particular mode of assessing damages, the landowner may recover his damages in a common-law action,¹ and such a right in a condemning party is not a franchise which passes to a purchaser of its property, but a mere personal privilege, not transferable.² Where the company alone can take the initiative the landowner will not be deprived of his right of action at common law.³

Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254.

Exclusiveness of Charter Remedy.—The remedy provided in the charter of a railroad company for damage done by the construction of a railroad is in exclusion of the remedy at common law. *Mason v. Kennebec, etc., R. Co.*, 31 Me. 215, *approved* in *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 148.

By the charter of a water company it was required that before they diverted any stream, the court, "on the application of either party," should appoint men to ascertain the damages, etc. The company, without any application or assessment of damages, diverted a stream. It was held that an action on the case would not lie against the company, but the remedy specially provided must be pursued. *Koch v. Williamsport Water Co.*, 65 Pa. St. 288.

The Court Provided.—It seems that where the statute authorizes property to be taken, and points out a particular court in which redress shall be sought, the statutory remedy must be pursued. *McCormack v. Terre Haute, etc., R. Co.*, 9 Ind. 283. This case, however, has been impliedly *overruled* in numerous cases. See *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586.

Arbitration Excluded.—Where the charter of a city authorizes the taking of lands for public improvements, and provides a special mode of ascertaining the value of the lands taken and damages, by commissioners appointed in the manner and having the qualifications prescribed in the charter, that method of ascertainment is exclusive. The officers of the city cannot make a valid agreement that the valuation of the lands and damages shall be determined by a submission to arbitration. Under such circumstances the attorney of the city cannot consent to a reference. *Paret v. Bayonne*, 39 N. J. L. 559.

Taking Materials.—Where a statute authorizes a railroad company to take materials for the construction of its road, and prescribes a specific mode for ascertaining the value thereof, the common-law remedy, by action for trespass, is superseded, and the landowner must pursue the course pointed out by the statute. *Baker v. Hannibal, etc., R. Co.*, 36 Mo. 543, *followed* in *Leary v. Hannibal, etc., R. Co.*, 38 Mo. 486.

For Further Decisions as to when the landowner is confined to the remedy provided by statute in cases of pure trespass on, or irregular condemnation of, his land, see *infra*, XVIII. 1. *b. Statutory Remedy—When Exclusive.*

1. *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82.

Summary Remedy Cumulative Only.—When a charter provides for the assessment of damages in a summary way, there being no negative words in the statute, express or implied, the landholder whose property is taken is not deprived of his common-law remedy to recover damages. The statute creates no new right, and, being in derogation of a common-law right, must be strictly construed; the summary remedy given by the statute is cumulative only. *Doe v. Georgia R., etc., Co.*, 1 Ga. 524. But see *Brown v. Beatty*, 34 Miss. 227.

Property Damaged but Not Taken.—The mode provided by statute for assessing damages for right of way does not apply where property is damaged but no portion thereof taken. *Burlington, etc., R. Co. v. Reinhackle*, 15 Neb. 279, 14 Am. & Eng. R. Cas. 169.

2. *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82.

3. *Edward v. Lawrenceburgh, etc., R. Co.*, 7 Ind. 711. See also *infra*, XVIII. 1. *b. Statutory Remedy—When Exclusive.*

5. Choice of Act—Charter or General Law.—A general law relative to condemnation proceedings will not supersede otherwise unrepealed special charter provisions inconsistent with it,¹ unless the general law, expressly or by necessary implication, purports to apply in all cases,² or is clearly intended to be a revision of all antecedent laws, general or special, relating to the assessment of damages in such cases.³ In the absence of such intention the condemning party may proceed, at its option, under its charter or under the general law.⁴ But where proceedings have been instituted to condemn a right of way under a particular statute, they cannot be continued under a different statute, as the rights of the parties must be controlled by the statute under which the proceedings are begun.⁵

III. THE APPLICATION—GENERALLY—1. Who may Institute It.—The state may exercise the power of eminent domain itself directly, or select any agency it sees fit to do so, provided the constitutional restrictions are observed,⁶ it being exclusively the preroga-

1. *Clarkson v. Hudson River R. Co.*, 12 N. Y. 304; *Visscher v. Hudson River R. Co.*, 15 Barb. (N. Y.) 37; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *Shroder v. Lancaster*, 170 Pa. St. 136.

2. *McCrea v. Port Royal R. Co.*, 3 S. Car. 381; *Goodrich v. Milwaukee*, 24 Wis. 422.

3. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Moore v. Superior*, etc., R. Co., 34 Wis. 173.

General Act Prescribing Different Mode.—The Port Royal R. Co. was chartered in 1857, and its charter was renewed in 1870. The charter of 1857 prescribed the mode by which lands might be condemned to the use of the company. By a general act passed in 1868, a different mode of condemning lands to the use of all railroad corporations was prescribed. It was held that the company must proceed in the mode prescribed by the Act of 1868. *McCrea v. Port Royal R. Co.*, 3 S. Car. 381.

4. *Cory v. Chicago*, etc., R. Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Central Branch Union Pac. R. Co. v. Atchison*, etc., R. Co., 26 Kan. 669, 5 Am. & Eng. R. Cas. 389; *McMahon v. Cincinnati*, etc., Short-Line R. Co., 5 Ind. 413; *Cascades R. Co. v. Sohns*, 1 Wash. Ter. 558.

Charter Giving Option.—Under a charter authorizing a company to take land under the Illinois Act of 1852, or any other act which had been or might thereafter be passed, the company could take land under an act passed in

1845. *Taylor v. Pettijohn*, 24 Ill. 312.

5. *Peoria*, etc., R. Co. *v. Laurie*, 63 Ill. 264; *Emerson v. Western Union R. Co.*, 75 Ill. 176; *Cincinnati*, etc., R. Co. *v. Clifford*, 113 Ind. 460, 33 Am. & Eng. R. Cas. 81; *Chicago*, etc., R. Co. *v. Chicago*, 148 Ill. 141; *Hornellsville Electric R. Co. v. New York*, etc., R. Co., 83 Hun (N. Y.) 407.

Before Modifying Act Goes into Effect.—The special charter of a company was made subject to general legislation. At the same session a general law was enacted which modified the provisions of the special charter as to the condemnation of lands, but which did not go into effect until after the special charter. It was held that until the general law took effect the company should act under its charter in condemnation proceedings. *Croft v. Bennington*, etc., R. Co., 64 Vt. 1.

In the Absence of a Provision in a Railroad Charter as to the manner of condemning land, the method prescribed by the general law must be followed. *Holloway v. University R. Co.*, 85 N. Car. 452; *Norfolk*, etc., R. Co. *v. Warren*, 92 N. Car. 620; *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77.

6. See *infra*, VI. 1. a. **Parties Complainant.** *San Francisco*, etc., R. Co. *v. Caldwell*, 31 Cal. 367; *Leisse v. St. Louis*, etc., R. Co., 72 Mo. 561; *Yost's Report*, 17 Pa. St. 524; *Philadelphia*, etc., R. Co. *v. Patent* (Pa. 1886), 5 Atl. Rep. 747; *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352; *Matter of*

tive of the legislature to determine in what persons, corporations, or other agencies the right to condemn for public use shall be vested.¹

2. Time to Apply—Recording—Effect of Prior Occupancy or Construction.—A railroad company may institute condemnation proceedings after taking possession,² or even after its road has been constructed, and while it is in operation.³

Recording.—The recording of the company's certificate of incorporation is not a condition precedent to the lawful exercise of the right to condemn.⁴

3. Determining Questions of Necessity and Propriety.—Whether there exists a sufficient cause or necessity for resorting to condemnation proceedings is a question preliminary in its character, involving both law and fact, and should be settled in some separate way in advance.⁵

Deansville Cemetery Assoc., 5 Hun (N. Y.) 482.

Instances of Direct Appropriation by the State, see Mississippi, etc., *Boom Co. v. Patterson*, 98 U. S. 403; *Hingham, etc., Bridge, etc., Corp. v. Norfolk County*, 6 Allen (Mass.) 353; *Genet v. Brooklyn*, 99 N. Y. 296; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

In Whose Name to Proceed.—If the act authorizing proceedings directs them to be commenced in the name of the people of the state, and they are commenced in the name of the governor, lieutenant-governor, and secretary of state, this renders the whole proceeding a nullity. *Stanford v. Worn*, 27 Cal. 171.

1. *Moody v. Jacksonville, etc., R. Co.*, 20 Fla. 597, 14 Am. & Eng. R. Cas. 53.

As to what persons and corporations may be granted the right of eminent domain, see Am. and Eng. Encyc. of Law, tit. EMINENT DOMAIN.

2. *Grand Rapids, etc., R. Co. v. Chesebro*, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159.

3. *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 502.

There is no absolute obligation on the corporation to institute process for assessing the damages, as in case of its default the landowner may do so. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh (Va.) 43, 36 Am. Dec. 374.

Canal Appropriations.—The owner of lands appropriated for canal purposes in *New York* is entitled to have his

damages assessed as soon as the agents of the state have taken possession and commenced construction. He is not bound to wait until the work is completed. *People v. Hayden*, 6 Hill (N. Y.) 359. The contrary rule prevails in *Pennsylvania*. *Com. v. Fisher*, 1 P. & W. (Pa.) 462.

4. *Wheeling Bridge, etc., R. Co. v. Camden Consolidated Oil Co.*, 35 W. Va. 205, 47 Am. & Eng. R. Cas. 27.

Recording Proceedings.—But the proceedings themselves must be recorded in the county in which the land lies, or a purchaser of such land may set up title as *bona fide* purchaser and defeat the proceedings. *Parker v. Fort Worth, etc., R. Co.*, 84 Tex. 333, 51 Am. & Eng. R. Cas. 643.

5. *Manistee, etc., R. Co. v. Fowler*, 73 Mich. 217; *Tehama County v. Bryan*, 68 Cal. 57; *Lynch v. Rutland*, 66 Vt. 570.

It must be ascertained in advance by a competent tribunal, before which the parties whose lands are sought to be taken, as well as the company, can be heard. *Reed v. Louisville Bridge Co.*, 8 Bush (Ky.) 69. It is a waiver of the right to have a preliminary determination of this question, for the landowner to go to trial before a jury without claiming it. *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326.

Meaning of "Necessary."—The word "necessary," as used in section 601, first division of the Compiled Statutes of *Montana*, permitting lands appropriated for a public use to be again taken for a more necessary public use,

Legislature to Determine.—The intended use being a public one, this question of necessity or expediency, according to the decided weight of authority, is left in the first instance to the determination of the legislature,¹ and where the power to condemn has been delegated, it passes to the body thus empowered to take proceedings, in the absence of any provision in the statute submitting the matter to a court or jury.² In cases of gross abuse of this power by the law-making body, the courts will interfere and set aside the law,³ but they cannot inquire into the motives which actuate the authorities, or into the propriety of making the particular improvement.⁴

Courts to Determine.—In some jurisdictions, however, the question whether the property sought to be taken is necessary for the public use or convenience must be judicially determined.⁵

does not mean an absolute necessity for the particular location sought, but a reasonable necessity to be determined from considerations of practicability, economy, and facilities, under the particular circumstances of the case, having regard to senior rights and the benefits to the public. *Butte, etc., R. Co. v. Montana Union R. Co.*, 16 Mont. 504.

1. *Mississippi, etc., Boom Co. v. Patterson*, 98 U. S. 403; *U. S. v. Oregon R., etc., Co.*, 9 Sawy. (U. S.) 61, 16 Fed. Rep. 524, 14 Am. & Eng. R. Cas. 23; *DeVaigne v. Fox*, 2 Blatchf. (U. S.) 95; *Sholl v. German Coal Co.*, 118 Ill. 427; *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 141; *St. Louis, etc., R. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82; *Welton v. Dickson*, 38 Neb. 767; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *People v. Smith*, 21 N. Y. 595; *Matter of Union Ferry Co.*, 98 N. Y. 139; *Syracuse v. Stacey*, 86 Hun (N. Y.) 441; *Call v. Wilkesboro*, 115 N. Car. 337; *Tait v. Central Lunatic Asylum*, 84 Va. 271; *Varner v. Martin*, 21 W. Va. 534.

The Legislature is Not Bound to Submit the question to a judicial tribunal, but may exercise the right itself, or delegate it to a jury, commission, or any other body it sees fit. *State v. Rapp*, 39 Minn. 65; *State v. Stewart*, 74 Wis. 620, 28 Am. & Eng. Corp. Cas. 310.

Function of the Court.—If the use is a public use, the power of the court is confined to seeing that the burdens cast upon the citizen are in conformity with the methods prescribed by the legislature, and that those methods are not in conflict with the fundamental

rights of the people. *Wulzen v. San Francisco*, 101 Cal. 15.

2. *Pike County v. Griffin, etc., Plank Road Co.*, 9 Ga. 475; *O'Hare v. Chicago, etc., R. Co.*, 139 Ill. 151; *Farne-man v. Mount Pleasant Cemetery Assoc.*, 135 Ind. 344; *Barrett v. Kemp*, 91 Iowa 296; *Lynch v. Forbes*, 161 Mass. 302; *Simpson v. Kansas City*, 111 Mo. 237; *Deitrichs v. Lincoln, etc., R. Co.*, 13 Neb. 361; *Matter of Cooper*, 28 Hun (N. Y.) 515; *Philadelphia v. Ward*, 174 Pa. St. 45; *Eldridge v. Smith*, 34 Vt. 484; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609. So held as respects the necessity of taking land for municipal purposes. *Warner v. Gunnison*, 2 Colo. App. 430; *Knoblauch v. Minneapolis*, 56 Minn. 321; *Dunham v. Hyde Park*, 75 Ill. 371; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129; *Cape Girardeau v. Houck*, 129 Mo. 607.

3. *Parham v. Decatur County*, 9 Ga. 341; *Rogers v. St. Charles*, 3 Mo. App. 41; *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884; *Hood v. Finch*, 8 Wis. 381.

4. *Dunham v. Hyde Park*, 75 Ill. 371; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345.

5. *Lecoul v. St. James Police Jury*, 20 La. Ann. 308; *Reynolds v. Reynolds*, 15 Conn. 83; *New Central Coal Co. v. George's Creek Coal, etc., Co.*, 37 Md. 537; *Rensselaer, etc., R. Co. v. Davis*, 43 N. Y. 137; *Matter of New York Cent. R. Co.*, 66 N. Y. 407, *affirming* 5 Hun (N. Y.) 86.

Court may Refuse to Proceed.—On an application by a railroad company to expropriate lands, if it should appear

4. Determining whether Use Is a Public One.—The organic law requiring the intended use to be a public one, the passing of a statute by the legislature authorizing the taking of land is a determination that the use to which the land to be taken is to be devoted is a public one; but the legislature has not the power to so determine that a use is a public use as to make the determination conclusive.¹ The courts alone have the power to finally determine that question.² But if a particular use be declared by the legislature to be a public use the courts will hold such use to be public, unless it manifestly appears that it is not a public use.³ There need be no preliminary proceeding

that the company has already a sufficient quantity for its purpose, the court should refuse an order to summon a jury to assess its value; and should such an order be improvidently granted, before action upon it, it is proper for the court to rescind it. *Jefferson Co. v. Hazeur*, 7 La. Ann. 182.

Michigan.—This is particularly so in Michigan, where the constitution requires the necessity of the use as well as the compensation for the property taken to be passed upon by the jury. Mich. Const., art. xviii., § 2; *Horton v. Grand Haven*, 24 Mich. 465; *McClary v. Hartwell*, 25 Mich. 139; *Arnold v. Decatur*, 29 Mich. 77; *Paul v. Detroit*, 32 Mich. 108.

The Duty of a Jury to pass upon the question of the public necessity for taking private property does not imply simply the solution of the question whether the property sought to be condemned will be useful in carrying out an alleged improvement previously determined upon, but also whether the improvement itself is a public necessity. *Park, etc., Com'rs v. Moesta*, 91 Mich. 149.

1. *Tyler v. Beacher*, 44 Vt. 648. In *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, there is a syllabus to the effect that the legislature is to finally decide whether a scheme of improvement be of such public utility as to justify a resort, for its furtherance, to the power of taxation and eminent domain, but a careful examination of the opinion discloses that the learned judge had in mind, when he used the words "public utility," not so much the public character of the use as the necessity or expediency of resorting to it.

2. *Bankhead v. Brown*, 25 Iowa 540; *Williams v. Judge*, 45 La. Ann. 1295; *St. Joseph Terminal R. Co. v. Hannibal, etc.*, R. Co., 94 Mo. 535; *Cape*

Girardeau v. Houck, 129 Mo. 607; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249; *Call v. Wilkesboro*, 115 N. Car. 337; *Tyler v. Beacher*, 44 Vt. 648.

Whether the use to which it is sought to appropriate property is a public use, and whether such use will justify the compulsory taking of private property, and, when the power is attempted to be exercised by a corporation, whether the power is delegated to it by the legislature, and whether the uses and purposes for which it is sought to be exercised fall within the legislative grant of powers, are proper subjects of judicial determination. *Chicago, etc.*, R. Co. v. *Wiltse*, 116 Ill. 449, 24 Am. & Eng. R. Cas. 261; *In re St. Paul, etc.*, R. Co., 34 Minn. 227, 22 Am. & Eng. R. Cas. 94; *Tracy v. Elizabethtown, etc.*, R. Co., 80 Ky. 259, 14 Am. & Eng. R. Cas. 407; *Concord R. Co. v. Greely*, 17 N. H. 47; *Matter of Niagara Falls, etc.*, R. Co., 108 N. Y. 375, 33 Am. & Eng. R. Cas. 99, *affirming* 46 Hun (N. Y.) 94; *Pittsburg, etc.*, R. Co. v. *Benwood Iron Works*, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531.

3. *Welton v. Dickson*, 38 Neb. 767; *Varner v. Martin*, 21 W. Va. 534. Some cases hold that the courts are to determine the question from the facts and circumstances of the particular case (*Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 676), without regard to any legislative declaration on the subject. *Kansas v. Baird*, 98 Mo. 215; *Aldridge v. Spears*, 101 Mo. 400; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129. The true rule is believed to be that where the absence of all pretense of public benefit is clear and palpable it is the duty of the courts to

for the determination of this question.¹

5. Effort to Agree with Landowner—*a. NECESSITY.*—Most, if not all, of the statutes give the right to condemn only when the compensation for the property taken or damaged cannot be agreed upon, unless the owner is incapable of consenting, or his name and residence are unknown, or he be a nonresident of the state.² A *bona fide* effort to agree is a condition precedent to a valid condemnation,³ and the fact that such an effort was made and failed must appear on the face of the proceedings, or they will be void and confer no jurisdiction.⁴

Raising Objection—Waiver.—Ordinarily, the objection that no attempt to agree has been made may be raised at any stage of the proceedings,⁵ but some cases hold that the owner may waive this statutory requirement,⁶ and that a failure to object before the trial court is a waiver.⁷

declare the act unconstitutional and void, as an attempt to take property for a private use; but to authorize a court to interpose it must be clear and manifest that no public use was contemplated or public benefit is to result. Bloomfield, etc., Natural Gas Light Co. v. Richardson, 63 Barb. (N.Y.) 437.

1. St. Louis v. Frank, 9 Mo. App. 579.

It can be Raised at Any Stage of the proceedings, and can generally be determined from an inspection of the petition or other pleading by which the proceeding is instituted. State v. Engelmann, 106 Mo. 628.

Pleadings.—As to how the public character of the intended use should be pleaded, see *infra*, VII. 8. *Stating the Purpose—Public Use.*

2. Reed v. Ohio, etc., R. Co., 126 Ill. 48, 36 Am. & Eng. R. Cas. 234; Grand Rapids, etc., R. Co. v. Weiden, 70 Mich. 390; Chicago, etc., R. Co. v. Young, 96 Mo. 39; Rogers v. St. Charles, 3 Mo. App. 41; New York, etc., R. Co. v. Godwin, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 21; Water Com'rs v. Clark (Supreme Ct.), 3 N. Y. Supp. 347; Allen v. Wilmington, etc., R. Co., 102 N. Car. 381; Oregon Cascades R. Co. v. Oregon Steam Nav. Co., 3 Oregon 179. As to effect of infancy, coverture, and nonresidence of owner, see Brown v. Rome, etc., R. Co., 86 Ala. 206, 36 Am. & Eng. R. Cas. 571; Bellona Co.'s Case, 3 Bland (Md.) 442; Grand Rapids, etc., R. Co. v. Chesebro, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159.

3. Toledo, etc., R. Co. v. Detroit,

etc., R. Co., 62 Mich. 564, 28 Am. & Eng. R. Cas. 272; Jersey City v. National Docks R. Co., 55 N. J. L. 194; Oregon R., etc., Co. v. Oregon Real Estate Co., 10 Oregon 444; Neal v. Pittsburgh, etc., R. Co., 2 Grant's Cas. (Pa.) 137; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100; Porter v. Abilene (Tex. App. 1890), 16 S. W. Rep. 107.

4. Council Bluffs, etc., R. Co. v. Bentley, 62 Iowa 446, 20 Am. & Eng. R. Cas. 401; Cunningham v. Pacific R. Co., 61 Mo. 33; Kansas City, etc., R. Co. v. Campbell, 62 Mo. 585; Moses v. St. Louis Sectional Dock Co., 84 Mo. 242; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130; Graf v. St. Louis, 8 Mo. App. 562; State v. Plainfield, 41 N. J. L. 138; *In re Philadelphia, etc., R. Co.*, 7 Phila. (Pa.) 461; Howland v. School Dist. No. 3, 16 R. I. 257.

Railroad companies cannot have experimental suits at law as a means of chaffering with the landowners for the cheapest route. Neal v. Pittsburgh, etc., R. Co., 2 Grant's Cas. (Pa.) 137.

5. Cases cited in next preceding note.

6. U. S. v. Reed, 56 Mo. 565.

7. Drainage Com'rs v. Volke, 59 Ill. App. 283; Wilson v. Trenton, 53 N. J. L. 178.

Attempt to Agree Unnecessary.—In *Indiana* an offer to purchase the land before commencing proceedings is not necessary. Ney v. Swinney, 36 Ind. 454; Swinney v. Ft. Wayne, etc., R. Co., 59 Ind. 205.

In *Massachusetts* the filing of the petition is a sufficient showing of an

b. SUFFICIENCY.—The attempt to agree must be made in good faith, by some one authorized to bind the party, to induce the owner to accept an offer honestly made, and not merely formal or colorable.¹

IV. JURISDICTION—1. **In General.**—The jurisdiction is altogether statutory and limited, and can only be exercised in the manner and to the extent provided by statute,² and the jurisdictional

election not to agree. *Burt v. Brigham*, 117 Mass. 307; *Ætna Mills v. Waltham*, 126 Mass. 422. A similar rule prevails in *Tennessee*. *Bigelow v. Mississippi Cent., etc.*, R. Co., 2 Head (Tenn.) 624.

In *Missouri* such attempt is not essential, unless required by the charter under which the proceedings are had. *Kansas City v. Smart*, 128 Mo. 272.

In *New York* the amendment of the petition, changing the quantity of land asked for, was held not to require a further attempt to agree upon the price. *Matter of Prospect Park, etc.*, R. Co., 67 N. Y. 371, *affirming* 8 Hun (N. Y.) 30.

In *Pennsylvania* such an attempt was held useless and unnecessary, where the owners had combined against the improvement, attended the striking of the jury, and made preparations for their coming. *Schuylkill etc., Nav. Co. v. Diffenbach*, 1 Yeates (Pa.) 367.

If there is an actual failure to agree with a landowner as to damages, from any cause, not necessarily as the result of the abortive attempt to agree, it is enough to justify a recovery. The mere absence of consent of the owner to the change is of itself alone sufficient to enable a recovery. *Seaman v. Washington*, 172 Pa. St. 467.

As to the necessity of pleading an attempt to agree, see *infra*, VII. 12. *a. Necessity of the Allegation.*

1. *Grand Rapids, etc.*, R. Co. *v. Weiden*, 70 Mich. 390; *West Virginia Transp. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 382; *Powers v. Bears*, 12 Wis. 214.

If the owner demands an exorbitant price this is equivalent to a refusal to agree. *Matter of Prospect Park, etc.*, R. Co., 67 N. Y. 371, *affirming* 8 Hun (N. Y.) 30; *Matter of Middletown*, 82 N. Y. 196.

All that is Required Is that there should be an honest disagreement between the parties as to the compensation which one is willing to give and

the other to receive. *Dyckman v. New York*, 7 Barb. (N. Y.) 498; *Todd v. Austin*, 34 Conn. 78. The offer being an honest one, it is of no consequence that the agent making it had no expectation that it would be accepted. *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415.

Insufficient Attempts.—Where the landowner made two propositions to the company's agent, who made no reply, and nothing more was done, it was held insufficient. *West Virginia Transp. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 382; *Laue v. Saginaw*, 53 Mich. 442. So, merely asking permission to use materials, without any offer of compensation, is not enough. *Lind v. Clemens*, 44 Mo. 540.

As to Pleading the Effort to Agree, see *infra*, VII. 12. *Alleging Inability to Agree with Owner.*

2. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 549; *Gray v. St. Louis, etc.*, R. Co., 81 Mo. 126, 22 Am. & Eng. R. Cas. 106.

Proceedings do Not Lie for mere damage where no property is taken, *Pittsburg, etc.*, R. Co. *v. West Chicago St. R. Co.*, 54 Ill. App. 273; nor to enforce a forfeiture, *Oregon Cascades R. Co. v. Baily*, 3 Oregon 164; but the courts are clothed with ample power to prevent abuses of the right to condemn. *Chicago, etc.*, R. Co. *v. Chicago*, 143 Ill. 641.

Only Tribunal Authorized can Act.—When the power to condemn is vested in one tribunal it cannot be exercised in another, and when two or more are required to act conjointly, less than the whole number cannot condemn. *St. Louis v. Gleason*, 93 Mo. 33.

Term Time or Vacation.—The proceedings may be instituted either in term time or vacation. *Centralia, etc.*, R. Co. *v. Rixman*, 121 Ill. 214, 30 Am. & Eng. R. Cas. 336; *DeBuol v. Freeport, etc.*, R. Co., 111 Ill. 499; *Williams v. Judge*, 45 La. Ann. 1295. *Contra*, *Baltimore, etc.*, Tel. Co. *v. Louisiana Western R. Co.*, 39 La. Ann. 659.

facts must appear on the record.¹ The presentation of the petition and giving of notice confers jurisdiction.²

Venue.—Unless the statute prescribes otherwise the proceedings must be brought in the county where the land lies,³ even though the works effecting the damage are in another county.⁴ The venue may be changed to another county,⁵ but in such a case the party obtaining the change forfeits the right to a jury of view, as the court in one county cannot order a view in another.⁶

Judge out of Court.—The better opinion is that these proceedings cannot be commenced before a judge out of court. *Matter of Broadway, etc., R. Co., 73 Hun (N. Y.) 7; Washington, etc., R. Co. v. Cœur d'Alene R., etc., Co., 2 Idaho 991.* But some cases hold that it can be. *Davie County v. Cook, 86 N. Car. 18; Lewis v. St. Paul, etc., R. Co., 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612.*

Order for Immediate Possession.—In *California, Colorado, Florida, and Michigan* the courts have sometimes attempted to put the condemning party into possession during the pendency of the proceedings, and before compensation made or secured; but these orders have been set aside as beyond the jurisdiction. In *California* a statute allowing this to be done was held unconstitutional. *Davis v. San Lorenzo R. Co., 47 Cal. 517; Loomis v. Andrews, 49 Cal. 239; Sanborn v. Belden, 51 Cal. 266; San Mateo Waterworks v. Sharpstein, 50 Cal. 284; In re Bryan, 65 Cal. 375; People v. Pitkin County, 11 Colo. 147; Moody v. Jacksonville, etc., R. Co., 20 Fla. 597, 14 Am. & Eng. R. Cas. 53; Grand Rapids, etc., R. Co. v. Chesebro, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159; Detroit, etc., R. Co. v. Probate Judge, 63 Mich. 676, 28 Am. & Eng. R. Cas. 285.* See *infra*, XV. 8. *b. Effect on Petitioner's Right to Enter.*

1. *Keenan v. Dallas County, 26 Ala. 568; St. Louis, etc., R. Co. v. Le-wright, 113 Mo. 660; Chicago, etc., R. Co. v. Young, 96 Mo. 39; St. Louis v. Gleason, 93 Mo. 33.*

Objections to Jurisdiction.—The question as to jurisdiction may be raised at any time and by any party, *Kansas City, etc., R. Co. v. Campbell, 62 Mo. 585;* but where the court is one of general jurisdiction every presumption will be indulged in favor of its jurisdiction. *Buddecke v. Ziegenhein, 122 Mo. 239; Talladega County v. Thomp-*

son, 18 Ala. 694; Chicago, etc., R. Co. v. Chamberlain, 84 Ill. 333.

Appearance and going on with the proceedings are held, in *New York*, to waive objections to the jurisdiction. *Matter of Lexington Ave. (Supreme Ct.), 44 N. Y. St. Rep. 387; Akin v. Water Com'rs, 82 Hun (N. Y.) 265.*

2. *Skinner v. Lake View Ave. Co., 57 Ill. 151; Bailey v. McCain, 92 Ill. 277; Chicago, etc., R. Co. v. Swan, 120 Mo. 30.*

Jurisdiction of Person and Property.—Upon the presentation of a petition to the District Court, in accordance with the provisions of the statute, showing a right on the part of the petitioner to acquire the land therein described, under the law of eminent domain, and invoking the action of the court in the premises, the court has jurisdiction of the subject-matter of the proceedings. There is then only wanting to complete jurisdiction in the condemnation proceedings, that, by the means prescribed by statute or otherwise, the parties whose interests are involved should be brought within the jurisdiction of the court. The provisions of the statute relating to the service of notice of the time and place when the petition will be presented to the court for its action, are designed only for the purpose of investing the court with jurisdiction over the persons interested in the proceeding. *Rheiner v. Union Depot, etc., Co., 31 Minn. 289.*

3. *Missouri Pac. R. Co. v. Carter, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249; Talladega County v. Thompson, 18 Ala. 694; California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 293, 409.*

4. *Stamford Water Co. v. Stanley, 39 Hun (N. Y.) 424.*

5. *Simmons v. St. Paul, etc., R. Co., 18 Minn. 184.* And see article CHANGE OF VENUE, vol. 4, p. 387.

6. *Rockford, etc., R. Co. v. Cop-pinger, 66 Ill. 510.*

2. Jurisdiction of Particular Courts—Federal Courts.—A proceeding under an Act of Congress to condemn lands for the use of the United States is a "suit of a civil nature at common law or in equity," within the meaning of the Judiciary Act, and is cognizable in the federal courts, where the state statutes and practice will be followed.¹ Such proceedings are also removable, in a proper case, from the state court in which they are instituted, to the United States Circuit Court.²

State Courts.—Generally the statutes confer the jurisdiction upon any court of record in the county where the land lies, but courts not of record and justices of the peace have been frequently empowered to hear and determine the application, an appeal being provided for to a higher court. The statutes of the several states differ widely upon this subject; and owing to their frequent alteration, amendment, or repeal by the lawmaking power, the decisions elucidating them, collated in the notes,³

1. Kohl v. U. S., 91 U. S. 367; U. S. v. Block, 3 Biss. (U. S.) 208; U. S. v. Engeman, 45 Fed. Rep. 546.

2. Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, affirming 3 Dill. (U. S.) 465; Northern Pac. Terminal Co. v. Lowenberg, 9 Sawy. (U. S.) 348; Mineral Range R. Co. v. Detroit, etc., Copper Co., 25 Fed. Rep. 515; Reed v. Chicago, etc., R. Co., 25 Fed. Rep. 886; Colorado Midland R. Co. v. Jones, 29 Fed. Rep. 193.

3. **Alabama**—*Probate Court*.—The constitution does not inhibit the legislature from conferring upon the probate court jurisdiction of proceedings to condemn private property for "public use." New Orleans, etc., R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211.

It has jurisdiction to condemn that part of the right of way of a railroad which is not in actual use; and an injunction restraining the occupation by one company of the right of way of another will not be granted, when it appears that the roadbed or track of the latter is not interfered with. Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 520, 39 Am. & Eng. R. Cas. 117.

Commissioners' Court.—The jurisdiction of the commissioners' court, in the matter of the establishment or change of a public road, is dependent on these three things: 1st, an application to the court; 2d, thirty days' notice of the application, by advertisement at the courthouse door and three other public places in the county;

and, 3d, the location of the road within the county. Lowndes County v. Bowie, 34 Ala. 461.

California—*Superior Court*.—The superior court in which proceedings for condemnation are pending has authority to prevent the plaintiff from taking possession of the land sought to be condemned before compensation is made and until an order for such possession is made by the court, under Code of Civ. Pro., § 1254; and if possession is taken in advance of such order the court may make an order requiring the possession to be restored to the owner. Neale v. San Diego County, 77 Cal. 28.

County Courts.—Proceedings for the condemnation of water to supply cities with pure water, and the right of way to conduct it, are "special cases" within the meaning of section 8 of article vi. of the Constitution. The Constitution gives jurisdiction of "special cases" to the county courts, unless the statute confers jurisdiction upon some other court. Spencer Creek Water Co. v. Vallejo, 48 Cal. 70.

The county judge or county court before whom such proceedings are prosecuted has no authority to try and determine, in the same proceeding, conflicting adverse claims to the same lands and waters, as between rival corporations seeking the appropriation and use of the same lands and waters for substantially the same objects; nor has such judge or court, in said proceeding, power or authority to determine whether such lands or waters

should not be deemed conclusive as to the present condition of the law, until any local statutes subsequently enacted have been carefully examined.

are subject to such condemnation or not. *San Francisco, etc., Water Co. v. Alameda Water Co.*, 36 Cal. 639.

Colorado.—*County Courts* are without jurisdiction where the amount of the award is in excess of two thousand dollars. *Denver, etc., R. Co. v. Otis*, 7 Colo. 198, 25 Am. & Eng. R. Cas. 232; *Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434.

Florida.—*Circuit Courts*.—Proceedings for the condemnation of land for railroad and canal purposes, under the Act of February 12, 1885, as amended by that of June 8, 1887, chapters 3505, 3712, are in the Circuit Court in the exercise of its judicial powers as a court of chancery, and not before the circuit judge as a commissioner or special tribunal, or as distinct from the court. *Jacksonville, etc., R. Co. v. Adams*, 29 Fla. 260.

Illinois.—*County Courts*.—Since the passage of the Act of 1849, establishing county courts and abolishing courts held by county commissioners, the duty formerly imposed upon the latter court as to condemnation proceedings vests in the judges of the County Court. The provision regarding the senior county commissioner, who was to appoint commissioners in the absence of the circuit judge, is to be understood to apply to the county judge; but such county judge cannot act unless the circuit judge is absent. *Shute v. Chicago, etc., R. Co.*, 26 Ill. 436.

The County Court has no jurisdiction to determine whether or not the petitioner is a *bona fide* corporation within the meaning and spirit of the law. That can be done only on *quo warranto*. *Brown v. Calumet River R. Co.*, 125 Ill. 600, *affirming* 37 Ill. App. 113.

City Courts.—The several city courts, having concurrent jurisdiction with the circuit courts within the cities in which they are established, in all civil cases except appeals from justices of the peace, have jurisdiction in proceedings under the eminent domain law arising within the territorial limits of such cities. The practice in such city courts is the same as in circuit courts. *Hercules Iron Works v. Elgin, etc., R. Co.*, 141 Ill. 491.

Indiana.—*Circuit Courts and Common Pleas* have concurrent jurisdiction in actions for the assessment of damages for lands taken by railroad companies; and where proceedings for such purposes have been commenced in one of said courts, and appraisers appointed thereby, and an award made and returned by them, the other court cannot then deprive it of jurisdiction. *Hughes v. Lake Erie, etc., R. Co.*, 21 Ind. 175. The right of way of a railroad company is such an interest in real estate as to be beyond the jurisdiction of the Court of Common Pleas, under 2 Rev. Stat. 18. *Cincinnati, etc., R. Co. v. Sipe*, 11 Ind. 67.

Justice of the Peace.—A proceeding before a justice of the peace for an assessment of damages, under the act authorizing the construction of plank, macadamized, and gravel roads, does not involve the title to real estate. *Norristown, etc., Turnpike Co. v. Burket*, 26 Ind. 53.

Maryland.—*Superior Court—Circuit Courts.*—The superior court and the circuit courts for the counties, as courts of law, have special and exclusive jurisdiction to hear and determine all questions arising upon an application to confirm or set aside an inquisition for the condemnation of land for the use of a railroad. *Western Maryland R. Co. v. Patterson*, 37 Md. 125.

Massachusetts.—*Superior Court.*—Under the Act of 1873, c. 261, providing that in all cases in which it is provided by law that a sheriff's jury may be had for any purpose, application for a jury may be made by petition to the superior court, the court to which application is first duly made acquires exclusive jurisdiction of the matter. *Miller v. Barnstable County*, 119 Mass. 485.

Michigan.—*Probate Court.*—Assuming authority in the Probate Court to appoint the commissioners or jury of appraisal in condemnation proceedings, it does not follow that such jurisdiction extends to anything to be done collaterally or outside of the inquest, whereby the power of the court is to be exercised directly on the rights of the parties. It has no power to stay proceedings in any court in the state

V. NOTICE—PROCESS—1. Necessity—General Doctrine that Owner must Have Notice.—According to the decided weight of authority, notice to the landowner, so that he may be afforded an opportunity to

where parties might litigate a trespass committed by the railroad company, and the legislature can confer no such power upon it. *Detroit, etc., R. Co. v. Probate Judge*, 63 Mich. 676, 28 Am. & Eng. R. Cas. 285.

Missouri.—*The Circuit Court* has power to hear and determine petitions, and while that jurisdiction is statutory and limited, the law provides ample means to prevent its erroneous exercise, as it is settled that appeals lie from its judgments in such proceedings. *State v. Seay*, 23 Mo. App. 623.

Justice of the Peace.—A justice of the peace has jurisdiction to condemn land for use by a railroad for reservoir purposes. *Musick v. Kansas City, etc., R. Co.*, 124 Mo. 544, affirming 114 Mo. 309.

New York—Supreme Court.—The Act of 1847, p. 504, amending the charter of the Lockport & N. F. R. Co., authorizes the company to apply to any court of record of the county where the land is situate for condemnation proceedings; and it is therefore not necessary to apply to the Supreme Court according to the General Railroad Act. *Mosier v. Hilton*, 15 Barb. (N. Y.) 657.

Commissioners to Examine Route.—The commissioners first duly appointed, under the General Railroad Act of 1850, § 22, to examine a proposed route, have exclusive jurisdiction to examine and determine in respect to all objections to the proposed location; and that determination is final upon all questions relating thereto. *Matter of Long Island R. Co.*, 45 N. Y. 364.

North Carolina—Superior Court.—The charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common-law jurisdiction. It was held that the clerk of a superior court has jurisdiction of such proceedings. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. Car. 16, 44 Am. & Eng. R. Cas. 168.

Ohio—Probate Court.—The Act of April 30, 1852, conferring upon the Probate Court jurisdiction in cases for the appropriation of private property to the use of corporations authorized

to construct public improvements, is a constitutional enactment. *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308. Under that act the Probate Court has a special and limited jurisdiction, to be exercised in the cases and in the mode prescribed in the act; and that court cannot, under an order of the Court of Common Pleas and to carry into effect that order, take jurisdiction of a case, or proceed in a mode not authorized by the act. *Dayton, etc., R. Co. v. Marshall*, 11 Ohio St. 497.

Pennsylvania—Quarter Sessions.—Under the act incorporating the Union Canal Company, jurisdiction to award a venire for a jury to ascertain and report the damages caused by the construction of the canal is not confined to the Court of Quarter Sessions or the Mayor's Court of Philadelphia; but the Court of Quarter Sessions of any county through which the canal passes has jurisdiction over an assessment of damages done to lands within that county. *Heilman v. Union Canal Co.*, 50 Pa. St. 268.

Texas—District Courts.—Prior to the act approved March 19, 1889, District Courts of Texas had no jurisdiction to condemn private property for the right of way or in fee in favor of a railway company. *Galveston Wharf Co. v. Gulf, etc., R. Co.*, 72 Tex. 454, 36 Am. & Eng. R. Cas. 668.

A District Court has the power to ascertain and determine whether a condemnation has been made of the right of way; but it cannot, if objected to, condemn the land in favor of the railway company in a proceeding to try the title to the land. *Ackerman v. Huff*, 71 Tex. 317, 36 Am. & Eng. R. Cas. 589.

The District Court, where the amount claimed is within its jurisdiction, has jurisdiction over a suit for damages by a landowner against a county for land taken without compensation, upon the Commissioners Court refusing such claim for damages. *Llano County v. Scott*, 2 Tex. Civ. App. 408.

County Courts.—The statute conferring jurisdiction upon the county courts in railroad condemnation proceedings, without regard to the amount in controversy, and without reference

protect his rights, is an essential prerequisite to the taking of his property for public use.¹ Where, by the failure to give him

to the nature of the estate to be acquired, seems to be in conflict with the Constitution, art. v., §§ 8-16, defining the jurisdiction of such courts; yet such jurisdiction will be sustained under art. v., § 22, providing that the legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts. *Gulf, etc., R. Co. v. Tacquard*, 3 Tex. App. Civ. Cas., § 140.

Virginia—County Courts.—The general statute relating to corporations (Code 1873, c. 56) confers no jurisdiction on a county court to take or appropriate land or other property of individuals or corporations for a railroad company. Its only jurisdiction in such a case is to appoint commissioners to ascertain and report what compensation and damages the owner of the property is entitled to receive, where he and the company cannot agree upon the question, and to determine what shall be a just compensation, upon the payment of which the statute vests the fee simple title of the property in the company. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 10 Am. & Eng. R. Cas. 23.

West Virginia—Circuit Court.—The provisions in chapter 88 of the Acts of 1872-73, in reference to the manner in which lands shall be condemned by railroad companies, is not repealed or abrogated by chapter 114 of the Acts of 1875, and the amendatory Act of 1879, chapter 8, and therefore the Circuit Court has no jurisdiction in a case where a railroad company seeks to condemn lands, the jurisdiction in such cases being confined to a county court. *Chesapeake, etc., R. Co. v. Hoard*, 16 W. Va. 270.

Wisconsin—Circuit Court.—A petition for the condemnation of land occupied by a railroad was addressed to the circuit judge, and the railroad company having answered denying the title of the petitioner, the parties appeared in court, pursuant to stipulation, and the petitioner voluntarily undertook to prove his title. It was held that the court had jurisdiction, on such hearing, and without appointing commissioners, to determine whether the petitioner was entitled to have the land

condemned. *Walton v. Green Bay, etc., R. Co.*, 70 Wis. 414.

1. *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 259; *Dickey v. Tenneson*, 27 Mo. 373; *Patten v. Weightman*, 51 Mo. 432; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Atlantic, etc., R. Co. v. Cumberland County*, 51 Me. 36; *Burns v. Multnomah R. Co.*, 8 Sawy. (U. S.) 543, 15 Fed. Rep. 177; *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17; *Ryder v. Horsting*, 130 Ind. 104; *Central Turnpike Corp.*, 7 Pick. (Mass.) 13; *Eighth School Dist. v. Copeland*, 2 Gray (Mass.) 414; *State v. Orange*, 32 N. J. L. 49; *Badgely v. Hamilton County*, 1 Disney (Ohio) 316; *Neeld's Road Case*, 1 Pa. St. 353; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480; *Evans v. Santana Live Stock, etc., Co.*, 81 Tex. 622; *Curran v. Shattuck*, 24 Cal. 427; *Matter of New York, etc., R. Co.*, 62 Barb. (N. Y.) 85.

In *Boonville v. Ormrod*, 26 Mo. 193, the court say: "The constitution may not require notice to be given of the taking of private property for public use, yet when the legislature prescribes a mode by which private property may be taken for such purpose, we will, out of respect to it, suppose that it did not contemplate a violation of that great rule, recognized and enforced in all civil governments, that no one shall be injuriously affected in his rights by a judgment or decree resulting from a proceeding of which he had no notice and against which he could make no defense. Nothing would so much impair that just self-respect arising from the ownership of property fairly acquired, as the reflection that it is subject to be defeated by others without notice to the possessor. The times require that courts should be zealous in carrying out that great aim of government—the defense of men and their children in the enjoyment of property acquired by their diligence, toil and labor. No man can cherish a warm affection for a government that suffers others, without notice and behind his back, to seize and appropriate his property on occasions justified by no emergency."

In *Windsor v. McVeigh*, 93 U. S.

notice, the landowner is denied a hearing upon the question of the right to compensation and the amount thereof, this is a taking of his property without due process of law, within the constitutional prohibition.¹ In such a case, an award having been made, the landowner need not move to set it aside, but may attack it collaterally in any action or proceeding in which rights are claimed under it.²

Contrary Doctrine—No Notice Required.—On the other hand, in several jurisdictions, the giving of notice is held not a constitutional requirement, and such notice may be dispensed with unless specifically required by statute.³ In *Kansas*, even where a statute

274. Field, J., says: "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."

Proceedings without Notice Void on Certiorari.—If the county commissioners issue a warrant for a jury to assess the damages, on the application of persons claiming damages, without giving notice to the party adversely interested of the pendency of such application, the proceedings under the warrant will be illegal, and certiorari will lie to quash the erroneous proceedings. *Atlantic, etc., R. Co. v. Cumberland County*, 51 Me. 36.

Condemnation of Railway Property.—The condemnation of a part of the right of way of a railroad will be inoperative, unless it have notice and be made a party. *Anniston, etc., R. Co. v. Jacksonville, etc., R. Co.*, 82 Ala. 297.

Necessity of Notice Implied in Statute.—The Maryland statute necessarily implies that notice shall be given to the owner by the company or its authorized agent. *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 51 Am. & Eng. R. Cas. 669, reviewing *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Ulman v. Baltimore*, 72 Md. 587; *George's Creek Coal, etc., Co. v. New Central Coal Co.*, 40 Md. 425; *Western*

Maryland R. Co. v. Patterson, 37 Md. 125.

A Bona Fide Purchaser of Land, without notice of proceedings pending for its condemnation, at the time of purchase, no notice of *lis pendens* being filed, is not affected by the proceedings. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306.

1. *Stuart v. Palmer*, 74 N. Y. 183; *Johnson v. Joliet, etc., R. Co.*, 23 Ill. 202; *Hood v. Finch*, 8 Wis. 381; *Seifert v. Brooks*, 34 Wis. 443.

In *Stuart v. Palmer*, 74 N. Y. 183, Earl, J., said: "This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do or authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

In *Neeld's Road Case*, 1 Pa. St. 353, it is said: "The law abhors all *ex parte* proceedings without notice. Notice in this case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it, is repugnant to every principle of justice, and such a proceeding is utterly void."

2. *Kanne v. Minneapolis, etc., R. Co.*, 33 Minn. 419.

3. In *Johnson v. Joliet, etc., R. Co.*, 23 Ill. 131, the court say: "We have no doubt the legislature in the exercise

provides for the giving of notice, a failure to comply with it will not be fatal to the condemnation, though it will render the

of this right can, without notice of any kind, on an emergency of which they are to judge, take any man's property for public use, by making compensation, and prescribe the mode by which this compensation shall be ascertained."

In *George's Creek Coal, etc., Co. v. New Central Coal Co.*, 40 Md. 425, the court say: "It is next objected that the appellant had no notice of the application for a new inquisition and no opportunity to be heard against the petition and motion for it, and it is contended that without such notice the order directing it was passed without lawful authority. Here again the statute furnishes a complete answer to the objection. It does not require any notice to be given to the landowner, either of the original application to the magistrate, or of that to the court for a new inquisition when the first has been set aside. However important notice in such cases may be, it is sufficient for the question we are now considering, that the lawmakers have not made it a prerequisite to the validity of the proceedings. It is probable the legislature thought the construction of such works of public interest ought not to be delayed by the necessity of giving notice to parties not *sui juris*, and non-residents of the county where the lands to be condemned were situated, and that the requirement of a previous attempt to purchase from resident owners *sui juris*, and failure to agree, was sufficient notice to them that the company would proceed to have their lands condemned. But we need not speculate as to what was the motive of the legislature in omitting the requirement of notice in such cases; they have passed a law which confers jurisdiction upon the courts to pass orders like this without notice." This case is *disapproved* in *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

Delaware.—An act of the legislature, providing for the taking of private property for a railroad and for the assessment of damages by commissioners, need not, under the Constitution, provide for notice to the owner of the time and place of the meeting of the commissioners to make the assessment,

nor need it secure to the owner a hearing in relation to the assessment of damages; and such act will not be rendered unconstitutional or void by reason of the omission of such provisions therefrom. *Wilson v. Baltimore, etc., R. Co.*, 5 Del. Ch. 524.

Illinois.—If the charter of a railway, authorizing the condemnation of land for a right of way, does not so direct, a notice of the intended proceeding to condemn need not be given. *Johnson v. Joliet, etc., R. Co.*, 23 Ill. 202, *disapproving Chase v. Hathaway*, 14 Mass. 222; *Eddy v. People*, 15 Ill. 386.

Michigan.—Whether the statute (Comp. Laws 1871, § 1258) does or can dispense with notice in any case to parties concerned when their property is to be appropriated to public uses, *quære*. If there be any exceptional case where notice may be dispensed with, the public authorities who have attempted the appropriation without notice are called upon, when the validity of their proceedings is in question, to show that the circumstances existed which justified such action. The burden is upon them of making out such an exceptional case; and not upon the owners of the property taken, to show the contrary. *Names v. Highway Com'rs*, 30 Mich. 490.

Minnesota.—To make proceedings for taking private property for public use valid, personal notice to the owner is not a constitutional requisite. *Kuschke v. St. Paul*, 45 Minn. 225.

Mississippi.—As a general principle, notice, either actual or constructive, to the party affected by the judgment of a court, is essential to its validity; but there is an exception to this rule, which applies to what are called proceedings *in rem*, or suits of that nature, included in which are condemnation proceedings. In these proceedings the judgments entered are conclusive against all persons interested in the subject-matter, whether they have had actual notice of the proceeding or not. *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

The action of the party pursuant to the statute in going upon the land, examining, reviewing, marking, and laying out the road, is sufficient con-

condemning party liable for the damages growing out of its failure to give notice.¹

Statutory Notice Is Jurisdictional and must be Given.—Whether notice be essential to empower the court to proceed, or not, where there is no statutory requirement as to notice, becomes unimportant where the legislature has expressly provided for a notice; in that case such notice is essential to the jurisdiction of the court, and a condemnation without it will not pass any title from the landowner to the condemning party.²

Notice should be Given although Not Required by Statute.—The better opinion is that in every proceeding affecting the property of individuals, the owners of the property affected are entitled to

structive notice to all parties interested. *Stewart v. Board of Police*, 25 Miss. 479.

Missouri.—Ordinarily it is only necessary to give the owner notice ten days before the petition is heard; it is not required that notice be given him before the assessment of damages by the commissioners. *Cory v. Chicago*, etc., R. Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183. But where the charter of a railroad company does not require notice to the property owner of the intended application to the judge for the appointment of viewers, but does require the viewers to give notice to the landowner of the time when they will view the property and assess the damages, due notice of the time of viewing the property and assessing the damages is all that is required. *St. Joseph, etc., R. Co. v. Shambaugh*, 106 Mo. 557.

New York.—Under the General Railroad Act of 1850, c. 140, § 22, any landowner who feels aggrieved by the proposed location of a railroad may, within fifteen days after receiving notice of the location of the road, apply to a justice of the Supreme Court by a petition to be verified, setting forth his objections to the location as designated, and asking the appointment of commissioners to examine the proposed route with a view of changing it; but under this statute no notice is required to be given of the application for the appointment of the commissioners, neither has the company the right to appear and litigate the question of appointment before the judge; but a notice of the hearing on the report of the commissioners is the only notice required. *Matter of Hartman*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 124.

Under the Act of 1867, c. 399, in-

corporating a company to construct a bridge between the cities of New York and Brooklyn, it was not necessary to give notice to the actual occupants of land over which the bridge would pass, or upon which it would rest, as required by section 22 of the General Railroad Act (Laws 1850, p. 211), and a failure to give such notice was not a jurisdictional defect. *Matter of New York Bridge Co.*, 67 Barb. (N. Y.) 295.

Notice of Appointment of Commissioners or Viewers.—In several states it is held that commissioners or viewers to assess compensation for land taken for public use may be appointed without notice to the landowner. *Norris v. Heppenheimer*, 54 N. J. L. 268; *Matter of Middletown*, 82 N. Y. 196; *Zack v. Pennsylvania R. Co.*, 25 Pa. St. 394.

1. *Chicago, etc., R. Co. v. Griesser*, 48 Kan. 663.

2. *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126; *Jacksonville, etc., R. Co. v. Adams*, 27 Fla. 443, 47 Am. & Eng. R. Cas. 206; *Wood v. Highway Com'rs*, 62 Ill. 391; *Johnson v. Stephenson*, 39 Ill. App. 88; *Wild v. Deig*, 43 Ind. 455; *Birge v. Chicago, etc., R. Co.*, 65 Iowa 440, 20 Am. & Eng. R. Cas. 291; *Kansas City, etc., R. Co. v. Fisher*, 53 Kan. 512; *Missouri Pac. R. Co. v. Houseman*, 41 Kan. 300; *New Orleans, etc., R. Co. v. Frederic*, 46 Miss. 1; *Matter of New York, etc., R. Co.*, 62 Barb. (N. Y.) 85; *Hornellsville Electric R. Co. v. New York, etc., R. Co.*, 83 Hun (N. Y.) 407; *Evans v. Santana Live Stock, etc., Co.*, 81 Tex. 622; *Llano County v. Scott*, 2 Tex. Civ. App. 408; *Parker v. Fort Worth, etc., R. Co.*, 84 Tex. 333, 51 Am. & Eng. R. Cas. 643; *Adams v. Clarksburg*, 23 W. Va. 203; *Morgan v. Louisiana, etc., R., etc., Co. v. Bourdier*, McGloin (La.) 232.

notice of the proceeding, although not directed by the statute under which the proceeding is had.¹

Necessity of Notice Implied.—If not expressed, the necessity of notice is implied in the statute in order that the landowner may have an opportunity to defend his rights.² Thus the duty to give notice is implied by a provision in the statute giving a right of appeal,³ or requiring an effort to agree with the landowner,⁴ or

1. *Illinois*.—Peoria, etc., R. Co. v. Warner, 61 Ill. 52.

Kentucky.—Tracy v. Elizabethtown, etc., R. Co., 80 Ky. 259.

Maine.—Howard v. Hutchinson, 10 Me. 335.

Massachusetts.—Com. v. Peters, 3 Mass. 229; Hinkley, Petitioner, 15 Pick. (Mass.) 447.

Michigan.—Ayres v. Richards, 38 Mich. 214.

Missouri.—Dickey v. Tennon, 27 Mo. 373.

New Jersey.—Vantilburgh v. Shann, 24 N. J. L. 740; State v. Trenton, 36 N. J. L. 499.

New York.—Highway Com'rs v. Claw, 15 Johns. (N. Y.) 537.

North Carolina.—Gamble v. McCrady, 75 N. Car. 509.

Ohio.—Kramer v. Cleveland, etc., R. Co., 5 Ohio St. 140.

Pennsylvania.—In re Road in South Abington Tp., 109 Pa. St. 118.

West Virginia.—Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812.

Wisconsin.—Seifert v. Brooks, 34 Wis. 443.

2. Strachan v. Brown, 39 Mich. 168; Chesapeake, etc., Canal Co. v. Union Bank, 4 Cranch (C. C.) 75; Whiteford Tp. v. Probate Judge, 53 Mich. 130.

The Spirit and Intention of the Act in directing the jury to hear the parties and their witnesses, requires that the parties should have notice of the proceeding; and independent of anything in the statute, no proceeding affecting judicially the rights of another, occurring in his absence without notice, can be valid. *People v. Tallman*, 36 Barb. (N. Y.) 222.

Propriety of Notice Even though Not Required by Statute.—Where the statute does not require the court to have the owners summoned to answer the petition, it would still be a good practice to have them notified to appear, or at least to have them notified, before viewers are appointed; and where the owner is absent beyond the reach

of process, or incapacitated to contract, it is indispensable that the court should appoint guardians and make such decree or order as may be necessary to protect the interest to be affected; and the names of the parties should be disclosed in the petition for the view. *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

Before Judgment.—Before the court can enter judgment upon an application made to appropriate land to public use, the owner of the land must have notice of such application; but at whatever stage of the proceedings the owner of the land is notified to appear, after such notice he has the right to contest the appropriation of his land to the petitioner's use. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

Statute Not Providing for Notice Unconstitutional.—An act providing for taking private property for public use, appointing, without any consent of the owners, three private persons as commissioners to determine the compensation to be paid, not requiring any notice of the proceedings before them nor providing that the owners may, at any stage of the proceedings, appear before the commissioners for any purpose, is unconstitutional and void. *Langford v. Ramsey County*, 16 Minn. 375.

3. *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 259; *Dickey v. Tennon*, 27 Mo. 373.

A mere general declaration in a city charter that the owner or owners of land affected by the decision of the assessors shall have the right to appeal therefrom to a jury in the superior court, without providing for any notice to such lot owner or owners of the rendition of such decision, so as to enable them to exercise the right of appeal, is too vague, indefinite, and uncertain to cure the defect in the charter. *Savannah, etc., R. Co. v. Savannah*, 96 Ga. 680.

4. *Boonville v. Ormrod*, 26 Mo. 193;

requiring viewers to hear evidence adduced by the owner,¹ or authorizing him to strike off jurors, or oppose the confirmation of the inquisition.²

Giving of Notice must Appear on the Record.—The record of the proceedings must show that the notice required by the statute was duly given.³ In some jurisdictions a mere recital in the record that due notice has been given will satisfy this requirement;⁴ in others the facts must be set forth, so that an inspection of the record will show whether the direction of the statute has been obeyed.⁵

Hinckley, Petitioner, 15 Pick. (Mass.) 447; Peoria, etc., R. Co. v. Warner, 61 Ill. 52.

1. Skinner v. Lake View Ave. Co., 57 Ill. 151.

2. Swan v. Williams, 2 Mich. 427.

3. Alabama.—Talladega County v. Thompson, 15 Ala. 134; Barnett v. State, 15 Ala. 829.

Illinois.—Highway Com'rs v. Harper, 38 Ill. 103; Highway Com'rs v. People, 2 Ill. App. 24.

Indiana.—Peabody v. Sweet, 3 Ind. 514.

Iowa.—State v. Berry, 12 Iowa 58; Everett v. Cedar Rapids, etc., R. Co., 28 Iowa 417.

Kentucky.—Lawless v. Reese, 4 Bibb (Ky.) 309; Shackelford v. Coffey, 4 J. J. Marsh. (Ky.) 40.

Maine.—Southard v. Ricker, 43 Me. 575; Coleman v. Andrews, 48 Me. 562.

Massachusetts.—Walker v. Boston, etc., R. Co., 3 Cush. (Mass.) 1.

Michigan.—Names v. Highway Com'rs, 30 Mich. 490; Shue v. Highway Com'r, 41 Mich. 638; Lampson v. Ingham County, 45 Mich. 150; Bennett v. Drain Com'r, 56 Mich. 634; Brazee v. Raymond, 59 Mich. 548.

Missouri.—Whitely v. Platte County, 73 Mo. 30; Chicago, etc., R. Co. v. Young, 96 Mo. 39; St. Louis, etc., R. Co. v. Lewright, 113 Mo. 660.

Nebraska.—Robinson v. Mathwick, 5 Neb. 252; Doody v. Vaughn, 7 Neb. 28.

New Jersey.—Road in Sussex County, 13 N. J. L. 157; State v. Orange, 32 N. J. L. 49.

Ohio.—Harbeck v. Toledo, 11 Ohio St. 219; Fravert v. Finfrock, 43 Ohio St. 335.

Oregon.—Thompson v. Multnomah County, 2 Oregon 34.

Pennsylvania.—Boyer's Road, 37 Pa. St. 257; *In re* Private Road in Red-stone Tp., 112 Pa. St. 183.

Washington.—Bernard v. Brewer, 2 Wash. (Va.) 76.

4. Alabama.—Lowndes County v. Bowie, 34 Ala. 461.

Connecticut.—Huntington v. Birch, 12 Conn. 142.

Illinois.—Shinkle v. Magill, 58 Ill. 422; Chicago, etc., R. Co. v. Chamberlain, 84 Ill. 333.

Indiana.—Wright v. Wells, 29 Ind. 354; Wild v. Deig, 43 Ind. 455; Muncey v. Joest, 74 Ind. 409; Carr v. State, 103 Ind. 548.

Iowa.—McCollister v. Shuey, 24 Iowa 362; Everett v. Cedar Rapids, etc., R. Co., 28 Iowa 417; Pagels v. Oaks, 64 Iowa 198.

Kansas.—Venard v. Cross, 8 Kan. 248; Crawford v. Elk County, 32 Kan. 555.

New Jersey.—State v. Lewis, 22 N. J. L. 564; Coster v. New Jersey R., etc., Co., 23 N. J. L. 227; State v. Justice, 24 N. J. L. 413.

Ohio.—Ferris v. Bramble, 5 Ohio St. 109; Keys v. Williamson, 31 Ohio St. 561; Fravert v. Finfrock, 43 Ohio St. 335.

5. Alabama.—Talladega County v. Thompson, 15 Ala. 134; Barnett v. State, 15 Ala. 829; Molett v. Keenan, 22 Ala. 484.

Maine.—Southard v. Ricker, 43 Me. 575; Prentiss v. Parks, 65 Me. 559; Leavitt v. Eastman, 77 Me. 117.

Massachusetts.—Lancaster v. Pope, 1 Mass. 86.

Michigan.—People v. Highway Com'rs, 14 Mich. 528; Dupont v. Highway Com'rs, 28 Mich. 362; Wright v. Rowley, 44 Mich. 557; Brazee v. Raymond, 59 Mich. 548.

Missouri.—Whitely v. Platte County, 73 Mo. 30.

Nebraska.—State v. Otoe County, 6 Neb. 129.

New Jersey.—Road in Sussex County, 13 N. J. L. 157; Vanwickle

2. To Whom Given—In General.—All the owners, whatever their interests may be, must be notified, or the interests of such as are omitted will not be affected.¹ One entitled to individual notice, whether actual or constructive, will not be bound by a notice to another.²

Who Are "Owners," "Occupants," or "Persons Interested," within the Statutes.—Ordinarily, the statutes provide for notice to "owners or occupants," or to "owners and persons interested" in the land. In such cases the notice should be addressed to each of these persons by name.³ By the word "owner" is meant the person having some legal estate, while under the expression "persons interested" are included not only the person in whom is vested the legal title, but also others having some right or interest therein, not amounting to a legal estate.⁴ The expression "occupants" or "actual occupants" means those residing on the land; it will not include an owner having the key of a vacant house, but living elsewhere.⁵ The decisions as to the proper persons upon whom to serve the notice under these descriptive expressions in the statutes will be found collated in the notes.⁶

v. Camden, etc., R., etc., Co., 14 N. J. L. 162.

New York.—People *v. Smith*, 7 Hun (N. Y.) 17.

Oregon.—Thompson *v. Multnomah County*, 2 Oregon 34.

Pennsylvania.—Central R. Co.'s Appeal, 102 Pa. St. 38; *In re Road in Plumcreek Tp.*, 110 Pa. St. 544.

1. *Detroit, etc., R. Co. v. Detroit*, 49 Mich. 47; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *New Orleans, etc., R. Co. v. Frederic*, 46 Miss. 1; *State v. Reed*, 38 N. H. 59; *Matter of New York, etc., R. Co.*, 62 Barb. (N. Y.) 85.

2. *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126. Thus notice to the husband will not bind the wife, *Whitcher v. Benton*, 48 N. H. 157; *Grosser v. Rochester*, 148 N. Y. 235; nor will notice to a life tenant affect the remainderman, *Chicago, etc., R. Co. v. Smith*, 78 Ill. 96; nor notice to a trespasser, the real owner, *Dunlap v. Toledo, etc., R. Co.*, 46 Mich. 190. A notice directed to a person named, "and all others owning or having an interest" in the land, is not notice to a person not named; but if he appeals from an assessment had under the notice he is estopped to claim want of notice. *Ellsworth v. Chicago, etc., R. Co.*, 91 Iowa 386.

Tenant when Not Entitled to Notice.—A tenant whose name does not appear

in the commissioner's report of condemnation proceedings against the land, because he failed to make known his interest to them, is not entitled to the personal notice provided in Pub. Stat., c. 64, § 35, requiring a city council in such proceedings to cause notice of the filing of such report to be served on persons named in the report. *Whalen v. Bates* (R. I. 1895), 33 Atl. Rep. 224.

3. *Chicago, etc., R. Co. v. Smith*, 78 Ill. 96; *Birge v. Chicago, etc., R. Co.*, 65 Iowa 440.

4. *State v. Easton, etc., R. Co.*, 36 N. J. L. 181; *Platt v. Bright*, 29 N. J. Eq. 128, 19 Am. Ry. Rep. 95; *Severin v. Cole*, 38 Iowa 463, *distinguishing* *Boynton v. Peterborough, etc., R. Co.*, 4 Cush. (Mass.) 467.

5. *Hunt v. Smith*, 9 Kan. 137.

6. **Agents.**—Where the agency is duly proven the notice may be served upon an agent of the owner residing on the land. *Chase County v. Carter*, 30 Kan. 581. So also notice to a corporation owning land may be served upon its agent, but a notice to an agent, and served upon him, will not bind the company. *Evans v. Santana Live Stock, etc., Co.*, 81 Tex. 622. But notice of the time, when a railway route is about to be laid off, to the special agent of a town company appointed to sell property at specified prices, to receive payment on such sales, and to

Unknown Owners.—Where the real owners are unknown, service of the notice should be made on the apparent owners, those who,

pay the taxes on the property, is notice to the company. *Memphis, etc., R. Co. v. Parsons Town Co.*, 26 Kan. 503, 14 Am. & Eng. R. Cas. 379.

Executors and Administrators.—In *Michigan* notice to an executrix of a deceased landowner is good, not only as to her personal interest, but also binds those whom she represents as executrix. Her appearance gives jurisdiction where the estate is still in administration, the rights of the heirs and devisees being secured by her personal liability and that of her sureties. *Barlage v. Detroit, etc., R. Co.*, 54 Mich. 564, 17 Am. & Eng. R. Cas. 131. But in *Missouri* notice of such proceedings given to an administrator will not be notice to the heirs; they must be personally notified. *Boonville v. Ormrod*, 26 Mo. 193.

Infant Owners.—A statute requiring that the owner of each parcel of land proposed to be taken shall be served with notice does not require service on an infant owner in person, but the court may order such service if, at any time during the proceedings, it is suggested that there are infant owners within the county who have attained the age of discretion, and who ought to be personally notified. The guardian of an infant owner must be notified, however, and may appear and make all proper defenses on behalf of his ward; and if he does not so appear and defend, the court should appoint a guardian *ad litem*. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263. To lay out a road on the lands of a minor, without notice to his guardian, or some one interested for him, is a fatal error although damages may have been assessed in his favor. *Neeld's Road Case*, 1 Pa. St. 353.

Lessees and tenants whose names do not appear on the assessment roll are not entitled to notice under the *New York Act* of May 6, 1884, in relation to street surface railroads, providing in section 5 that notice shall be served upon the property owners only, along the line of the road, whose names appear on the assessment roll. *Matter of Broadway Surface R. Co.*, 34 Hun (N. Y.) 414.

Mortgagor.—In *Maine* notice of the location of a townway may be given

either to a mortgagor or mortgagee in the actual possession of the land. *Cool v. Crommet*, 13 Me. 250. And in *New Hampshire* the mortgagor in possession is ordinarily the proper person to be notified of the hearing, and to receive the award of damages. *Gurnsey v. Edwards*, 26 N. H. 224. So also in *Massachusetts*. *Read v. Cambridge*, 126 Mass. 427.

Mortgagee.—The mortgagee of land is an owner in such a sense as to be entitled to notice of the assessment of damages. *Severin v. Cole*, 38 Iowa 463. This is undoubtedly so if the mortgagee be in possession at the time, *Parker's Petition*, 36 N. H. 84; for otherwise he may subsequently foreclose his mortgage on the land taken. *Sherwood v. Lafayette*, 109 Ind. 411; *Warwick Sav. Inst. v. Providence*, 12 R. I. 144; *Platt v. Bright*, 29 N. J. Eq. 128. Where the mortgagee is not in possession, the better opinion is that he is not entitled to notice, the mortgagor while in possession being regarded as the owner of the land for this purpose. *Parish v. Gilmanston*, 11 N. H. 293; *Chicago, etc., R. Co. v. Sheldon*, 53 Kan. 169; but it has been held that a mortgagee whose mortgage is recorded is entitled to notice, although not in possession, as without it he might lose his entire security by proceedings carried on without his knowledge or consent, *Wilson v. European, etc., R. Co.*, 67 Me. 358; *Dodge v. Omaha, etc., R. Co.*, 20 Neb. 281. See also *Gray v. Case*, 51 N. J. Eq. 426.

Overseer.—An overseer residing on and conducting a farm for a nonresident owner may be properly served with the notice. *Kimmey's Petition*, 5 Harr. (Del.) 18.

Owner of Adjoining Lands.—In the condemnation of lands under water, belonging to the state, the owner of adjoining uplands has no such interest as entitles him to notice. *Matter of New York, etc., R. Co.*, 29 Hun (N. Y.) 269.

Person whose Land would be Crossed.—Where a landowner files a petition under N. Y. Act of 1870, c. 560, § 1, amending the general railroad Act of 1850, asking the appointment of commissioners to change the proposed

by the records, appear to be the owners;¹ and the unknown owners should be notified by posting or publishing the notice.²

3. Form and Sufficiency.—*a. GENERALLY.*—While the legislature cannot dispense with the giving of notice, it may, by statute, prescribe the kind of notice and the mode of giving it.³

Reasonable Notice.—Sometimes the statute gives no further indication of the kind of notice to be given or the manner of giving it, than that it be a *reasonable notice*; in such cases the reasonableness of the notice as regards time will depend to some extent on the place of residence of the person to be notified;⁴ and as regards the manner of giving it, either personal service,⁵ publication in a county paper,⁶ or mailing will as a general rule satisfy the statute.⁷

b. FORMAL REQUISITES.—The notice should be in writing,⁸

location of a railroad, it is necessary, in order to render the proceeding valid, that a third person, whose land would be crossed if the change be made, should have notice. *Norton v. Wallkill Valley R. Co.*, 63 Barb. (N. Y.) 77, reversing 61 Barb. (N. Y.) 476, 42 How. Pr. (N. Y.) 228.

Purchasers.—In *California* notice to the owner, when the proceedings are commenced, is not notice to one who purchases from him pending the proceedings. *Curran v. Shattuck*, 24 Cal. 427. The contrary, however, is held in *Wisconsin*. *Plumer v. Wausau Boom Co.*, 49 Wis. 449.

Station Agent.—The station agent of a company at the depot on the grounds through which a highway is proposed to be laid is the occupant of such grounds, within the meaning of Wis. Rev. Stat., § 1267, upon whom notice of the supervisors' meeting may be served, and service upon such agent is also valid if it would be valid were it a summons in an action against the railway company. *State v. O'Connor*, 78 Wis. 282. *Contra* in *Minnesota*. *In re St. Paul, etc.*, R. Co., 36 Minn. 85, 28 Am. & Eng. R. Cas. 255.

A Tenant of the Freehold should be served with notice where he is a tenant in possession, and apparently the visible owner. *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484.

Widow and Heirs.—Notice to a widow only, whose interest was only a dower estate, will not bind the heirs; they also should be notified. *New Orleans, etc.*, R. Co. *v. Frederic*, 46 Miss. 1.

1. *Wilson v. Hathaway*, 42 Iowa 173.

2. *Healey v. Newton*, 119 Mass. 480.

Diligent Inquiry for the real owners

must be made before proceeding as against unknown owners, or the court will stay the proceedings until such inquiry be made. *Harbeck v. Toledo*, 11 Ohio St. 219, where the court intimate that the failure to use such diligence cannot, however, be availed of on error to review the judgment of condemnation.

3. *Owners of Ground, etc., v. Albany*, 15 Wend. (N. Y.) 374; *Hornellsville Electric R. Co. v. New York, etc., R. Co.*, 83 Hun (N. Y.) 407.

4. Where the owners were trustees of an academy, and a majority of them lived in the town where the road was contemplated to be laid out, it was held that a notice of seven days was sufficient. *Belfast Academy v. Salmond*, 11 Me. 109. No time being mentioned in the statute, the notice may be served any time before the return day, in which case the owner must show the insufficiency of the service. *Muire v. Falconer*, 10 Gratt. (Va.) 12; *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397.

5. See *infra*, V. 4. *a. Personal Service.*

6. *Freetown v. Bristol County*, 9 Pick. (Mass.) 46. See *infra*, V. 4. *b. Posting.*

7. *Crane v. Camp*, 12 Conn. 464.

8. But a written notice that a right of way will be required is unnecessary when the owner has notice otherwise of the intended entry for such purpose. *Tompkins v. Augusta, etc., R. Co.*, 37 S. Car. 382; and under Cal. Polit. Code, § 2685.

The notice required to be given by the viewers to the owner of the land over which the road passes, of the pro-

and signed by some one.¹ For other requirements in respect of form, the local statutes should be consulted.²

c. WHAT NOTICE SHOULD CONTAIN.—Owing to the great diversity of the statutory provisions, the only general rule as to the proper contents of the notice that can be safely formulated, is that it must substantially, if not strictly, follow the requirements of the statute.³ The purpose of such statutes clearly is to give the landowner an opportunity to protect his interests by attendance. Where the form or mode of notice is not prescribed he should be apprised of the proceedings to be instituted, the property to be taken, and of the time and place of meeting.⁴ The nature of the proposed action and the object sought to be accomplished should also be stated.⁵

posed route, need not be in writing. *Humboldt County v. Dinsmore*, 75 Cal. 604.

1. Road Notices, 5 Harr. (Del.) 324. *Contra*, when the statute does not prescribe, *Wright v. Wells*, 29 Ind. 354.

It has been held that the commissioners appointed to make the condemnation may give and sign the notice of condemnation, *Clement v. Wichita*, etc., R. Co., 53 Kan. 682; and that all need not sign, the name of the chairman affixed to the notice being enough, *Parish v. Gilmanton*, 11 N. H. 293. As respects the notice to be given by petitioners for a highway in *Nebraska*, at least ten petitioners must sign it. *State v. Oroe County*, 6 Neb. 129. The notice of hearing before the supervisors may be signed by their clerk. *Williams v. Mitchell*, 49 Wis. 284.

2. Notice in Form of Complaint.—The charter of a turnpike company, in providing the mode of assessing damages for the condemnation of the right of way, directed the giving of notice to a justice of the peace of the county, without prescribing the form or contents of such notice. It was held that the fact that a written instrument filed before a justice by said company, in a proceeding to condemn the right of way over land, after giving notice to the justice, assumed the form of a complaint against the owner of the land, did not vitiate the notice or render it bad on demurrer. *Heady v. Vevay*, etc., Turnpike Co., 52 Ind. 117.

Filing of Map need Not Precede Notice.—The notice authorized by *Kansas Gen. Stat.*, c. 23, § 86, is sufficient, even though no map, profile, or notice has

been filed or given as required by sections 48 and 49 of said act. *Missouri River*, etc., R. Co. *v. Shepard*, 9 Kan. 647.

3. *In re Mount Pleasant Ave.*, 10 R. I. 320; *Woolsey v. Hamilton County*, 32 Iowa 130; *Abbott v. Scott County*, 36 Iowa 354. See also *supra*, II. 3. *Strict Compliance with Statute Essential*.

4. *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Matter of New York El. R. Co.*, 70 N. Y. 327; *Vanwickle v. Camden*, etc., R., etc., Co., 14 N. J. L. 162; *Doughty v. Somerville*, etc., R. Co., 21 N. J. L. 442, 22 N. J. L. 495; *Ross v. Elizabethtown*, etc., R. Co., 20 N. J. L. 230; *Williams v. Hartford*, etc., R. Co., 13 Conn. 397; *Quincy*, etc., R. Co. *v. Taylor*, 43 Mo. 35; *Quincy*, etc., R. Co. *v. Kellogg*, 54 Mo. 334; *Chicago*, etc., R. Co. *v. Smith*, 78 Ill. 96; *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 51 Am. & Eng. R. Cas. 669.

The notice given should indicate correctly the authority invoked and the proceedings intended. *Leavitt v. Eastman*, 77 Me. 117. It must be of such a character as to inform the owner that it is his land which is about to be taken for public use, and if he is not so informed the proceeding is void. *Quackenbush v. District of Columbia*, 20 D. C. 300.

A notice of an alteration to run northerly from one point to another, "over the most practicable route for a road," was insufficient. *Potter v. Ames*, 43 Cal. 75.

5. *Quincy*, etc., R. Co. *v. Taylor*, 43 Mo. 35, where it is held that in order that the landowner may understand the nature and object of the pro-

d. TIME AND PLACE.—Ordinarily, the notice must specify the time and place at which the proposed action will be had or proceedings taken.¹ The owner is entitled to notice of time and place as to each step in the proceedings in its nature final.²

As Regards Time, the notice must strictly follow the statute; a notice for any other number of days than the statute prescribes is void.³

A Description of the Place of Meeting, as in a named village without more particularly locating the place,⁴ or as "at the site of the proposed road in said town," is too indefinite, and renders the proceedings void.⁵

e. NOTICE OF ADJOURNMENT OR NEW PROCEEDINGS.—When the parties interested are duly notified of the time and place of a meeting of the commissioners, or other tribunal, no new notice to them is necessary of the time and place of an adjourned meeting;⁶ but where no meeting is held at the appointed day, or an indefinite adjournment is had subject to the call of some member of the tribunal, a new notice is requisite.⁷ So also where one of the commissioners declines to serve, or one of the jurors

ceedings the substance of the petition must be stated in the notice.

Proposed Action.—Where the statute prescribed notice of a meeting to "decide upon" an application for a road, a notice that the commissioners would meet to "make an examination or survey," or to "take into consideration the application," was held bad. *Austin v. Allen*, 6 Wis. 134; *Babb v. Carver*, 7 Wis. 124. To the same effect is *Fitchburg R. Co. v. Fitchburg*, 121 Mass. 132.

Purpose of the Taking.—A notice that the selectmen, in accordance with a vote of the town, will on a certain day lay out and assess damages for the taking of a lot of land, but not stating that it is for a schoolhouse, is insufficient. *Harris v. Marblehead*, 10 Gray (Mass.) 40.

1. Public Roads, 5 Harr. (Del.) 174; *Logansport v. Pollard*, 50 Ind. 151.

This is in the nature of a condition precedent to any action on the part of the commissioners, and to the exercise of the power to appropriate the land. *Wood v. Highway Com'rs*, 62 Ill. 391; *New Orleans, etc., R. Co. v. Frederic*, 46 Miss. 1.

2. *Seifert v. Brooks*, 34 Wis. 443; *Ex p. Reynolds*, 52 Ark. 330.

3. Public Roads, 5 Harr. (Del.) 174; *Logansport v. Pollard*, 50 Ind. 151; *Wallkill Valley R. Co. v. Norton*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.)

317; *Croft v. Bennington, etc., R. Co.*, 64 Vt. 1.

The fact that the petition was heard at a later day than the one named in the notice does not oust the court of jurisdiction where the owner did not appear in court on the day named in the notice. *Thompson v. Chicago, etc., R. Co.*, 110 Mo. 147.

4. *Highway Com'rs v. Hoblit*, 19 Ill. App. 259; *Minneapolis, etc., R. Co. v. Kanne*, 32 Minn. 174; *In re Johnson*, 49 N. J. L. 381.

5. *Hammon v. Highway Com'rs*, 38 Ill. App. 237. So also in designating the court, a statement in the notice that a petition will be presented "to the Special Term of the Supreme Court of New York," is not sufficient under the N. Y. Code Civ. Pro., § 3361, which requires a notice of the time and place at which will be presented a petition "to a Special Term of the Supreme Court held in the judicial district where the property or some portion of it is situated." Such notice is applicable to a special term held at any place in the state, and under it the court would acquire no jurisdiction. *Matter of Broadway, etc., R. Co.*, 69 Hun (N. Y.) 275.

6. *New Salem, Petitioner*, 6 Pick. (Mass.) 470; *Com. v. Berkshire County*, 8 Pick. (Mass.) 343.

7. *Pegler v. Highway Com'rs*, 34 Mich. 359; *Memphis, etc., R. Co. v. Parsons Town Co.*, 26 Kan. 503.

dies or leaves the country, such change in the personnel of the tribunal requires a new notice.¹

f. DESCRIBING THE PROPERTY.—If the statute so requires, the property sought to be taken must be particularly described in the notice, or at least with such certainty as to apprise the landowner what property is proposed to be taken.² In the absence of such statutory requirement the property taken need not be particularly described or designated.³

Describing the Location or Improvement.—In highway and street cases the location of the termini,⁴ and the nature and extent of the proposed improvement, should be definitely stated in the notice.⁵

4. Service—*a. PERSONAL SERVICE*, if the statute requires it, must be the mode adopted, or the proceedings will be void,⁶ but

1. *State v. Plainfield*, 41 N. J. L. 138; *Anderson v. St. Louis*, 47 Mo. 479. But in *Matter of Broadway Widening*, 63 Barb. (N. Y.) 572, it was held that a new commissioner can be appointed in place of one resigning, without a new notice.

In Cases of Rehearing or Reassessment of damages there must be a new notice. *People v. Tallman*, 36 Barb. (N. Y.) 222.

2. *State v. Elizabeth*, 32 N. J. L. 357; *Matter of Orange St.*, 50 How. Pr. (N. Y. Supreme Ct.) 244; *Kuschke v. St. Paul*, 45 Minn. 225. As to the description of the property in the pleadings, see *infra*, VII. 6. *Description of the Premises*.

3. *Doughty v. Somerville, etc.*, R. Co., 21 N. J. L. 442; *Wilkin v. First Div. St. Paul, etc.*, R. Co., 16 Minn. 271, where the lands were referred to as being on the line of a designated division of the railroad or branches.

Descriptions Held Sufficient.—The following have been held sufficient descriptions of the property sought to be taken, so far as the notice is concerned: A certain number of feet on each side of the centre line of the railroad, "as the same is located, staked, and marked." *Lower v. Chicago, etc.*, R. Co., 59 Iowa 563, 10 Am. & Eng. R. Cas. 17.

Part of the owner's land lying on a certain street, between the intersections of two other streets, with a reference, for further description, to the ordinance under which the improvement was to be made. *State v. Plainfield*, 41 N. J. L. 138.

"The land late of C. in the township of H., now occupied by the New Jersey R. Co. as the location of its track."

Coster v. New Jersey R., etc., Co., 23 N. J. L. 227.

A notice stating that some of the lands were unimproved, whereas all were improved. *Snyder v. Trumpbour*, 38 N. Y. 355.

In *Matter of Newland Ave.* (Supreme Ct.), 38 N. Y. St. Rep. 796, in a proceeding to take lands under the charter of Jamestown (Laws of 1886, c. 84), an objection was made that the land of a property owner was incorrectly described in the notice, and that a part was omitted. It was held that such an objection went to the effect and not to the regularity of the proceeding, and that the city would not acquire title to any more of the land in question than was embraced in said notice.

4. *In re Highway*, 16 N. J. L. 391; *State v. Green*, 18 N. J. L. 179; *State v. Elizabeth*, 32 N. J. L. 357.

5. *Albany St. Opening*, 6 Abb. Pr. (N. Y. Supreme Ct.) 273; *Matter of Central Park*, 51 Barb. (N. Y.) 277.

6. *Lohman v. St. Paul, etc.*, R. Co., 18 Minn. 174; *Adams v. Clarksburg*, 23 W. Va. 203.

In *Indiana* the delivery of the act of appropriation to the owner of the land, or guardian, is the first notice required by the statute, and this must be done before the appointment of the appraisers. *Swinney v. Ft. Wayne, etc.*, R. Co., 59 Ind. 205.

In *Massachusetts* the notice required by statute to the owner of land included within a railroad location, of a petition for authority to take land, will be presumed. It is not necessary that all the landowners should be notified personally by name. *Brock v. Old Colony R. Co.*, 146 Mass. 194, 33 Am. & Eng. R. Cas. 96.

the fact that a statute does not require personal notice does not render the statute void.¹ Notice may be served by reading it where the statute requires personal service,² and the petitioner, or one of them if there are two or more, or any other person, may serve the notice, unless the statute provides otherwise.³ Personal service is generally required as respects resident owners and occupants of the land.⁴

b. POSTING.—A statute providing that notice may be served generally—even upon resident owners—by posting the notice, and that personal service shall not be required in any case, is not unconstitutional,⁵ but posting cannot be resorted to in the absence of a statute authorizing it, and the statute must be strictly followed, and the proof of service must so show.⁶

Mailing.—Where the statute relative to notice applies only to owners resident in the state, the mailing of a notice to non-resident owners is *reasonable* notice.⁷

c. PUBLICATION. (See also article PUBLICATION.)—Where actual service cannot be had, as in the cases of nonresident or unknown owners, constructive service, if authorized by statute, is “due process of law;”⁸ but the statute must be strictly

1. *Davies v. Los Angeles*, 86 Cal. 37.

2. *Green v. State*, 56 Wis. 583.

3. *Sanborn v. Meredith*, 58 N. H. 150; *McClure v. Groton*, 50 N. H. 49.

4. *Hunt v. Smith*, 9 Kan. 137; *Chicago, etc., R. Co. v. Swan*, 120 Mo. 30; *State v. Fond du Lac*, 42 Wis. 287; *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

Service in Another State.—Where the law required personal service or the leaving of the notice at the owner's place of abode, personal service in another state on a nonresident owner was held good. *Saginaw, etc., R. Co. v. Bordner* (Mich. 1896), 66 N. W. Rep. 62; *State v. Hudson River R., etc., Co.* (N. J. L. 1892), 25 Atl. Rep. 853.

5. *Davies v. Los Angeles*, 86 Cal. 37; *Chicago, etc., R. Co. v. Swan*, 120 Mo. 30; *Mississippi River, etc., R. Co. v. Jones*, 54 Mo. App. 529.

6. *People v. La Grange Tp. Board*, 2 Mich. 187; *Whitely v. Platte County*, 73 Mo. 30.

7. *Crane v. Camp*, 12 Conn. 464.

In *Ives v. East Haven*, 48 Conn. 272, an order was made that N. should be notified, as a landowner, of the time and place of the hearing. An officer called at N.'s house to leave a certified copy of the order, but found that he and his family had gone to another state. The paper was then mailed to N., and he received it next day. N.

returned in time to attend the hearing, but did not appear. The service was held to be sufficient.

Notice Mailed to Incorrect Address.—Where the statute directs notice to be mailed to nonresidents whose addresses are known, a notice directed to a place other than the correct one, which is stated in the petition, will be a nullity. *Morgan v. Chicago, etc., R. Co.*, 36 Mich. 428.

8. *Huling v. Kaw Valley R., etc., Co.*, 130 U. S. 559, 39 Am. & Eng. R. Cas. 52; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

Kansas.—Under Comp. Laws, c. 23, publication of a notice directed to persons owning lands on the line of a railroad, as the same was or might be located through a certain section, that the commissioners on a certain date would proceed to lay off the route for said road through said section, and appraise the value and assess the damages, is sufficient to support the condemnation of lands in such section by the company. *Huling v. Kaw Valley R., etc., Co.*, 130 U. S. 559, 39 Am. & Eng. R. Cas. 52.

An owner of land is not in the actual occupancy of the same, within the meaning of section 49 of the Kansas Act concerning private corporations, unless he is an actual resident thereon; and where such owner is not an actual

complied with, or the proceedings will be void.¹

Time of Publication.—The notice must be published for the full period prescribed in the statute, or the court will not acquire jurisdiction over parties who do not appear.² The notice takes effect from its first publication and not from its date.³

occupant of the land, notice of an appropriation of a part of the same for a right of way for a railway, given by publication in a newspaper, as provided by amended section 86 of said act (Laws 1870, c. 74, § 1), is sufficient. *Hunt v. Smith*, 9 Kan. 137.

Minnesota.—In proceedings *in rem* for the condemnation of land, and the assessment of the owners' damages therefor, it is competent for the legislature to provide for constructive notice of the proceedings to the parties interested by publication. *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141, 24 Am. & Eng. R. Cas. 309.

Under Gen. Stat. 1878, c. 34, § 15, it is a condition precedent to the right to make service by publication of the notice therein required, upon nonresident landowners or those whose residence is unknown, that an affidavit shall have been filed, showing the fact of the nonresidence, or that after diligent inquiry the residence of such owner is unknown or cannot be ascertained. *Brown v. St. Paul, etc., R. Co.*, 38 Minn. 506, following *Barber v. Morris*, 37 Minn. 194.

Wisconsin.—Rev. Stat., § 1846, providing that notice of the proceedings for the condemnation of land may be given by publication even to resident owners, is constitutional. *Winnebago Furniture Mfg. Co. v. Wisconsin Midland R. Co.*, 81 Wis. 389, *distinguishing* *Seifert v. Brooks*, 34 Wis. 443; *State v. Fond du Lac*, 42 Wis. 287.

1. *Brush v. Detroit*, 32 Mich. 43, where the proceedings were held void for this reason at the instance of a party who had himself been personally served.

Statute must be Strictly Followed.—Where the statute required a city, as a substitute for personal service upon the owners, to publish "a copy of the application with a statement of the time and place at which it is to be made," the publication of a notice of the time and place for making the application, describing therein the property and the purposes for which it is to be taken, but not accompanied by a

"copy of the application," is not a compliance with this statutory prerequisite, and does not confer upon the court or judge authority to make an order appropriating the lands. *Harbeck v. Toledo*, 11 Ohio St. 219.

Where notice is given, by publication in a newspaper, that if the owner fails to apply for an assessment of damages by a date named, then the railroad company will apply therefor, and that the appraisement will be made at the premises on a day and hour named in the notice, such publication will give no authority for the assessment of damages nine months after the date fixed therefor in the notice. *Hull v. Chicago, etc., R. Co.*, 21 Neb. 371.

Kind of Newspaper.—Where notice is required to be published in two newspapers, English newspapers are presumed to be intended, and a sheet containing nothing but advertisements, and printed for gratuitous distribution, is not a newspaper. *Tyler v. Bowen*, 1 Pittsb. (Pa.) 225.

2. *Stanford v. Worn*, 27 Cal. 171; *Rifenburg v. Muskegon*, 83 Mich. 279.

A requirement that the notice be published in one or more papers for three consecutive weeks, in a village where there is only one daily paper, is satisfied by publication in two papers once in each week for three consecutive weeks. *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255.

3. *Riche v. Bar Harbor Water Co.*, 75 Me. 91, where the charter of the water company provided that "notice of such location shall be given to all persons affected thereby, by publication in some public newspaper." The company gave notice in a newspaper that, "for the purpose of erecting thereon a reservoir or reservoirs, and such other works as they deem necessary," they had "caused a survey of a certain lot of land to be made, and the plan thereof to be filed in the office of the town clerk. * * * This land is situated upon the hill known as Cunningham's Hill (at Bar Harbor), and was formerly owned or supposed to be

The publication must be continued for the whole period in the same newspaper.¹

Who Bound.—Only the persons named in the notice as published will be bound thereby.²

d. PROOF OF SERVICE.—This is a matter depending upon the requirements of the statute which must be strictly followed; but if the statute is silent as to the manner of proving service, any satisfactory proof of the fact of service is sufficient.³ In such a case a recital in the final order, signed by the commissioners, that the requisite notices were duly posted is sufficient.⁴ Where an officer serves the notice his return is the proper proof of such service, it being better evidence than the oral testimony of a witness;⁵ but the proof may be made by affidavit, stating when,

owned by A. P. Cunningham or others. For further particulars, interested parties are referred to the plan in the office of the town clerk." The notice was held to be a sufficient compliance with the charter.

1. The publication of such notice in a daily newspaper a part of the time, and the remainder of the time in a weekly (the papers being sent to different sets of subscribers in different localities) will not confer jurisdiction, and all proceedings thereunder will be void. *Hull v. Chicago, etc., R. Co.*, 21 Neb. 371.

Where the statute directed two weeks' publication, and also at least ten days' personal service or mailing before the hearing of the application referred to in the notice, it was held that the publication must be completed at least ten days before such hearing. *Matter of Carlton St.*, 16 Hun (N. Y.) 497, *affirmed* in 78 N. Y. 362.

2. Section 1247 of the Iowa Code requires that a notice by publication for the condemnation of right of way for a railroad must be addressed by name to the person whose land is to be taken or affected, and the owner not so named will not be bound by a notice addressed to "all other persons having any interest in or owning any of the following real estate." *Birge v. Chicago, etc., R. Co.*, 65 Iowa 440, 14 Am. & Eng. R. Cas. 414, 20 Am. & Eng. R. Cas. 291.

The charter of a railroad company required notice by publication to the owner, or occupier, or unknown owners of land sought to be condemned, of the application to appoint commissioners, and the company published

such notice as to one who had held a life estate only, but who was then dead, not naming the remainderman. It was held that the subsequent proceedings condemning the land for right of way were not binding upon the remainderman, and that he might recover the land appropriated by ejectment. *Chicago, etc., R. Co. v. Smith*, 78 Ill. 96.

3. *Parish v. Gilmanton*, 11 N. H. 293; *Carr v. Boone*, 108 Ind. 241.

4. *Shinkle v. Magill*, 58 Ill. 422.

Recitals in the Report of the commissioners appointed to condemn a right of way show the following facts: "Afterward, on the 1st day of July, 1887, we caused to be published in the *Sumner County Standard*, a newspaper published in said Sumner county, a notice, of which the following is a copy;" following this is a notice that they will proceed to lay off the route on the 30th day of July, 1887, which notice is dated at the bottom "June 28, 1887," and signed by the commissioners; after this comes the following recital: "Which said notice was published for 30 days before the time fixed for proceeding to lay off said route, and afterward and on, to wit, the 30th day of July, 1887, at the time and place mentioned in said notice aforesaid, we met, organized, and adjourned to meet at the same place on the 3d day of August, 1887." Having been acted on by the commissioners as a valid notice, and so construed by the District Court, the report was held to show *prima facie* that thirty days' notice was given as required by the statute. *Clement v. Wichita, etc., R. Co.*, 53 Kan. 682.

5. *Mobley v. Breed*, 48 Ga. 44.

where, and by whom the notice was posted or served.¹ The proof of service, in whatever form it be, should show the facts as to the manner of service, so that the court may see whether the party was legally notified.²

5. Waiver of Notice by Appearance or Otherwise. (See generally article APPEARANCES, vol. 2, p. 644.)—Notwithstanding any irregularity in the notice, or in the service, and even when no notice at all is given, if the party entitled to notice appears and takes part in the proceedings, it is a waiver of notice, the object of giving it, to wit, to enable him to appear and protect his interests, having been fully attained.³ It has been held that such an appearance estops the landowner from objecting that no notice was served upon him;⁴ but the better view is that the court, having acquired jurisdiction of the subject-matter by the filing of the petition, the landowner's appearance confers jurisdiction of his person, thus completely empowering the court to act in the premises.⁵

1. *State v. Otoe County*, 6 Neb. 129; *Wright v. Wells*, 29 Ind. 354.

Aiding Defective Affidavit.—Where proof of posting is not required to be in writing, an affidavit failing to state that the places of posting were "public places" may be aided by other evidence of that fact. *Carr v. Fayette County*, 37 Iowa 608. But where an affidavit is required, a deficient one cannot be cured by a sufficient one filed after confirmation. *Scott v. Brackett*, 89 Ind. 413. Yet, where the defect was merely clerical (omission of the officer's jurat), on proof that the oath was duly administered at the proper time, the trial court ordered the officer to affix his jurat as of that time. *Williams v. Stevenson*, 103 Ind. 243.

2. *Central R. Co.'s Appeal*, 102 Pa. St. 38; *Road in Sussex County*, 13 N. J. L. 157; *Vanwickle v. Camden, etc., R., etc., Co.*, 14 N. J. L. 162.

3. *California*.—*Kimball v. Alameda County*, 46 Cal. 19.

Connecticut.—*Ives v. East Haven*, 48 Conn. 272.

Georgia.—*Green v. Reeves*, 80 Ga. 805.

Illinois.—*Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *Gilkerson v. Scott*, 76 Ill. 509; *McManus v. McDonough*, 107 Ill. 95.

Indiana.—*Smith v. Alexander*, 24 Ind. 454; *Swinney v. Ft. Wayne, etc., R. Co.*, 59 Ind. 205; *Indiana, etc., R. Co. v. Allen*, 100 Ind. 409; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Robinson v. Rippey*, 111 Ind. 112.

Kansas.—*Akin v. Riley County*, 36 Kan. 170; *Stephens v. Leavenworth County*, 36 Kan. 664.

Massachusetts.—*Barre Turnpike Corp. v. Appleton*, 2 Pick. (Mass.) 430; *Copeland v. Packard*, 16 Pick. (Mass.) 217.

Michigan.—*Dunning v. Drain Com'r*, 44 Mich. 518; *East Saginaw, etc., R. Co. v. Benham*, 28 Mich. 459.

New Hampshire.—*Peavey v. Wolfborough*, 37 N. H. 286; *Boston, etc., R. Co. v. Folsom*, 46 N. H. 64.

New York.—*Dyckman v. New York*, 7 Barb. (N. Y.) 498; *Polly v. Saratoga, etc., R. Co.*, 9 Barb. (N. Y.) 449; *Long Island R. Co. v. Bennett*, 10 Hun (N. Y.) 91.

North Carolina.—*Little v. May*, 3 Hawks (N. Car.) 599.

Pennsylvania.—*Cambria Street*, 75 Pa. St. 357; *New Road in Byberry*, 6 Phila. (Pa.) 384.

Rhode Island.—*Tingley v. Providence*, 9 R. I. 388.

Virginia.—*Muire v. Falconer*, 10 Gratt. (Va.) 12.

Wisconsin.—*State v. Langer*, 29 Wis. 68, where it is held that the appearance is not a waiver, unless the landowner expressly consents to the taking or accepts the damages. To the same effect, see *Seifert v. Brooks*, 34 Wis. 443.

United States.—*Great Falls Mfg. Co. v. Atty.-Gen.*, 124 U. S. 581.

4. *Greene v. Reeves*, 80 Ga. 805.

5. *Skinner v. Lake View Ave. Co.*, 57 Ill. 151.

Appeal.—The taking and prosecuting of an appeal is equivalent to an appearance, and waives the defects of want of notice or jurisdiction of the person.¹

Special Appearance.—But a special appearance for the purpose of contesting the power of the court to proceed, expressly reserving all legal objections, is not a waiver of notice;² nor is the objection waived where, in case it had been raised, the tribunal before which the party appeared would not have had power to pass upon it.³

A Casual Meeting of the landowner and the commissioners on the former's land, without more, is not a waiver of notice.⁴

Infants and Persons Non Compotes Mentis cannot waive notice.⁵

Upon the presentation of a petition to the District Court, in accordance with the provisions of the statute, showing a right on the part of the petitioner to acquire the land therein described, and invoking the action of the court in the premises, the court has jurisdiction of the subject-matter of the proceeding. There is then only wanting, to complete jurisdiction of the condemnation proceedings, that, by the means prescribed by statute or otherwise, the parties whose interests are involved should be brought within the jurisdiction of the court. The provisions of the statute relating to the service of notice of the time and place when the petition will be presented to the court for its action are designed only for the purpose of investing the court with jurisdiction over the persons interested in the proceeding. Defects with respect to the jurisdiction over the person may be waived, and, when waived, cannot afterwards be questioned. Any distinct recognition by a party, in the progress of a cause, of the authority of a tribunal to adjudicate therein, is effectual as a waiver of defects going merely to the jurisdiction of the person. *Rheiner v. Union Depot, etc., Co.*, 31 Minn. 289, 14 Am. & Eng. R. Cas. 373, distinguished in *Minneapolis, etc., R. Co. v. Kanne*, 32 Minn. 174, 17 Am. & Eng. R. Cas. 122.

1. *Atchison, etc., R. Co. v. Patch*, 28 Kan. 470; *Rheiner v. Union Depot, etc., Co.*, 31 Minn. 289, 14 Am. & Eng. R. Cas. 373; *East Saginaw, etc., R. Co. v. Benham*, 28 Mich. 459; *State v. Fond du Lac*, 42 Wis. 287.

One who has taken and presented such an appeal may not afterwards pursue the inconsistent remedy of an

action to restrain the corporation from the use of the land upon the ground of such defect in the condemnation proceedings. *Rheiner v. Union Depot, etc., Co.*, 31 Minn. 289, 14 Am. & Eng. R. Cas. 373, distinguishing *Lohman v. St. Paul, etc., R. Co.*, 18 Minn. 174; *Weir v. St. Paul, etc., R. Co.*, 18 Minn. 155.

2. *State v. Jersey City*, 25 N. J. L. 309. See also article APPEARANCES, vol. 2, p. 620.

Limited Appearance.—Where ten days' notice is not given of the appointment of appraisers, as required by N. Y. Act of 1847, c. 31, § 4, under which the proceeding was had, but the record shows that the landowner appeared and objected to the regularity of the proceedings, though the ground of objection is not disclosed, it will be presumed that he appeared especially to object to the sufficiency of the notice, and such limited appearance has been held not sufficient to waive notice and render the proceedings valid. *Cruger v. Hudson River R. Co.*, 12 N. Y. 190, applying *Dyckman v. New York*, 5 N. Y. 434; *Mohawk, etc., R. Co. v. Artcher*, 6 Paige (N. Y.) 84.

Demurrer to Petition.—Where a landowner objects to a proceeding on account of the insufficiency of the notice given, such objection is not waived by subsequently demurring to the petition. *Matter of Broadway, etc., R. Co.*, 69 Hun (N. Y.) 275.

3. *Hinckley, Petitioner*, 15 Pick. (Mass.) 447.

4. *Minneapolis, etc., R. Co. v. Kanne*, 32 Minn. 174.

5. *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585; But see *Hancock v. Boston*, 1 Met. (Mass.) 122.

Where Parties have Had Actual Notice, with ample time to protect their rights, but failed to appear, the courts will be reluctant to interfere for want of the statutory notice, unless a plain case of injury is made out.¹

6. Process.—In some of the states proceedings to condemn lands for railway purposes are instituted by the issuing of a summons, under statutes prescribing the giving of notice in that form.² The summons must be served in strict compliance with the statute, either personally or, in case of nonresidence of the party to be served, by publication.³

VI. PARTIES—1. General Rules—*a. PARTIES COMPLAINANT.*—Ordinarily condemnation proceedings are instituted by, and in the name of, the party seeking to appropriate the property,⁴ but it is within the power of the legislature to designate any one to take the initiative.⁵

1. *Sumner v. Oxford County*, 37 Me. 112; *Peters v. Griffiee*, 108 Ind. 121.

Effect of Actual Notice.—A nonresident whose land has been condemned cannot successfully assail the proceedings on the ground that the provisions of the act, as to the manner of giving him notice of the proceedings and the time allowed him to apply for damages, are unconstitutional because of the insufficiency of such notice and time allowed, where it appears that he has had actual notice and, within the time limited, filed a bill to enjoin the proceedings. *Cage v. Trager*, 60 Miss. 563.

Since an act providing for the taking of private property for public use is not unconstitutional because it omits to secure the owner a hearing in reference to the assessment of damages, or a notice thereof, a preliminary injunction will not be granted to restrain the occupation of land by a railroad company after an assessment under such act, when it appears that, as matter of fact, the landowner had actual notice of, and was heard at, the meeting of the commissioners for the purpose of assessing damages, and the bill contains no allegations of partiality, unfairness, corruption, or fraud on the part of the commissioners. *Wilson v. Baltimore, etc.*, R. Co., 5 Del. Ch. 524.

2. *Pacific Coast R. Co. v. Porter*, 74 Cal. 261, 33 Am. & Eng. R. Cas. 167; *Leibengut v. Louisville, etc.*, R. Co., 103 Ill. 431, 14 Am. & Eng. R. Cas. 349; *Hercules Iron Works v. Elgin, etc.*, R. Co., 141 Ill. 491; *Musick v. Kansas City, etc.*, R. Co., 114 Mo. 309.

3. *Bowman v. Venice, etc.*, R. Co., 102 Ill. 472, 14 Am. & Eng. R. Cas. 347; *Leonard v. Sparks*, 117 Mo. 103; *Yolo County v. Knight*, 70 Cal. 431.

Service by "Due Course of Mail" is invalid unless expressly recognized by the statute. *Doyle v. Kansas City, etc.*, R. Co., 113 Mo. 280.

4. See *supra*, III. *Who may Institute It.*

In *Colorado Midland R. Co. v. Ruedi*, 2 Colo. App. 202, the right to begin the proceeding is limited to the condemning party; but in *Hannibal, etc.*, R. Co. *v. Morton*, 27 Mo. 317, an objection that the proceeding was instituted in the name of an individual as agent for the railroad company was considered immaterial.

Federal Condemnation.—A proceeding to condemn land under the federal statute having been commenced in the name of the secretary of the treasury, it was proper to amend by making the United States the formal petitioner. *Chappell v. U. S.*, 160 U. S. 499.

5. *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56, where it is held that the commissioners of the Central Park in the city of New York, a recognized public body, having been authorized to institute such proceedings, the question whether such a body had, apart from its authority, a legal existence, is immaterial.

In *Matter of Rochester Water Com'rs*, 66 N. Y. 413, proceedings were held properly commenced by a board of water commissioners, as such, they being authorized to secure the condemnation, although the title to

Right of Landowner to Begin Proceedings.—While the initiative is ordinarily with the condemning party, it is sometimes given to the landowner, in which case the relative positions of the parties are reversed, the defendants becoming plaintiffs and *vice versa*. This is particularly so in cases arising under the mill acts.¹

In some of the states the landowner is not authorized by the statutes to begin the proceedings, that function being restricted to the condemning party, the owner's remedy, in case the land is taken without condemnation, being by action.² In other jurisdictions the landowner may himself institute the proceedings, if there be any delay on the part of the corporation,³ either during the progress of the work of construction or after its completion.⁴

the property condemned would vest in the city.

In Matter of Street Opening (Supreme Ct.), 1 N. Y. Supp. 145, it was held that where a statute directs that proceedings to condemn lands shall be taken in the name of the mayor, aldermen, and commonalty of the city of New York, the proceedings are not defective because the name of the board of street opening and improvement was also used, and that body took part therein.

Lessor and Lessee of Railroad.—A company which has leased its railroad may institute the proceedings, notwithstanding the lease is not expired, and so may the lessee. *Deitrichs v. Lincoln, etc., R. Co.*, 13 Neb. 361, followed in *Gottschalk v. Lincoln, etc., R. Co.*, 14 Neb. 389, where a proceeding instituted by the lessee road in the name of the lessor was held valid. In *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. Rep. 273, the court declined to pass upon the question of the lessee's right to condemn.

Company which has Sold Its Road.—So, also, though a general statute requires actions to be brought in the name of the real party in interest, a company which has entered upon land and begun the construction of its road is the proper party to institute condemnation proceedings, although it had sold its road before it instituted them. The title to the land, when acquired, will inure to the benefit of the company's grantee. The statute does not apply to such proceedings. *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183.

1. This branch of the subject will be treated in the article MILLS.

2. *Arkansas*.—Mans. Dig., § 5458; *Bentonville R. Co. v. Baker*, 45 Ark. 252.

Indiana.—1 G. & H. 509, § 15. Unless there has been an instrument of appropriation filed by the condemning party. *Indianapolis, etc., R. Co. v. Reed*, 52 Ind. 357.

Kansas.—*Kansas Pac. R. Co. v. Streeter*, 8 Kan. 133.

3. *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Andrew v. Nantasket Beach R. Co.*, 152 Mass. 506; *Lincoln v. Com.*, 164 Mass. 368; *Mat-ter of Brooklyn El. R. Co.*, 76 Hun (N. Y.) 79; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Reese v. Addams*, 16 S. & R. (Pa.) 40; *Losch's Appeal*, 109 Pa. St. 72.

Assignee of Right to Damages.—The assignee of a right to compensation for lands taken for a railroad is a party "interested in such lands" within the meaning of section 1852, Wis. Rev. Stat., and may proceed under that section to recover such compensation. *Tucker v. Chicago, etc., R. Co.*, 91 Wis. 576.

4. *Allison v. Delaware, etc., Canal Co.*, 5 Whart. (Pa.) 482; *Hibbs v. Chicago, etc., R. Co.*, 39 Iowa 340.

This is so notwithstanding the landowner had consented to the taking of his land, *Midland R. Co. v. Smith*, 125 Ind. 509, 44 Am. & Eng. R. Cas. 222; *Charleston, etc., R. Co. v. Blake*, 12 Rich. (S. Car.) 634, and had given a deed of a right of way therein, or an agreement to convey, where fraud is proved, or a condition subject to which such deed or agreement was given has not been performed. *Rockford, etc., R. Co. v. Shunick*, 65 Ill. 223; *Humphreys v. Richmond, etc.,*

Joinder of Parties Plaintiff.—The owner of an estate in fee and one to whom he has given a bond for a deed on the fulfilment of certain conditions may join in the petition, although such conditions have not been performed.¹ So two or more lot owners injured by a street railway constructed in front of their lots may join as complainants, and the commissioners may issue separate warrants to collect their damages.² The widow and children of the deceased owner of the premises condemned who are in the actual occupation thereof may join,³ and so may landlords and tenants of such premises,⁴ and partners of the owner of the leasehold may be joined with him.⁵

b. PARTIES DEFENDANT—Necessary Parties.—The want of uniformity in the constitutions and statutes of the several jurisdictions, as to who are necessary parties defendant in condemnation proceedings, has led to such conflicting and often contradictory views on the part of the judges upon this question, that any attempt to reconcile their conflicting decisions would be fruitless.⁶

R. Co., 88 Va. 431, 51 Am. & Eng. R. Cas. 397.

1. Mass. Rev. Stat., c. 24, § 48; Locks & Canals *v.* Nashua, etc., R. Corp., 10 Cush. (Mass.) 385, followed in Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 17 Am. & Eng. R. Cas. 192.

2. Mass. Pub. Stat., c. 49, § 34; Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395.

3. Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558.

4. It is not essential in such case for the tenants to show that they hold under a written lease for a term certain; it is sufficient if it appear that they are tenants from year to year at a certain annual rent. Getz *v.* Philadelphia, etc., R. Co., 105 Pa. St. 547.

5. Ehret *v.* Schuylkill River East Side R. Co., 105 Pa. St. 158.

Partners.—So, also, partners in a mill situated on an unperfected homestead of one of them may join in an action for damages to the mill race caused by the construction of the railroad. Hot Springs R. Co. *v.* Tyler, 36 Ark. 205; Ashby *v.* Eastern R. Co., 5 Met. (Mass.) 368; Reed *v.* Hanover Branch R. Co., 105 Mass. 303.

Joint Owners.—But in Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39, it was held that the two owners of a ferry across the Delaware, one of whom held a New Jersey charter for his end of the ferry, and the other a Pennsylvania charter for his end, could not properly join in an action for damages to the ferry caused by a

bridge; but that, their chartered interests not being joint, separate actions must be brought.

An Objection that Parties are Improperly Joined as plaintiffs should be made when the petition for the appointment of viewers is presented or, at the very latest, when the issue is framed by the court. Ehret *v.* Schuylkill River East Side R. Co., 151 Pa. St. 158.

6. **Alabama.**—To authorize one to be made a party in highway and ferry cases, he must have a private right, as an individual proprietor, which he can vindicate by suit, and the record must show his interest. Creswell *v.* Greene County, 24 Ala. 282.

California.—A person through whose lands a proposed road will pass is beneficially interested, and is a proper party to contest the legality of the proceedings for the establishment of the road. Damrell *v.* San Joaquin County, 40 Cal. 154.

Connecticut.—A cemetery association instituted a proceeding under the statute for enlarging its territory by taking adjoining lands owned in severalty by different persons. It was held that all the owners, though having no joint interest, were properly made defendants together. Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551.

Indiana.—One through whose lands a drain will run must be a party to the proceedings by notice or otherwise, and, unless this appear on the trial, the whole proceeding must fail. Wright *v.* Wilson, 95 Ind. 408.

Where the proceedings are instituted by the party seeking the condemnation, it goes without saying that the owner of the land sought to be taken must be made a defendant; and, generally speaking, all persons having a proprietary interest, *i. e.*, any interest recognized as property by the law of the forum, are necessary parties, as are also all other persons, if any, who are by the statute made necessary parties.¹

Kansas.—Where a judgment purporting to be for the condemnation of the right of way for a railway company was rendered against the company, without its appearing that proceedings were instituted by the company, or that it was a party to them, or had notice thereof, or was served with summons, it was held that such judgment was without jurisdiction and was void. *Junction City, etc., R. Co. v. Silver*, 27 Kan. 741, 14 Am. & Eng. R. Cas. 324.

Michigan.—Under a statute requiring all parties interested to be brought in, it is not competent to dismiss as to a portion of the joint owners and proceed as to the others; a partial condemnation of an undivided interest can furnish no benefit to a railroad in building its track. *Grand Rapids, etc., R. Co. v. Alley*, 34 Mich. 18.

Proceedings to open a street across the land of a railroad company are invalid when the company was not named in the proceedings and did not appear, even though damages were awarded to it for the land taken. *Detroit, etc., R. Co. v. Detroit*, 49 Mich. 47.

Mississippi.—A proceeding by petition, under the charter of the Grand Gulf R. & B. Co., to assess the value of the land over which the road is to pass, and also assess the damages, so affects the interests of the owner as to make him a party to the proceedings. *Thompson v. Grand Gulf R., etc., Co.*, 3 How. (Miss.) 240.

New York.—One who has control of a lot, pays the taxes, and has an equitable interest in it, is a proper party to proceedings to acquire the lot for a street, and has the right to be heard on the question of compensation. *Matter of Hand St.*, 52 Hun (N. Y.) 206.

North Carolina.—An order by county commissioners appointing appraisers to assess the value of the benefits and damages which would accrue to the owner of land on account of a certain canal sought to be cut through his land, upon the petition of other parties,

filed under the provisions of the 39th chapter Battle's Revisal, is void, unless said landowner be made a party to the petition. *Gamble v. McCrady*, 75 N. Car. 509.

Pennsylvania.—Every person whose rights or liabilities may be in any way affected by the final decree should be made a party and have notice of the proceedings. *Hibberd's Appeal*, 2 Pa. Dist. Rep. 28.

Texas.—Proceedings to condemn lands for the use of a corporation do not involve the question of title to the land. The petitioners must ascertain the true owner of land they wish to acquire and make him a party; the petition assumes his title. *Galveston, etc., R. Co. v. Mud Creek, etc., Co.*, 1 Tex. App. Civ. Cas., § 393.

West Virginia.—Where there are adverse or conflicting claims to the real estate proposed to be taken, the claimants must be made parties to the proceeding. But their conflicting claims should not be litigated until after the condemnation proceeding is ended. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

Wisconsin.—Where land has been appropriated without the consent of the owner, and the latter seeks to enjoin the company until his damages are paid, as in condemnation proceedings, all parties interested in the land, or who may be entitled thereto, such as the mortgagees of the company, should be brought before the court, so that they may be bound by any judgment or decree. *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16.

1. As to who are deemed "owners," "occupants," or "persons interested," within the meaning of the statutes, see *supra*, V. 2. *To Whom Given.*

Notice of Ownership Not of Record.—Where a railroad company, at the time of instituting condemnation proceedings for the appropriation of a right of way over certain lands, has actual notice that a certain parcel thereof is in the possession of a certain person

Unnecessary or Improper Parties.—One who is not the owner of the land taken, or of any property interest therein, need not be made a party unless the statute expressly requires it. So the owner of land which it is not proposed to take, but which may be injured, is not a necessary party.¹

Person Holding License or Privilege.—The same is true of one holding a mere license or privilege in the use of the land.²

Joinder of Parties Defendant.—Upon this question the power of the legislature is supreme; it may direct one proceeding against all the owners of the land to be taken or affected, or separate proceedings against each owner; it may direct the including of different tracts of land in one proceeding, or separate proceedings as to each tract or parcel. Unless the local statute is silent on this subject, its provisions must be strictly adhered to; if silent, or of doubtful interpretation, the weight of authority favors the joinder in one proceeding of all parties in interest.³

under claim of ownership, such person should be made a party to the proceedings in order to be bound, although in fact the record title to such land may stand in the name of another at the time of the filing of the *lis pendens* notice of the condemnation proceedings, and the deed transferring title may not have been recorded until after the date of the filing of such notice. *Owen v. St. Paul, etc., R. Co.*, 12 Wash. 313.

1. *In re St. Paul, etc., R. Co.*, 34 Minn. 227, 22 Am. & Eng. R. Cas. 94; *Norwood v. New York, etc., R. Co.*, 161 Mass. 259.

Lateral Railways.—In proceedings under the Pennsylvania lateral railroad acts it is not essential, though it is proper, that all owners of land over which the proposed railroad is to pass should be named in the petition; and if a mistake be made as to the real owners, the court may direct the damages assessed by the viewers to be paid to the proper party on proof of the facts. *Boyd v. Negley*, 40 Pa. St. 377.

Owner of Easement.—While, under a statute requiring the owners of "estate or interests in" the land to be made parties, the owner of an easement therein is included, yet he is not a necessary party where the proposed improvement will in no way injure or interfere with his easement. *Matter of Niagara Falls, etc., R. Co.*, 48 Hun (N. Y.) 616, 15 N. Y. St. Rep. 546.

Equitable Owner.—In taking land for a public highway, under the *California* practice, the person who holds the

legal title is the only necessary party and the only one whose damages are to be assessed. The person who has an equitable title only is not a necessary party. *Hidden v. Davisson*, 51 Cal. 138.

Persons Holding Mere Statutory Liens, such as judgment creditors, are not necessary parties under a statute providing for notice and compensation "to the owner or owners" of the land taken. *Watson v. New York Cent. R. Co.*, 47 N. Y. 157, *affirming* *Sheld. (N. Y.)* 159, 6 Abb. Pr. N. S. (Buffalo Super. Ct.) 91.

2. *Bird v. Great Eastern R. Co.*, 34 L. J. C. P. 366; *Shepherd v. New Orleans*, 6 Rob. (La.) 349.

Telegraph Company.—Thus, in proceedings by a telegraph company to obtain the right to construct lines over the right of way of a railroad company, the railroad corporation cannot complain that another telegraph company, to whom it had granted the exclusive privilege over its right of way, was not made a party. *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211.

3. *Troy, etc., R. Co. v. Cleveland*, 6 How. Pr. (N. Y. Supreme Ct.) 238; *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308; *Colcough v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 171; *McKee v. St. Louis*, 17 Mo. 184; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 379; *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332; *Kohl v. U. S.*, 91 U. S. 367.

Nonresidents.—Mo. Gen. Stat., c. 66, § 5, providing that "any number of

Such a course is convenient, and can injure no one if damages are separately assessed to each owner.¹ But the condemning party need not join all the owners.²

c. DEFECT OF PARTIES AND HOW CURED.—The omission of Any Proper Party will not invalidate the proceeding as against such persons as are made parties. The only consequence is that as against the omitted persons the condemnation will be nugatory.³

Curing Defect of Parties.—Where the petition enumerates the various owners of the land, and they voluntarily come in and make themselves parties, an objection on the ground of a defect of parties, when the petition was first filed, is untenable.⁴ But the omission of a necessary party cannot be cured by service by publication.⁵

New Parties—Intervention.—New parties may be added by amendment,⁶ or the proceedings may be discontinued as to parties

owners, residents in the same county or circuit, may be joined in one petition," when read in connection with section 2 of the same act, authorizing the inclusion in the same petition of residents, nonresidents, and persons unknown, authorizes only those whose interests lie within the county or circuit to be made parties defendant. *Union Depot Co. v. Frederick*, 117 Mo. 138, 57 Am. & Eng. R. Cas. 656 (*overruling* *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249); *Missouri Pac. R. Co. v. Wilson*, 45 Mo. App. 1. See also *Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334, which holds that a misjoinder in such a case would not warrant a dismissal as against the parties properly before the court.

1. *Evergreen Cemetery Assoc. v. Beecher*, 53 Conn. 551. In *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308, it is intimated, but not decided, that in such a case each landowner would be entitled to the usual number of challenges to jurors, which, if there were a large number of defendants, might render it impossible to obtain a jury.

2. *Matter of Middletown*, 82 N. Y. 196. Thus, if marble or lime rock is owned separately from the ownership of the rest of the land, the railroad company can maintain a petition for the assessment of the damages that the owner of the marble or lime rock has sustained from such taking. *Lime Rock R. Co. v. Farnsworth*, 86 Me. 127.

Matter Not Jurisdictional.—Whether several distinct landowners may be

joined in one proceeding to acquire a right of way, and whether persons holding equitable interests should be served with personal notice of the application, are questions merely of practice, and are not jurisdictional. *Ex p. Bacot*, 36 S. Car. 125, 50 Am. & Eng. R. Cas. 597.

3. *State v. Easton, etc., R. Co.*, 36 N. J. L. 181; *Dodge v. Omaha, etc., R. Co.*, 20 Neb. 276, 28 Am. & Eng. R. Cas. 260; *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190; *Detroit, etc., R. Co. v. Detroit*, 49 Mich. 47; *Owen v. St. Paul, etc., R. Co.*, 12 Wash. 313.

4. *Hill v. Glendon, etc., Min., etc., Co.*, 113 N. Car. 259.

So if a party improperly joined with others should appear and take any steps in the case without objecting to such misjoinder, or should, after the damages were assessed, receive the amount assessed, he might be estopped from objecting to the validity of the proceedings. *Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334.

5. *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193.

6. *Matter of Metropolitan El. R. Co. (Supreme Ct.)*, 18 N. Y. St. Rep. 134; *Wood v. West Boston, etc., Bridges*, 122 Mass. 394.

But when the case is called for trial, the court will not delay the hearing for the purpose of bringing in new parties not shown to be interested in the premises. *Chicago, etc., R. Co. v. Gates*, 120 Ill. 86, 30 Am. & Eng. R. Cas. 268. Such new parties should be summoned

improperly joined.¹ All parties should be heard before the same jury, the proceeding being indivisible.²

One claiming to be the true owner may enter his voluntary appearance and assert his claim to damages.³

Substitution.—Where, pending the proceedings, the petitioning company consolidates with another company, the consolidated company may be substituted as plaintiff;⁴ and, in like manner, where, pending the proceedings, a receiver of the petitioning company is appointed, this does not change the status of the proceeding.⁵

2. Particular Applications—*a.* GRANTOR AND GRANTEE.—**The General Rule** is that he should be made a party who is entitled to receive the compensation when its amount is ascertained. This ordinarily means the owner of the property at the time the proceedings are begun,⁶ but the decisions are widely dissimilar on this subject. Some of them require the damages to be estimated as of the time of the taking or entry;⁷ others adopt the time of

and made parties before the warrant for the jury is issued. *Davidson v. Boston*, etc., R. Co., 3 Cush. (Mass.) 91.

1. *Fitch v. Stevens*, 2 Met. (Mass.) 505; *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448.

2. *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547.

Death of Party.—If a party dies pending the proceedings they should be revived in the name of the heirs, *Peoria, etc., R. Co. v. Rice*, 75 Ill. 329; *Valley R. Co. v. Bohm*, 29 Ohio St. 633; or the parcel of land owned by him should be wholly omitted from the orders made, *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. St. Rep. 134.

3. *Hilton v. St. Louis*, 99 Mo. 199.

It is error for the court to require, as a condition of granting the application of any person whose estate or interest in the land will be affected by the proceedings to be made a party, that he will agree not to question the regularity of the proceedings or the right of the complainant to maintain them: *Matter of New York, etc., R. Co.*, 26 Hun (N. Y.) 194.

A Judgment Creditor of a person who is alleged to be the real owner will not be permitted to intervene in the proceeding, as the title to the real estate cannot be settled in such a way. *Harris v. Brewster*, 154 Pa. St. 22.

The Sureties on a Bond to Secure the Damages will not be permitted to defend on the ground that the dissolution of the railroad company prior to the

condemnation proceedings abated the action against the principal and discharged the sureties. *Keller v. Harrisburg, etc., R. Co.*, 161 Pa. St. 504.

4. *California Cent. R. Co. v. Hooper*, 76 Cal. 404.

5. It might still have been prosecuted by the receiver in the name of the company, and the addition of the receiver as a party plaintiff should not prejudice or affect any right of either party, nor make it necessary that a new petition be filed, or that the landowners be given the right to file an answer, which they had waived under the original petition, without objection. *Matter of Rochester, etc., R. Co.*, 54 Hun (N. Y.) 634, 26 N. Y. St. Rep. 753, 4 Silv. Sup. Ct. (N. Y.) 92. But under the Maine statute county commissioners cannot amend by substituting as parties persons not named in the petition. *Littlefield v. Boston, etc., R. Co.*, 65 Me. 248.

6. *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191; *Elizabethtown, etc., R. Co. v. Helm*, 8 Bush (Ky.) 681.

7. *California*.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240.

Illinois.—*Rice v. Chicago*, 57 Ill. App. 558.

Indiana.—*Logansport, etc., R. Co. v. Buchanan*, 52 Ind. 163; *Lafayette, etc., R. Co. v. Murdock*, 68 Ind. 137.

Kansas.—*Wier v. St. Louis, etc., R. Co.*, 40 Kan. 130.

Massachusetts.—*Whitman v. Boston, etc., R. Co.*, 7 Allen (Mass.) 373;

the filing of the petition;¹ others the time of the appraisal or assessment;² others the time of the filing of the report or award;³ others the time of the injury or construction of the improvement;⁴ and still others the time of the trial.⁵ A conveyance subsequent to the time so fixed will not entitle the vendee to be made a party.⁶ Where land is occupied without condemnation proceedings, either wrongfully or by the mere consent or acquiescence of the owner, no title passes, and a subsequent deed from the owner, containing no reservation, will pass the right to "just compensation" to the purchaser, thus making the latter a necessary party to proceedings thereafter instituted; but the

Drury v. Midland R. Co., 127 Mass. 571.

Missouri.—*Ragan v. Kansas City*, etc., R. Co., 111 Mo. 456.

United States Supreme Court.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1.

1. *Arkansas*.—*Newgass v. St. Louis*, etc., R. Co., 54 Ark. 140.

Illinois.—*McAuley v. Columbus*, etc., R. Co., 83 Ill. 348; *Dupuis v. Chicago*, etc., R. Co., 115 Ill. 97; *Schreiber v. Chicago*, etc., R. Co., 115 Ill. 340, 23 Am. & Eng. R. Cas. 130; *Concordia Cemetery Assoc. v. Minnesota*, etc., R. Co., 121 Ill. 199, 30 Am. & Eng. R. Cas. 363.

Missouri.—*Stewart v. White*, 98 Mo. 226; *Kiebler v. Holmes*, 58 Mo. App. 119.

Nebraska.—*Missouri Pac. R. Co. v. Hays*, 15 Neb. 224, 14 Am. & Eng. R. Cas. 177; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 53, 36 Am. & Eng. R. Cas. 673; *Fremont*, etc., R. Co. v. *Bates*, 40 Neb. 381, 57 Am. & Eng. R. Cas. 711.

2. *California*.—*California Southern R. Co. v. Colton Land*, etc., Co. (Cal. 1884), 2 Pac. Rep. 38, 14 Am. & Eng. R. Cas. 194.

Colorado.—*Lamborn v. Bell*, 18 Colo. 346.

Minnesota.—*Winona*, etc., R. Co. v. *Denman*, 10 Minn. 267; *Leber v. Minneapolis*, etc., R. Co., 29 Minn. 256.

Missouri.—*Chicago*, etc., R. Co. v. *Randolph Town-Site Co.*, 103 Mo. 451, 47 Am. & Eng. R. Cas. 118; *Chicago*, etc., R. Co. v. *McGrew*, 104 Mo. 282; *Doyle v. Kansas City*, etc., R. Co., 113 Mo. 280.

Wisconsin.—*Milwaukee*, etc., R. Co. v. *Eble*, 3 Pin. (Wis.) 334, 4 Chand. (Wis.) 72; *Lyon v. Green Bay*, etc., R. Co., 42 Wis. 538.

3. *Arkansas*.—*Roberts v. Williams*, 15 Ark. 43.

Kansas.—*Ellsworth*, etc., R. Co. v. *Maxwell*, 39 Kan. 651.

Minnesota.—*Leber v. Minneapolis*, etc., R. Co., 29 Minn. 256; *Sherwood v. St. Paul*, etc., R. Co., 21 Minn. 122.

Missouri.—*St. Louis*, etc., R. Co. v. *Fowler*, 113 Mo. 458.

New Jersey.—*Metler v. Easton*, etc., R. Co., 37 N. J. L. 222.

Wisconsin.—*Driver v. Western Union R. Co.*, 32 Wis. 569; *West v. Milwaukee*, etc., R. Co., 56 Wis. 318, 10 Am. & Eng. R. Cas. 415.

4. *Illinois*.—*Lake Erie*, etc., R. Co. v. *Scott*, 132 Ill. 429, affirming 32 Ill. App. 292; *Chicago*, etc., R. Co. v. *Leah*, 41 Ill. App. 584.

Indiana.—*Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74.

Kentucky.—*Stickley v. Chesapeake*, etc., R. Co., 93 Ky. 323.

North Carolina.—*Hendrick v. Carolina Cent. R. Co.*, 101 N. Car. 617.

Pennsylvania.—*Zimmerman v. Union Canal Co.*, 1 W. & S. (Pa.) 346; *Pennsylvania R. Co. v. First German Lutheran Cong.*, 53 Pa. St. 445; *Campbell v. Philadelphia*, 108 Pa. St. 300; *Hoffman v. Bloomsburg*, etc., R. Co., 157 Pa. St. 174.

Texas.—*Central R. Co. v. Merkel*, 32 Tex. 723.

5. *California*.—*Arcata*, etc., R. Co. v. *Murphy*, 71 Cal. 122.

Colorado.—*Denver*, etc., R. Co. v. *Griffith*, 17 Colo. 598.

Minnesota.—*Blue Earth County v. St. Paul*, etc., R. Co., 28 Minn. 503, 10 Am. & Eng. R. Cas. 209.

6. *South*, etc., *Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236; *Campbell v. Philadelphia*, 108 Pa. St. 300; *Frey v. Duluth*, etc., R. Co., 91 Wis. 309.

vendor may recover the damages sustained by him prior to the date of the deed.¹

Executory Contracts.—The vendee under an executory contract of sale is the equitable owner, entitled to a deed upon performance of his contract. If, therefore, pending that performance, a part of the land is taken by sovereign authority, he still remains liable to the vendor for the entire purchase-money; is entitled to the entire damages; is a necessary party to the condemnation proceeding, and may maintain the proceeding in his own name.² The better opinion, however, is that the holder of the legal title should be joined as a party,³ but if no objection is made for non-joinder the equitable owner may recover his actual damages.⁴

b. LESSOR AND LESSEE.—A lessee must be made a party, or the judgment will not affect his interest.⁵ If the lease be

1. *Donald v. St. Louis, etc., R. Co.*, 52 Iowa 411, and cases cited; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Hetfield v. Central R. Co.*, 29 N. J. L. 571, reversing 29 N. J. L. 206. To the contrary, see *McLendon v. Atlanta, etc., R. Co.*, 54 Ga. 293; *Indiana, etc., R. Co. v. Allen*, 100 Ind. 409; *Davis v. Titusville, etc., R. Co.*, 114 Pa. St. 308.

Purchaser at Tax Sale.—The rights of a purchaser at tax sale are not extinguished by *ad quod damnum* proceedings to which he has not been made a party by proper notice. *Garmoe v. Sturgeon*, 65 Iowa 147.

Reservation of Water Rights.—It seems that the grantor of a tide mill and mill pond who has reserved the right of boating and rafting through the pond, and of using the same as a depot for lumber, has no such proprietary interest in the premises, by virtue of such reservation, as to entitle him to become, or to render it necessary that he should be made, a party to a proceeding under Mass. Rev. Stat., c. 24, §§ 48, 49, 50, for the recovery of damages occasioned by the laying out and construction of a railroad through the granted premises. *Davidson v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 91.

2. *Kuhn v. Freeman*, 15 Kan. 423; *St. Louis, etc., R. Co. v. Wilder*, 17 Kan. 239; *Pinkerton v. Boston, etc., R. Co.*, 109 Mass. 527. *Contra*, *Clark v. Close*, 43 Iowa 92; *Smith v. Ferris*, 6 Hun (N. Y.) 553.

This is true notwithstanding he has made default in the payments to be made under the contract, no advantage having been taken by the vendors of such default. *Odell v. Gulf, etc.,*

R. Co., 4 Tex. Civ. App. 607. *Contra*, *Clark v. Close*, 43 Iowa 92.

3. *Locks & Canals v. Nashua, etc., R. Corp.*, 10 Cush. (Mass.) 385.

4. *Hastings, etc., R. Co. v. Ingalls*, 15 Neb. 123, 20 Am. & Eng. R. Cas. 60, followed in *Omaha, etc., R. Co. v. Brown*, 29 Neb. 492; *Fremont, etc., R. Co. v. Setright*, 34 Neb. 253.

Donee.—The rule applies to one who has been placed in possession of land under a parol gift, and has lived upon it for fourteen years, paid the taxes, and made lasting and valuable improvements thereon. *Anderson v. Pemberton*, 89 Mo. 61.

Licensee.—But a licensee, under a parol license from the owner of land, of a well and an hydraulic ram thereon, cannot maintain a petition for damages against a city for an interference with the use of the well and ram by the taking of the land by the city under the right of eminent domain. *Clapp v. Boston*, 133 Mass. 367.

5. *Baltimore, etc., R. Co. v. Parrette*, 55 Fed. Rep. 50; *Burbridge v. New Albany, etc., R. Co.*, 9 Ind. 546; *Storm Lake v. Iowa Falls, etc., R. Co.*, 62 Iowa 218; *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76; *Baltimore v. Rice*, 73 Md. 307; *Levee Comr's v. Johnson*, 66 Miss. 248; *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238; *Philadelphia, etc., R. Co. v. Getz*, 113 Pa. St. 214; *Colcough v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 171; *Telephone Tel. Co. v. Forke*, 2 Tex. App. Civ. Cas., § 368; *Gilligan v. Providence*, 11 R. I. 258.

Sale of Fee.—But when proceedings are had to sell the fee in land, it is not necessary to make the lessee a party to

executed pending the proceedings against the lessor, the lessee may appear, plead, and defend his interest; he must do so after notice, or he will be estopped.¹ Ordinarily, both lessee and lessor are entitled to recover for the damages sustained by them respectively.²

c. MORTGAGOR AND MORTGAGEE.—Whether the mortgagee of land condemned be a necessary party is a question upon which the courts are in hopeless conflict, except as regards a

the suit. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 184, 9 Am. & Eng. R. Cas. 484.

Lessor Bound, though Lessee Not Joined.—Where the real owner is made a party to proceedings to condemn right of way for a railroad, the proceedings will be valid as against him, though the language used by the commissioners in their award may indicate that in their opinion an unknown lessee has an interest in it. *Chicago, etc., R. Co. v. Bean*, 69 Iowa 257.

The Lessee of a Market Stall need not be made a party to a proceeding to condemn the market house. *Strickland v. Pennsylvania R. Co.*, 154 Pa. St. 348.

1. *Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253.

Extinguishment of Rent.—The condemnation and appropriation to public uses of a portion of leased premises will extinguish a proportionate part of the rent; and this proportionate part may be ascertained and fixed in an equitable proceeding instituted for that purpose by the tenant. *Kingsland v. Clark*, 24 Mo. 24. *Contra*, see *Parks v. Boston*, 15 Pick. (Mass.) 198.

Lessee Estopped.—Where contractors building a free gravel road require gravel therefor from the land of plaintiff's landlord, plaintiff being a tenant in possession of the land, and the contractors being unable to agree with the owner of the land as to the price of the gravel, appraisers are duly appointed, who appraise the value of the material to be taken, and also assess all damages to said land and to growing crops thereon, the damages being paid to the owner of the freehold, and all being done with the knowledge and consent of the tenant, the tenant cannot thereafter recover damages of the contractors to his leasehold, but may recover his share of the damages from his landlord; however, the better prac-

tice would be to make the tenant a party to the proceeding, and apportion the entire damages between the tenant and the owner of the freehold. *Shauver v. Phillips*, 7 Ind. App. 12.

The Term for which the Lease is to Run is immaterial; parol leases from year to year stand upon the same footing as sealed demises for long terms. *Getz v. Philadelphia, etc., R. Co.*, 105 Pa. St., 547; *Gilligan v. Providence*, 11 R. I. 258.

2. *Parks v. Boston*, 15 Pick. (Mass.) 198; *Levee Com'rs v. Johnson*, 66 Miss. 248; *Matter of Buffalo, Sheld.* (N. Y.) 408.

Subtenants.—A clause in a lease provided that if the demised premises should be taken by a railroad company the lease should thereupon terminate, but that nothing therein contained should "prevent the lessor or lessees from recovering damages for such taking from the corporations or other persons taking." The tenants sublet the premises to other persons who had no knowledge of the contents of the lease between the owner and the tenants. It was held that the subtenants could recover the value of their leasehold from the railroad company. *Boteler v. Philadelphia, etc., Terminal R. Co.*, 164 Pa. St. 397.

Lessor must be Joined to Bind Reversion.—A voluntary agreement, entered into on the part of a lessee of a railroad with a company petitioning for a right to cross the track of the former, is binding upon such lessee but not upon the lessor as to the reversionary interest. Consequently, the lessee alone being made a party, the estate in reversion cannot be affected. *Matter of Boston, etc., R. Co.*, 79 N. Y. 69, affirming in part 22 Hun (N. Y.) 176.

The Owner of a Ground Rent reserved in a conveyance in fee need not be made a party, though equitably entitled to a share of the damages

mortgagee in possession, who, they agree, must have notice as owner.¹ One view is that the mortgagor has the entire legal estate, and should recover all the damages, regardless of the mortgage, the lien of the latter following the fund, which becomes a substitute for the land, and is applicable to the mortgage debt.² The other and better doctrine is that the mortgagee's interest in the land, and the rights secured to him by his mortgage, are property of which he cannot be deprived without notice and hearing;³ that to convert his security into money and hand it over to the mortgagor (possibly insolvent) is to deprive him of his property without compensation and without due process of law.⁴ But if the mortgagee releases his right to be made a party,⁵ or assents to his omission, he need not be joined as a party.⁶

sufficient to cover the rent accrued. *Workman v. Mifflin*, 30 Pa. St. 362.

1. *Cool v. Crommet*, 13 Me. 250; *Parish v. Gilmanton*, 11 N. H. 293, followed in *Parker's Petition*, 36 N. H. 84; *Ballard v. Ballard Vale Co.*, 5 Gray (Mass.) 468.

2. *California*.—*Schumacker v. Toberman*, 56 Cal. 508.

Connecticut.—*Norwich v. Hubbard*, 22 Conn. 588; *Whiting v. New Haven*, 45 Conn. 303.

Indiana.—*Murphy v. Beard*, 138 Ind. 560.

Kansas.—*Goodrich v. Atchison County*, 47 Kan. 355; *Rand v. Ft. Scott, etc.*, R. Co., 50 Kan. 114.

Louisiana.—*Postal Telegraph Cable Co. v. Louisville, etc.*, R. Co., 43 La. Ann. 522.

Massachusetts.—*Breed v. Eastern R. Co.*, 5 Gray (Mass.) 470, note; *Paine v. Woods*, 108 Mass. 160; *Farnsworth v. Boston*, 126 Mass. 1; *Read v. Cambridge*, 126 Mass. 427; *Wood v. Westborough*, 140 Mass. 403.

Michigan.—*Grand Rapids v. Grand Rapids, etc.*, R. Co., 58 Mich. 641.

Minnesota.—*Boutelle v. Minneapolis*, 59 Minn. 493; *Bennett v. Minneapolis, etc.*, R. Co., 42 Minn. 245.

Missouri.—*Warren v. Gibson*, 40 Mo. App. 469; *Thompson v. Chicago, etc.*, R. Co., 110 Mo. 147.

New Jersey.—*Platt v. Bright*, 29 N. J. Eq. 128.

New York.—*Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Auburn Bank v. Roberts*, 44 N. Y. 192; *Englehardt v. Brooklyn*, 3 Misc. Rep. (Brooklyn City Ct.) 30.

Pennsylvania.—*Schuylkill Nav. Co.*

v. Thoburn, 7 S. & R. (Pa.) 411; *Bean v. Kulp*, 7 Phila. (Pa.) 650.

Utah.—*Oregon Short Line, etc.*, R. Co. *v. Mitchell*, 7 Utah 505.

Wisconsin.—*Kennedy v. Milwaukee, etc.*, R. Co., 22 Wis. 581.

3. *Illinois*.—*Calumet River R. Co. v. Brown*, 136 Ill. 322.

Maine.—*Wilson v. European, etc.*, R. Co., 67 Me. 358.

Michigan.—*Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

Missouri.—*Chicago, etc.*, R. Co. *v. Baker*, 102 Mo. 553.

Nebraska.—*Dodge v. Omaha, etc.*, R. Co., 20 Neb. 276.

New Jersey.—*North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450, reversing 27 N. J. Eq. 371; *Platt v. Bright*, 29 N. J. Eq. 128.

Vermont.—*Adams v. St. Johnsbury, etc.*, R. Co., 57 Vt. 240, 25 Am. & Eng. R. Cas. 172.

4. *Severin v. Cole*, 38 Iowa 463.

5. *Camden, etc.*, Water Co. *v. Ingraham*, 85 Me. 179.

6. *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291.

Effect of Not Joining Mortgagee.—A mortgagee who is not made a party to proceedings for the condemnation of right of way for a railroad over the mortgaged property may waive the omission and assert his claim to the award in the hands of the sheriff, and such claim, where it is shown that the property is insufficient to pay the mortgage debt, and that the mortgagor is insolvent, constitutes a lien thereon superior to that of a prior attachment levied by a creditor of the mortgagor. *Sawyer v. Landers*, 56 Iowa 422.

d. HUSBAND AND WIFE.—Where the fee is in the husband he alone is the necessary party; if in the wife she must be made a party, as her interest will not be affected by making the husband only a party.¹ Whether the husband must be joined in order to divest the wife's interest is a question on which the adjudications differ.² The better and safer practice is to join both husband and wife as parties, since then the interests of both can be divested, both can be accorded a hearing, and the compensation can be apportioned between them as justice may require.³

Dower.—The inchoate right of dower may be divested by making the husband alone a party.⁴ After his death, but before

Where the mortgagee is omitted by mistake, and not through negligence, and compensation and damages are awarded to the mortgagor on the hypothesis that the land taken and damaged is free of incumbrance, and when it appears that the mortgagor's equity of redemption is of little or no value, and that the judgment is no protection to the company against the bill to foreclose the mortgage, a court of equity may relieve the company from the consequences of such mistake by requiring the compensation and damages awarded to be paid to the mortgagee to apply on his debt. *Calumet River R. Co. v. Brown*, 136 Ill. 322.

In such a case the mortgagee may file a bill to foreclose his mortgage upon the strip of land condemned, after selling the balance of the mortgaged land for less than the amount due him. *Warwick Sav. Inst. v. Providence*, 12 R. I. 144.

1. *Bixby v. Goss*, 54 Mich. 551; *Whitcher v. Benton*, 48 N. H. 157; *Watson v. Sewickley*, 91 Pa. St. 330; *Nebraska City v. Northcutt*, 45 Neb. 456; *Grosser v. Rochester*, 60 Hun (N. Y.) 379.

Omission of Wife's Name by Mistake.—If, in proceedings instituted by a husband as owner to assess damages for injuries to land arising from the construction of a railroad, it is discovered that the title to the land is in his wife, the wife's name as plaintiff, omitted by mistake, may be brought upon the record by amendment, under *Pennsylvania* Act of May 4, 1852, P. L. 574. *Seipel v. Baltimore, etc., Extension R. Co.*, 129 Pa. St. 425.

Condemnation of Homestead.—It seems that the homestead may be condemned by making the husband alone a party. *Canty v. Latterner*, 31 Minn. 239; *Ran-*

dall v. Texas Cent. R. Co., 63 Tex. 586. But see *Chicago, etc., R. Co. v. Anderson*, 42 Kan. 297.

But the surviving wife has such an estate in the homestead, being part of the community estate of herself and her deceased husband, as will enable her to maintain an action in her own name for its injury; and if the heirs of the deceased husband, who are not joined as plaintiffs, had also an interest in the land at the time of the injury, a party sued by her can only avail himself of that fact by plea in abatement, or by way of apportionment of damages. *Houston, etc., R. Co. v. Knapp*, 51 Tex. 592.

Consequential Injuries occasioned by change of grade may be sued for by the husband alone. *Hutchinson v. Parkersburg*, 25 W. Va. 226.

2. That he must be joined, see *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193; *East Tennessee, etc., R. Co. v. Love*, 3 Head (Tenn.) 63.

That he need not be joined, see *State v. Hulick*, 33 N. J. L. 307; *Sharpless v. West Chester*, 1 Grant's Cas. (Pa.) 257.

3. *Dwiggins v. Denver*, 24 Ohio St. 629, where the husband was held properly joined because the statute gave him a right of appeal. See also *East Tennessee, etc., R. Co. v. Love*, 3 Head (Tenn.) 63.

4. *Barbour v. Barbour*, 46 Me. 9; *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56; *Weaver v. Gregg*, 6 Ohio St. 547. But as between the wife and her husband the inchoate rights of the wife are not extinguished, but must be recognized and protected. *Matter of New York, etc., Bridge*, 89 Hun (N. Y.) 219. As to the *contra* doctrine that such inchoate right is property which the law will protect, see *Wheeler v.*

assignment of dower, it would seem that she should be recognized as the owner of a property interest in the land.¹

e. TENANTS IN COMMON.—One tenant in common cannot maintain a proceeding alone; his cotenants must unite with him. If they could proceed separately contradictory decisions might result.² So, also, in proceedings *in invitum* all the tenants in common should be joined; notice to one of them is not sufficient.³ The appearance and testimony of one of them would be of benefit to the others, and they should not be deprived of it.⁴

f. LIFE TENANT AND REMAINDERMAN.—A tenant for life is an "owner"⁵ and must be made a party to the proceed-

Kirtland, 27 N. J. Eq. 534; *State v. Easton*, etc., R. Co., 36 N. J. L. 181.

1. *French v. Lord*, 69 Me. 537; Matter of William, etc., Streets, 19 Wend. (N. Y.) 678. Compare *Nye v. Taunton Branch R. Co.*, 113 Mass. 277; *State v. Easton*, etc., R. Co., 36 N. J. L. 181.

Contra.—*Todemier v. Aspinwall*, 43 Ill. 401, where the court left the widow to settle with the heirs to whom the damages were awarded; *Moore v. New York*, 8 N. Y. 110, affirming 4 Sandf. (N. Y.) 456; *Simar v. Canaday*, 53 N. Y. 298, where the court intimated that the widow's right will be protected against every one but the state. *Roe v. U. S. Bank*, 3 Ohio 26.

After Assignment she becomes seized of a freehold estate, and, so far as these proceedings are concerned, stands in the position of an owner of the fee in the premises assigned to her. Matter of William, etc., Streets, 19 Wend. (N. Y.) 678.

2. *Tucker v. Campbell*, 36 Me. 346; *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Harrisburg*, etc., R. Co. *v. Bucher*, 7 Watts (Pa.) 33; *Columbia*, etc., Bridge Co. *v. Geise*, 34 N. J. L. 268.

Exception.—Where a railway company, without acquiring title, has taken and used a right of way across lots owned by tenants in common, one of such tenants, to whom his cotenants have assigned their claims as to a specified portion of the lots, may proceed under section 1852, Rev. Stat., to recover damages for the taking as to such portion. *Tucker v. Chicago*, etc., R. Co., 91 Wis. 576.

Flowage.—It seems that in *Massachusetts* one tenant in common can maintain a complaint for flowage without joining his cotenants, the statutes having been changed in this respect since *Merrill v. Berkshire*, 11 Pick.

(Mass.) 269, was decided. *Dwight v. Hampden County*, 7 Cush. (Mass.) 533.

3. *State v. District Ct.*, 52 Minn. 283; *Morgan's Louisiana*, etc., R., etc., Co. *v. Bourdier*, McGloin (La.) 232; *Whitcher v. Benton*, 48 N. H. 157; *Grand Rapids*, etc., R. Co. *v. Alley*, 34 Mich. 16, followed in *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

Nor can one tenant in common bind the others by a waiver of damages in whole or in part, *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; but a tender to one acting for the others is a good tender to all, *Dyckman v. New York*, 5 N. Y. 434.

If the interest of one only is condemned, the railroad company does not become a tenant in common with the others. *Weston v. Foster*, 7 Met. (Mass.) 297.

4. *Chicago*, etc., R. Co. *v. Chamberlain*, 84 Ill. 333.

It is not essential to the jurisdiction that all the owners shall be brought into court, but the court has power to hear and determine the case as to those before it. If the rights of one, in any sense, should depend upon the disposition of the case as to the others, then each party in interest would have the right to insist on all the parties being before the court before proceeding to a trial. *Bowman v. Venice*, etc., R. Co., 102 Ill. 459, 14 Am. & Eng. R. Cas. 338.

In *New York* the proceedings should be against tenants in common severally; but when such parties are proceeded against jointly, their voluntary appearance to contest the proceedings on other grounds is a waiver of objections on account of the misjoinder, and in such case a tender to one of the sum awarded to all is sufficient. *Dyckman v. New York*, 5 N. Y. 434.

5. *Gilligan v. Providence*, 11 R. I.

ing.¹ He may proceed separately or join with the owner of the fee.² Remaindermen also must be joined,³ and they can apply independently for such damages as affect the reversion.⁴

g. HEIRS AND PERSONAL REPRESENTATIVES.—Where a landowner dies before title has passed to the condemning party, the title passes to the heirs and they should be made parties;⁵ but if the title passed in the decedent's lifetime, leaving in him a right to compensation only, this is personalty and goes to the personal representative, who becomes the proper party to the further continuance of the proceeding.⁶

h. INFANTS.—The land of minors cannot be condemned without making their guardians defendants in the proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed.⁷ Notice of the proceedings to the infant only,

258; Kansas City, etc., R. Co., v. Weaver, 86 Mo. 473, 28 Am. & Eng. R. Cas. 247; Pittsburgh, etc., R. Co. v. Bentley, 88 Pa. St. 178.

1. Bentonville R. Co. v. Baker, 45 Ark. 252; Ross v. Elizabethtown, etc., R. Co., 20 N. J. L. 230; Matter of Metropolitan El. R. Co. (Supreme Ct.), 12 N. Y. Supp. 506; Colcough v. Nashville, etc., R. Co., 2 Head (Tenn.) 171.

2. Reading R. Co. v. Boyer, 13 Pa. St. 497; Passmore v. Philadelphia, etc., R. Co., 9 Phila. (Pa.) 579; Colcough v. Nashville, etc., R. Co., 2 Head (Tenn.) 171.

3. Bentonville R. Co. v. Baker, 45 Ark. 252; Matter of Metropolitan El. R. Co. (Supreme Ct.), 12 N. Y. Supp. 506; Ross v. Elizabeth Town, etc., R. Co., 2 N. J. Eq. 422.

4. Shortle v. Terre Haute, etc., R. Co., 131 Ind. 338, 51 Am. & Eng. R. Cas. 576.

5. Pittsburgh, etc., R. Co. v. Swinney, 97 Ind. 592; Neal v. Knox, etc., R. Co., 61 Mo. 298; Boynton v. Peterborough, etc., R. Co., 4 Cush. (Mass.) 467; Boonville v. Ormrod, 26 Mo. 193.

In *California*, where, after the preliminary proceedings before the board of supervisors, the owner dies, the suit to condemn may be brought against his executor. It is not necessary to take fresh proceedings before the supervisors, nor, it seems, to make the devisees parties. *Monterey County v. Cushing*, 83 Cal. 507.

6. Church v. Grand Rapids, etc., R. Co., 70 Ind. 161; Whitman v. Boston, etc., R. Co., 3 Allen (Mass.) 133; Howcott v. Warren, 7 Ired. (N. Car.)

20; St. Albans v. Seymour, 41 Vt. 579 (where the administrator was held the proper party although the proceedings were begun after the owner's death); Moore v. Boston, 8 Cush. (Mass.) 274.

If the Estate Is Insolvent the administrator is the proper party, the heirs having no interest in such an estate until the creditors are settled with. *Goodwin v. Milton*, 25 N. H. 458. But see *Boynton v. Peterborough, etc., R. Co.*, 4 Cush. (Mass.) 467.

Title Passing upon Payment.—Where the statute provides that the title shall pass upon payment of the damages, the heirs must be made parties unless the payment was actually made before the ancestor died. The deposit of the damages before his death does not entitle the personal representative to the money. *Peoria, etc., R. Co. v. Rice*, 75 Ill. 329.

7. Missouri Pac. R. Co. v. Carter, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249; Hotchkiss v. Auburn, etc., R. Co., 36 Barb. (N. Y.) 600; Jones v. Barclay, 2 J. J. Marsh. (Ky.) 73; Peavey v. Wolfborough, 37 N. H. 286; Clarke v. Gilmanton, 12 N. H. 515.

Who may Be Guardian.—And in such case the statute is not sufficiently complied with by making an appointment of an attorney by an order sufficient in form. It is the duty of the company to see that some reliable person is appointed, living in the vicinity, and that he should in fact personally appear before the jury and attend to and protect the infant's interests. Until such appointment and appearance the jury acquire no jurisdiction of the person of the infant, and they cannot proceed to appraise the land or assess the dam-

without service on the guardian, will not bind the infant.¹

i. TOWNS.—Whereas a town or other community through which a highway is laid out will have the burden of maintaining it, the town, as well as the petitioner for the highway, is interested and should be made a party.² If property of the town is taken it is clearly a necessary party, being entitled to compensation.³

j. TRUSTEES.—Ordinarily, in proceedings to subject trust property to public use, the trustee is the proper party to represent the trust estate, and it is not necessary that the beneficiaries be made parties.⁴

VII. PLEADING—1. **Necessity of Petition, Complaint, etc.**—Both the necessity and the form and contents of the pleadings depend upon the phraseology of the local statute. If the statute calls for a petition or a complaint, jurisdiction to proceed further cannot be acquired without it.⁵ The better practice is to file

ages. *Hotchkiss v. Auburn, etc., R. Co.,* 36 Barb. (N. Y.) 600.

1. *Clarke v. Gilmanton, 12 N. H. 515; Neeld's Road Case, 1 Pa. St. 353.*

Posthumous Child.—As to the practice where a posthumous child is born to the owner, see *Chicago, etc., R. Co. v. Wasserman, 22 Fed. Rep. 872, 20 Am. & Eng. R. Cas. 428.*

2. *Gifford v. Norwich, 30 Conn. 35; Williams, Petitioner, 59 Me. 517; Hinckley, Petitioner, 15 Pick. (Mass.) 447; Lanesborough v. Berkshire County, 22 Pick. (Mass.) 278; Thetford v. Kilburn, 36 Vt. 179,* where the town having been omitted the proceedings were remanded to the commissioners to notify the town and appraise the damages anew.

In *Alabama* it is held that an incorporated town is not affected by a condemnation proceeding instituted before its incorporation, it not having been a party to such attempted condemnation. *Columbus, etc., R. Co. v. Witherow, 82 Ala. 190.*

3. *Fagan v. Chicago, 84 Ill. 236; Matter of Church St., 49 Barb. (N. Y.) 457.*

4. *Hidden v. Davisson, 51 Cal. 138; Small v. Georgia Southern, etc., R. Co., 87 Ga. 602; Davis v. Charles River Branch R. Co., 11 Cush. (Mass.) 506; Hawkins v. Berkshire County, 2 Allen (Mass.) 254; State v. Orange, 32 N. J. L. 49; State v. Easton, etc., R. Co., 36 N. J. L. 181; People v. Robinson, 29 Barb. (N. Y.) 77.*

Where proceedings are instituted to condemn lands which are conveyed to

a trustee to secure a debt, the trust deed will be treated simply as a lien, and therefore the equitable owner of the land is a necessary party. *Oregon Short Line, etc., R. Co. v. Mitchell, 7 Utah 505.* To the same effect, see *New York, etc., R. Co. v. New York, etc., R. Co., 52 Conn. 274, 25 Am. & Eng. R. Cas. 215.*

Naked Trustee.—A mere naked trustee of an equitable interest in lands is not a necessary party to proceedings to condemn the lands under a charter requiring notice of such proceeding to be given to "owners" and "persons interested." And the fact that the notice to the party having such equitable interest of the proceedings was given to her as "occupant," and not as owner of the equitable interest, does not affect the validity of the proceedings for condemnation. She was apprised of the proceedings and enabled to protect her interest, and that interest was represented by the legal owner of the land. *McIntyre v. Easton, etc., R. Co., 26 N. J. Eq. 425, following State v. Easton, etc., R. Co., 36 N. J. L. 181.*

Where One of Two Partners Holds Land, paid for with partnership funds, in trust for the firm, both partners are proper parties to a petition for damages. *Reed v. Hanover Branch R. Co., 105 Mass. 303.*

5. *State v. Berry, 12 Iowa 58; Oliphant v. Atchison County, 18 Kan. 386; Detroit v. Recorder's Ct., 40 Mich. 64; Toledo, etc., R. Co. v. East Saginaw, etc., R. Co., 72 Mich.*

a petition, even where the statute does not expressly require it.¹ In those states, however, where the condemning party is permitted to take the property in the first instance, leaving the owner to institute proceedings for damages, no petition or other application need be filed by the former, unless the statute requires it.²

2. Formal Requisites—Writing.—Under some of the statutes the application must be in writing; in others it need not be.³

Address.—The petition should be addressed to the tribunal which, by the terms of the statute, is to act upon it, but informalities in the address will not be fatal if the petition is in fact presented to and acted upon by the proper tribunal.⁴

206; *Flint, etc., R. Co. v. Board of Railroad Crossings*, 72 Mich. 234; *Robinson v. Mathwick*, 5 Neb. 255; *State v. Otoe County*, 6 Neb. 129; *Haywood v. Charlestown*, 34 N. H. 23; *State v. Morse*, 50 N. H. 9.

1. *Portland, etc., Turnpike Co. v. Bobb*, 88 Ky. 226; *Com. v. Coombs*, 72 Mass. 489; *Hawkins v. Trousdale County*, 12 Lea (Tenn.) 359.

On Appeal to Jury.—In an appeal to the District Court from the award of damages by commissioners, where the only question is the amount of the recovery, new pleadings need not be filed in the District Court. *Fremont, etc., R. Co. v. Meeker*, 28 Neb. 94, 44 Am. & Eng. R. Cas. 115; *Nebraska R. Co. v. Van Dusen*, 6 Neb. 160.

But if other issues than the question of damages are involved, they must be presented by proper pleadings. *Tresler v. Missouri Pac. R. Co.*, 33 Neb. 171.

Following Practice of State Courts.—There being no fixed forms of pleading in *South Carolina* in condemnation proceedings, but the procedure being by petition by persons duly authorized, notice to the owner, a hearing by a court of record as to the necessity of taking the land, followed by an assessment of compensation finally made by a jury impaneled for that purpose, the institution of such proceedings by petition of a duly authorized agent of the United States, service of the petition on the landowner, and disposition of the matter by the United States District Court, is in accordance with the provision of the Act of 1888, requiring the practice, pleadings, forms, and modes of procedure in condemnation proceedings to conform, as near as may be, to

the practice, pleadings, forms, and proceedings existing at the time in like cases in the courts of record of the state. *In re Rugheimer*, 36 Fed. Rep. 369.

2. *Howard v. Hutchinson*, 10 Me. 335; *McCarthy v. Whalen*, 19 Hun (N. Y.) 503, *affirmed* in 87 N. Y. 148.

Proceedings Instituted by Owner.—Under an early *Indiana* statute it was held not to be necessary to file a formal complaint where the proceeding is instituted by the owner. The inquest itself, taken in connection with the application and writ, was sufficient to advise the company what is to be answered. *Marion, etc., R. Co. v. Ward*, 9 Ind. 123.

3. **Indiana.**—The application for appraisers need not be in writing, but the warrant under which they act must be. *Swinney v. Ft. Wayne, etc., R. Co.*, 59 Ind. 205. So an application under 2 Rev. Stat. 1876, p. 289, § 710, for a writ for the assessment of damages, must be in writing; and such application constitutes a complaint, to which objection may be made as in ordinary adversary proceedings. *Church v. Grand Rapids, etc., R. Co.*, 70 Ind. 161, 3 Am. & Eng. R. Cas. 198. A similar rule obtains in *Michigan*. *Kroop v. Forman*, 31 Mich. 144.

South Dakota.—The proceedings must be in writing, and made a record of the court. *Lewis v. St. Paul, etc., R. Co.*, 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612. So also in *New Jersey*. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189.

Virginia.—A petition for leave to build a mill may be *ore tenus*. *Mead v. Haynes*, 3 Rand. (Va.) 33; *Whitworth v. Puckett*, 2 Gratt. (Va.) 528.

4. **Informality in Address.**—*Iowa*

Signing.—The petition may be signed by the petitioner or his attorney,¹ or agent and lessee.² If a corporation is petitioner, its attorney may sign the petition.³

An objection that the instrument of appropriation is not signed by any one in behalf of the company is waived if not promptly made.⁴

Verifying.—Unless the statute so prescribes, the petition need not be verified.⁵ If it does so require, and a corporation is the petitioner, only its officers or agents can verify the petition.⁶ The petition is properly sworn to before a notary, and the mere omission of the month from the jurat will not render the verification bad.⁷ The lack of verification or defects therein is waived by consenting to the appointment of commissioners,⁸ or by answering the petition and going to trial on the merits.⁹

Code, § 922, provides that the petition shall be addressed to the board of supervisors, but where a petition was presented to and acted on by the board of supervisors, but addressed to the county auditor, it was held sufficient. *State v. Barlow*, 61 Iowa 572. So where a statute prescribed an address to the "mayor and aldermen," an addition to such address of the words "and common council" was held not fatal, the proper body having received and acted on the petition. *Worcester v. Keith*, 5 Allen (Mass.) 17.

Presentation.—As to the sufficiency of the presentation of the petition to the tribunal, see *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333.

1. *Gammell v. Potter*, 2 Iowa 562.

2. *Harvey v. Lloyd*, 3 Pa. St. 331; *Sharetts' Road*, 8 Pa. St. 89. *Contra*, see *Shafferstown Road*, 3 Watts (Pa.) 475, where a petition for a review in a road case, signed by the attorney of the landowner, was held bad.

3. *Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *Tucker v. Erie, etc., R. Co.*, 27 Pa. St. 281.

4. *Logansport, etc., R. Co. v. Buchanan*, 52 Ind. 163.

The omission of the signatures at the end of the petition is a mere irregularity, and does not render the petition or the subsequent proceedings void, nor does it prevent the county commissioners from taking jurisdiction of the case. *Smith v. Goldsborough*, 80 Md. 49.

5. *Gammell v. Potter*, 2 Iowa 562.

Federal Condemnation.—The provision of the Maryland statute that a petition in the state court to condemn

land for the use of the United States shall be verified by affidavit of an agent of the United States is inapplicable to a petition presented to a United States court by the officer designated in the act of Congress. *Chappell v. U. S.*, 160 U. S. 499.

6. *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 26 N. Y. St. Rep. 968.

What Officers may Verify.—The general land agent of a company is an officer of a corporation within the meaning of that term as used in 2 N. Y. Rev. Stat. (7th ed.) 1546, 1547, §§ 5 and 6, and has a right to verify the petition. *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 148.

A petition was verified by the company's attorney; the verification stated that he was its duly authorized attorney and agent, appointed by it to verify in its behalf petitions in such proceedings. It was held that the affiant was an officer of the corporation within the meaning of the provision of the N. Y. Code Civ. Pro., § 525, which requires, where the party is a domestic corporation, that a pleading in its behalf shall be verified "by an officer thereof;" and so that there was a sufficient compliance with the provision (§ 3366) requiring such petition to be verified in the same form and by the same persons as pleadings in a court of record. *Matter of St. Lawrence, etc., R. Co.*, 133 N. Y. 270.

7. *Updegraff v. Palmer*, 107 Ind. 181.

8. *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 148.

9. *Matter of Boston, etc., R. Co.*, 79 N. Y. 64.

Filing.—A petition must be filed within the time prescribed by the statute.¹ Though filed in vacation, it may be tried in term time,² but in such a case it must be presented to the judge, so that he may note thereon the date of presentation.³ A notice of the filing, signed by an attorney, is sufficient.⁴

3. Sufficiency—Generally.—The petition should present a case within the provisions of the statute,⁵ and must set out all the facts necessary to the maintenance of the proceeding.⁶ The proceeding is special in character and the pleadings are not governed by the statutory provisions relating to pleadings generally.⁷ A substantial compliance with the statute, however, is sufficient to give the court jurisdiction.⁸ Mere carelessness in the use of language will not vitiate the petition,⁹ but material matters must be directly alleged and not stated by way of recital.¹⁰ It is

1. *In re* Opening of Road, 6 Phila. (Pa.) 143.

2. *Johnson v. Freeport, etc.*, R. Co., 111 Ill. 413, 25 Am. & Eng. R. Cas. 192.

3. *Colorado Midland R. Co. v. Ruedi*, 2 Colo. App. 202.

4. *Harvey v. Lloyd*, 3 Pa. St. 331.

5. *Spofford v. Bucksport, etc.*, R. Co., 66 Me. 26; *Faribault v. Hulett*, 10 Minn. 30; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

In *Nebraska* the application to the county judge for the appointment of commissioners to appraise damages is required to be in writing, and should state the name of the corporation, the landowner, if known, a description of the real estate over which the road is located, the width required for right of way, and that the owner refuses to grant the same. The application must be signed by some person empowered by the corporation so to do, but it need not be dated nor verified, nor is it essential to jurisdiction that it should aver the act of incorporation of the railroad company. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

6. *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204; *Matter of Marsh*, 71 N. Y. 315, reversing 10 Hun (N. Y.) 49.

Intention to Complete the Work.—Application for condemnation of land, made on petition which fails to state that the petitioner intends to complete the work for which the land is sought to be condemned, as required by Code Civ. Pro., § 3360, subd. 7, is properly denied on oral objections of defendant. *Erie, etc., R. Co. v. Welch*, 1 N. Y. App. Div. 140; *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 506.

7. *Knoth v. Barclay*, 8 Colo. 300.

Form of Pleadings Unimportant.—

Upon an appeal from the report of viewers, the landowner filed a narr. in trespass *quare clausum fregit*, to which the company pleaded not guilty. The form of the pleadings was held to be of no consequence, as full relief could be given thereunder. *Cresson, etc., Short Route R. Co. v. Aunsman* (Pa. 1887), 11 Atl. Rep. 561.

8. *Indianapolis, etc.; Gravel Road Co. v. Christian*, 93 Ind. 360; *Stevens v. Cerro Gordo County*, 41 Iowa 341, following *McCollister v. Shuey*, 24 Iowa 364.

9. Thus the use of the phrase "will sustain" instead of the statute phrase "have sustained," in referring to the damage done, is not fatal. *Townsend v. Chicago, etc., R. Co.*, 91 Ill. 545. So the improper use of the word "alteration" and the omission of the term "location" are not fatal. *Raymond v. Cumberland County*, 63 Me. 112.

But where the statute prescribed that the petition should state that "in the opinion of the petitioners the public interests require that the improvement asked for should be made," a statement that "in the opinion of the petitioners the improvement asked for should be made," was held insufficient to confer jurisdiction, not being in substantial compliance with the statute. *In re Grove Street*, 61 Cal. 438.

10. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

Less strictness is required where the owner makes the petition than is required from the condemning party in a proceeding *in invitum*. *Martins-*

sufficient, however, to make the allegations on information and belief.¹ Where the condemning party purposes reserving to the landowner a driveway or other easement not reserved by the statute itself, such reservation should be made in the petition.²

4. Averments of Jurisdictional Facts.—The application must show the authority of the petitioner to acquire the land.³ If the petitioner is a corporation its incorporation should be alleged,⁴

ville, etc., R. Co. v. Bridges, 6 Ind. 400; Marion, etc., R. Co. v. Ward, 9 Ind. 123.

If the statute requires a particular averment, its omission is fatal. *Powers v. Irish*, 23 Mich. 429; *Moore v. Superior*, etc., R. Co., 34 Wis. 173.

Grade.—The *Michigan* statute does not require the grade of the proposed railroad to be stated in the petition. *Bay City Belt-Line R. Co. v. Hitchcock*, 90 Mich. 533.

A petition showing that, in order to restore to its former usefulness a street crossed by its track, a railroad company lowered the grade of such street and dug and removed the earth in front of the petitioner's lot, thereby damaging such lot, presents a case for a condemnation proceeding. *Shealy v. Chicago*, etc., R. Co., 72 Wis. 471.

1. *Thayer v. Burger*, 100 Ind. 262; *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 26 N. Y. St. Rep. 968.

2. *St. Louis*, etc., R. Co. v. *St. Louis Union Stock Yards Co.*, 120 Mo. 541.

3. **"Authority" Defined.**—The authority here referred to is not the corporate resolution of the board of directors directing the proceeding to condemn to be begun, but the reference is to the authority to exercise the power of eminent domain vested by law in the corporation. *Lake Shore*, etc., R. Co. v. *Baltimore*, etc., R. Co., 149 Ill. 272.

Authority of Federal Officers.—Under Act Cong. August 1, 1888, authorizing officers of the government to condemn lands for the use of the United States, a petition for condemnation must show affirmatively that the officer is authorized by Congress to acquire the lands, and that in his opinion it is "necessary or advantageous" to proceed by judicial process; and these facts cannot be inferred from an allegation that such officer has requested the attorney-general to institute such proceedings. *In re Montgomery*, 48 Fed. Rep. 896.

4. *San Francisco*, etc., *Water Co. v. Alameda Water Co.*, 36 Cal. 639.

Incorporation.—A petition need not directly aver that "the company is duly incorporated" if it states facts from which that fact appears. *Matter of New York*, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 216.

The petition complies with the direction of the statute if it refers to the act of the legislature granting the special charter, where the petitioner acts under such a charter, or to the articles of incorporation, when the petitioning corporation is organized under a general law, or to the license or other authority to construct the public improvement for which it is sought to condemn property. *Lake Shore*, etc., R. Co. v. *Baltimore*, etc., R. Co., 149 Ill. 272.

Telephone Company.—In the case of a taking of lands for the erection of telephone poles, it must appear that the telephone company is organized under the laws of the state, and that the common council of the city within which the poles are erected has designated, in writing or otherwise, the streets in which the poles are to be placed. *Winter v. New York*, etc., *Telephone Co.*, 51 N. J. L. 83.

Sewerage.—In proceedings for sewerage of a city or town, it is immaterial whether or not the place is incorporated, and it is therefore unnecessary to prove incorporation, although averred in the complaint. *Pasadena v. Stimson*, 91 Cal. 238.

Cemetery.—A petition is defective where it does not show that petitioner's certificate of incorporation or its by-laws "do not exclude any person from the privilege, on equal terms with other persons, of purchasing a lot or of burial in its cemetery." Such allegation is jurisdictional, and cannot be inserted in the petition by amendment. *Stannards Corners Rural Cemetery Assoc. v. Brandes*, 14 Misc. Rep. (N. Y. Supreme Ct.) 270.

and the performance of conditions precedent, the taking of all necessary preliminary steps, etc., should be shown.¹ But this may be done by a general allegation, in the language of the statute, where the statute does not require a specific statement of the facts.²

1. *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204.

Preliminary Steps.—The petitioners must allege that they have "surveyed the line or route of their proposed road, made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such localities, signed by a majority of the directors of the company in the clerk's office," etc., as required by N. Car. Code, § 1952; otherwise the proceeding will be dismissed. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. Car. 16, 44 Am. & Eng. R. Cas. 168.

But the allegation as to the survey need not be made where the petitioning company is shown to have consolidated with another company which had surveyed the line. *Matter of New York, etc., R. Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 216.

Additional Lands.—An application to acquire additional lands need not set out all the facts with the same particularity that is required in an original proceeding; and it is not necessary to show a formal resolution of the board of directors to proceed in such matter. *Matter of New York Cent., etc., R. Co.*, 33 Hun (N. Y.) 274.

2. In *Rochester R. Co. v. Robinson*, 133 N. Y. 242, the court said: "It is objected to this form of pleading that it does not state facts, but only the legal conclusions of the pleader, and that it is therefore insufficient to confer jurisdiction upon the court to proceed with the matter and enter final judgment of condemnation. We do not think the objection is tenable. It is a sufficient answer to such a criticism that the whole proceeding is regulated by statute, and that upon this point the law has defined with precision and exactness the form and substance of the allegation required. The legislature does not seem to have left any room for doubt or construction upon the subject. The section begins with a declaration that the proceeding shall be initiated by the presentation

of a petition, which shall set forth certain specified facts enumerated in subdivisions one to six inclusive, and wherever a general statement is regarded as insufficient, care has been taken to provide that facts shall be stated in detail, as, where the name or place of residence of an owner cannot, after diligent inquiry, be ascertained, it may be so averred, 'with a specific statement of the extent of the inquiry which has been made.' But when subdivision seven is reached, a marked change in the phraseology and grammatical construction of the section occurs. Instead of requiring specific facts to be stated, it is provided that the petition shall contain 'a statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned, and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.' This change is significant, and was evidently intentional, and we are not at liberty to import into the paragraph provisions and requirements which the framers of the law have purposely omitted from it. While the plaintiff might, if he should so elect, set forth the several acts done by him which constitute the preliminary steps referred to, yet he may adopt the language of the statute, and in the concise form there prescribed tender an issue to the defendant upon this branch of his case. The latter cannot be prejudiced by such a practice. What the law requires the plaintiff to do before the commencement of the proceeding is as well known to the one party as the other. If the defendant has knowledge that any preliminary step required has not been taken, he can, under section 3365, put the allegation in issue by a specific denial, or by including it in a general denial of all the averments of the petition, or, if he has no knowledge or information sufficient to form a belief upon the subject, by a denial in that form, and thus compel the plaintiff to make proof of compliance with all the statutory require-

5. Designating the Parties and Persons Interested.—Where, as is ordinarily the case, the statute prescribes that the petition or complaint shall set out the names of the owners, occupants, or persons interested in the property sought to be taken, the requirement must be complied with or the petition will be bad on demurrer.¹ If there is no such requirement in the statute the names of the owners, etc., need not be given; and in any event a voluntary appearance by such owners will prevent a reversal of the judgment.² A defect in the petition in this respect may be objected to at any stage of the proceedings, but is curable by amendment.³ Stating the names of the owners of the lands without stating the names of the occupants will satisfy a statute calling for the names of the owners and occupants.⁴ The owners should be designated by name, and not as the “heirs” of a person named, nor by the initials of their Christian names only.⁵

ments, or fail in the proceeding. An allegation of this kind is not correctly described as a conclusion of law. It is the averment of a fact, one, it is true, which is a deduction from other facts known to the pleader to have an existence. It is what is aptly described as a resultant fact or a conclusion of fact, and it is such facts, and not evidentiary facts, which should be alleged in a pleading.”

1. Peoria, etc., R. Co. v. Laurie, 63 Ill. 264; Jones v. Skinner, 61 Me. 25; Morton v. Franklin Co., 62 Me. 455; Hill v. Glendon, etc., Min., etc., Co., 113 N. Car. 259; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100.

Alternative Statement.—The petition for the location of a highway should not be dismissed because it sets out, generally, and in the alternative, “the names of the owners, agents, or occupants of the lands through which such proposed highway will pass,” without specifying in which of such relations any of such persons stand to any of the tracts of land therein described. Meyers v. Brown, 55 Ind. 596.

Subsequent Change of Ownership.—Where the petition divided one tract into two portions, and gave the names of the owners of each, the fact that one of the parties to the condemnation suit afterward recovered in ejectment a portion of the land from another party to the suit could not invalidate the whole proceedings. Union Depot Co. v. Frederick, 117 Mo. 138, 57 Am. & Eng. R. Cas. 656.

2. Watkins v. Pickering, 92 Ind.

332; Washington Ice Co. v. Lay, 103 Ind. 48.

If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken, “sufficiently accurate for identification,” it is no objection to a description that it does not state the name of the owner of the land taken. Woodbury v. Marblehead Water Co., 145 Mass. 509.

3. Milhollin v. Thomas, 7 Ind. 165; Russell v. Turner, 62 Me. 496; Matter of Flatbush Ave., 1 Barb. (N. Y.) 290; People v. Whitney’s Point, 32 Hun (N. Y.) 508.

4. Milhollin v. Thomas, 7 Ind. 165.
Corporate Owners.—The complaint, in an action against a corporation for the condemnation of a strip of land for the right of way, sufficiently complies with the requirements of Cal. Code Civ. Pro., § 1244, subd. 2, when it states the name of the defendant, and shows that it was the known owner and claimant of the land sought to be condemned. California Southern R. Co. v. Colton Land, etc., Co. (Cal. 1884), 2 Pac. Rep. 38, 14 Am. & Eng. R. Cas. 194.

Trustee.—So a petition by one in possession, and claiming title in fee as trustee, need not describe him as trustee. Hawkins v. Berkshire County, 2 Allen (Mass.) 254.

Schedule.—The names and residences of the owners and persons interested may be given in a schedule attached to the petition. Matter of Washington Park, 52 N. Y. 131.

5. Hughes v. Sellers, 34 Ind. 337.

6. Description of the Premises—*a. NECESSITY.*—Unless the requirements of the statute as respects the description of the property to be taken or the location of the proposed improvement are complied with, the petition will not confer jurisdiction.¹

b. SUFFICIENCY—*In General.*—Ordinarily the description should be as definite as is necessary in a deed,² and so certain that the lands to be taken shall be capable of definite and unmistakable ascertainment.³ Where the statute only requires a "general

But a later case holds that the order establishing a highway is not void, because, in the petition and notice, the Christian names of the landowners are not given, but only initial letters, and the owners of part of the land affected are described as the "Bryant heirs." *Miller v. Porter*, 71 Ind. 521.

Where the petition, in alleging the names of the owners of lands which will be affected, only sets out the initials of the Christian name, or the partnership name, only, of any of such owners, it is fatally defective on motion in arrest of judgment. *Vawter v. Gilliland*, 55 Ind. 278.

In Name of People.—Where the statute directs the proceedings to be commenced in the name of the people, and they are commenced in the name of the governor and other state officers, the whole proceedings are thereby rendered void. *Stanford v. Worn*, 27 Cal. 171.

If the Owners Are Unknown, the application should state what efforts have been made to identify them; ordinary diligence must be used before proceeding against unknown owners. *Harbeck v. Toledo*, 11 Ohio St. 225.

1. *Matter of New York Cent.*, etc., R. Co., 70 N. Y. 191; *Ames v. Union County*, 17 Oregon 600, 27 Am. & Eng. Corp. Cas. 60; *Philadelphia Water Supply Co. v. Susquehanna Canal Co.*, 4 Pa. Dist. Rep. 637.

California.—The complaint must contain a description of each piece of land sought to be taken, whether the same contains the whole or only a part of the entire parcel. *California Cent. R. Co. v. Hooper*, 76 Cal. 404.

Illinois.—The lots, parcels, and property sought to be taken or damaged must be described with reasonable accuracy (*Chicago, etc., R. Co. v. Chicago*, 132 Ill. 372), and such description should be followed in the subsequent orders, verdict, and judgment. *Galena, etc., R. Co. v. Pound*, 22 Ill. 399.

Indiana.—On a landowner's applica-

tion, under Rev. Stat. 1881, §§ 906, 909, for an assessment of damages for land taken for a railroad, the law authorizing the taking must be referred to, and both application and writ must contain a precise and particular description of the land sought to be taken. *Midland R. Co. v. Smith*, 109 Ind. 488, *further appeal* 125 Ind. 509.

Maine.—In all cases where private property is taken, whether it be in lands or the usufructuary interest in flowing water, the taking must be evidenced by some writing describing the estate so taken by definite and specific boundaries, quantity, or measure, according to the nature of the property taken. *Hamor v. Bar Harbor Water Co.*, 78 Me. 127.

Michigan.—The land must be specifically described (*Sanford v. Chicago, etc., R. Co.*, 2 Mich. N. P. (Supp.) 132), so that the jury may be left free from any questions except as to the necessity of the taking and the value of the land. (*Manistee, etc., R. Co. v. Fowler*, 73 Mich. 217.) The quantity of land taken must be accurately stated; and in cases where the right of an adjoining owner to the use of a street is the subject of condemnation, the extent of the owner's frontage upon the street should be accurately stated, as this must affect the nature and extent of his injury and the just compensation to be made to him. *Bay City Belt Line R. Co. v. Hitchcock*, 90 Mich. 533.

New Jersey.—The application should be in writing, and should specify clearly and intelligibly, either in terms or by reference to the survey or record, what land the company is proceeding to acquire. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189.

2. *Detroit, etc., R. Co. v. Wayne Circuit Judge*, 95 Mich. 318. And see in general upon this subject, article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

3. *Coster v. New Jersey R., etc.,*

description,"¹ or where the particular location is to be determined, not by the petitioner, but by the court, or by commissioners appointed by the court, only a general description need be, or, in fact, can be given. • This is generally the case in highway, ditch, and drain condemnations.² But where, as in railroad condemnations, the petitioner, and not the court, is to determine where the improvement shall be located, and what property shall be taken, the description must be of sufficient particularity to enable the landowner to know what property is required, and to enable a surveyor to locate it.³

Co., 23 N. J. L. 227, *affirmed* in 24 N. J. L. 730; National Docks, etc., Connecting R. Co. v. United New Jersey R., etc., Co., 53 N. J. L. 217. Only the land particularly described can be taken, National Docks, etc., Connecting R. Co. v. United New Jersey R., etc., Co., 52 N. J. Eq. 366; and none other need be described, Schaible v. Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. Rep. 334.

Land Injured but Not Taken.—Where the proceeding is to acquire land and the riparian rights of an owner whose remaining property will thereby be severed from such riparian rights, it is not necessary to describe in the petition the whole property which may be injuriously affected by the severance, but only that sought to be acquired. New Rochelle Water Works Co. v. Siebrecht, 65 Hun (N. Y.) 620, 47 N. Y. St. Rep. 388.

Under a petition on Mass. Rev. Stat., c. 24, § 55, for taking for a street certain land described by metes and bounds, damages may be recovered for injury thereby resulting to adjoining land of the petitioner. First Church v. Boston, 14 Gray (Mass.) 214.

Extreme Accuracy is required, both as to the property itself and as to the degree of interest to be acquired in it. Metropolitan El. R. Co. v. Dominick, 55 Hun (N. Y.) 198.

1. *Corey v. Swagger*, 74 Ind. 211; *Wilkin v. First Div. St. Paul, etc., R. Co.*, 16 Minn. 271; *Ex p. Bennett*, 26 S. Car. 317, where the length and width of the strip only were given.

Flowage.—Ordinarily, a general description of the property to be flowed satisfies the statute. *Folmar v. Folmar*, 71 Ala. 136; *Com. v. Ellis*, 11 Mass. 462; *Lake v. Loysen*, 66 Wis. 424.

2. *Sumner v. Oxford County*, 37 Me. 112; *Wright v. Wilson*, 95 Ind. 408;

Com. v. Berkshire County, 8 Pick. (Mass.) 343; *Westport v. Bristol County*, 9 Allen (Mass.) 204; *Wiggin v. Exeter*, 13 N. H. 304; *In re Public Road*, 4 N. J. L. 34; *State v. Shreve*, 4 N. J. L. 337.

Termini and Location.—The termini should be stated, and the location described in such a manner as to enable notice to be given to the owners of property to be taken or affected (*Bryan v. Moore*, 81 Ind. 13; *Pembroke v. Plymouth County*, 12 Cush. (Mass.) 351; *In re Highway*, 16 N. J. L. 391); and so as to enable a surveyor to find and locate the land from the description given (*Byron v. Blount*, 97 Ill. 62), and so that the land may be ascertained and described in the judgment without extrinsic evidence. *Rising Sun, etc., Turnpike Co. v. Hamilton*, 50 Ind. 580.

In *Illinois* only reasonable certainty is required in a petition to the County Court for the establishment of a road, as to beginning, line, and termini of the proposed road. It is not necessary that the line and every point on the route be inserted in the petition. *Henline v. People*, 81 Ill. 269.

3. *Alabama.*—*Macon v. Owen*, 3 Ala. 116.

Illinois.—*Byron v. Blount*, 97 Ill. 62. *Indiana.*—*Rising Sun, etc., Turnpike Co. v. Hamilton*, 50 Ind. 580; *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *McDonald v. Wilson*, 59 Ind. 54; *Conaway v. Ascherman*, 94 Ind. 187; *Clift v. Brown*, 95 Ind. 53; *Adams v. Harrington*, 114 Ind. 66.

Kentucky.—*Portland, etc., Turnpike Co. v. Bobb*, 88 Ky. 226.

Maine.—*Spofford v. Bucksport, etc., R. Co.*, 66 Me. 44.

Massachusetts.—*Kohlhepp v. West Roxbury*, 120 Mass. 596.

Nebraska.—*Omaha, etc., R. Co. v. Rickards*, 38 Neb. 847.

New Hampshire.—*Schoff v. Upper*

What Descriptions Are Sufficient.—A petition is sufficient which gives the exact point where the railroad enters on the land, the general course of the road, the point of exit, and the width of the strip to be taken.¹ Where the charter calls for a railroad to be built along an existing highway, it is sufficient to set forth the name of the landowner, the county, and the length and width of the desired right of way.² Where an actual, visible location has been made by driving stakes, blazing trees, etc., a reference to the land as "the land on which the road has been located," is sufficiently accurate.³ In highway cases it is ordinarily sufficient to name the termini and the general course of the route.⁴

Connecticut River, etc., Imp. Co., 57 N. H. 110.

New York.—People v. Taylor, 34 Barb. (N. Y.) 481.

Pennsylvania.—Pennsylvania R. Co. v. Porter, 29 Pa. St. 165, following O'Hara v. Pennsylvania R. Co., 25 Pa. St. 445.

Texas.—Parker v. Fort Worth, etc., R. Co., 84 Tex. 333, 51 Am. & Eng. R. Cas. 643; Galveston, etc., R. Co. v. Mud Creek, etc., Co., 1 Tex. App. Civ. Cas., § 393.

Wisconsin.—Strang v. Beloit, etc., R. Co., 16 Wis. 635.

Several Tracts of land belonging to different owners may be described in one petition. Brooklyn El. R. Co. v. Nagel, 75 Hun (N. Y.) 590.

1. St. Louis, etc., R. Co. v. Lew-right, 113 Mo. 660.

"**Reasonable Certainty**," required by W. Va. Acts of 1881, c. 18, § 5, is complied with by a description of the land as a strip thirty feet wide on each side the centre line of the road, containing three and ninety-nine one hundredths acres, beginning at the point where the centre line of the road as located crosses the boundary line of the landowner, thence through his land on a certain creek, giving the courses and distances of the lines, the general direction of the curves, and their radii. Ohio River R. Co. v. Harness, 24 W. Va. 511, 20 Am. & Eng. R. Cas. 405.

Describing the Termini.—A complaint in which the "general route" is given and the termini are stated to be National City and "a connection with the A. & P. R. R. Co., at or near the thirty-fifth parallel of north latitude in the State of California," sufficiently complies with section 1244 of the Cal. Code of Civil Procedure. California Southern R. Co. v. Southern Pac. R.

Co., 67 Cal. 59, 20 Am. & Eng. R. Cas. 309.

Landowners' Petition.—Landowners seeking an assessment of damages described the land as situate in certain congressional subdivisions, and "commencing at a stake in the west line of said tract of land, nine chains and twenty-one links from the northwest corner of said lot." The land on which the road was located was described by courses and distances, making a strip eighty feet wide and extending across eighty acres. This description was held, on demurrer, to be sufficient. Marion, etc., R. Co. v. Ward, 9 Ind. 123.

2. *Ex p.* Bennett, 26 S. Car. 317.

Lot, Block, and Plat.—Where the fee of lots abutting a public street extends to the center of the street, a petition by a railroad company with a track on one side of such street asking for the condemnation of the lots, describing them by lot, block, and plat adjacent and contiguous to its track on such side, is not bad for ambiguity of description. Cincinnati, etc., R. Co. v. Bay City, etc., R. Co. (Mich. 1895), 64 N. W. Rep. 471.

3. Lower v. Chicago, etc., R. Co., 59 Iowa 563; West v. West, etc., R. Co., 61 Miss. 536, 20 Am. & Eng. R. Cas. 402; Quincy, etc., R. Co. v. Kellogg, 54 Mo. 334; Chicago, etc., R. Co. v. Swan, 120 Mo. 30; Cleveland, etc., R. Co. v. Prentice, 13 Ohio St. 373; Duck River Valley Narrow Gauge R. Co. v. Cochrane, 3 Lea (Tenn.) 478.

4. Sumner v. Oxford County, 37 Me. 112; Bryant v. Penobscot County, 79 Me. 128; Knowles's Petition, 22 N. H. 361.

Sufficient Descriptions in Highway Cases.—The following descriptions have been held sufficiently definite and certain: "Passing over and upon the line dividing the lands of" certain

What Descriptions Are Insufficient.—A description not sufficiently certain and definite to enable a surveyor to locate the land taken, is demurrable.¹ The initial point should be definitely given, and to describe it as "near,"² or "at or near" a given point, is bad.³ The use of the word "about,"⁴ and of the terms "easterly," "northerly," "southerly," and the like, is objectionable.⁵

owners named. *Hedrick v. Hedrick*, 55 Ind. 78.

A description containing a definite starting point, "running thence in a westerly direction, * * * thence in a southerly direction," etc., the distances in each direction being given. *Coolman v. Fleming*, 82 Ind. 117.

A description, otherwise correct, which omitted to state whether the proposed road will be east or west of any particular meridian (*Casey v. Kilgore*, 14 Kan. 478), or that it will be in the county where the proceedings are had. *Sutherland v. Holmes*, 78 Mo. 399.

"Beginning at the terminus of the new road now building in Newfield, to B, thence in a western direction to the N H line." *Acton v. York County*, 77 Me. 128. To the same effect, see *Biddle v. Dancer*, 20 N. J. L. 633; *Satterly v. Winne*, 101 N. Y. 218.

From a point specified "to a point near the dwelling-house of A" on a certain road. *Westport v. Bristol County*, 9 Allen (Mass.) 203; *Miller's Road Case*, 9 S. & R. (Pa.) 35.

A description of a terminus as "at or near the old fordway" (*Smith v. Conway*, 17 N. H. 586); or as at a point in another highway, "one and one half rods northeasterly from a rock maple tree" standing near another highway at the place of intersecting the first-named road. *Wentworth v. Milton*, 46 N. H. 448. To the same effect, see *State v. Northrop*, 18 N. J. L. 271.

1. So held where the description was "a strip or parcel of land one hundred feet wide, fifty feet on each side of the track or roadbed of the said company's railroad when built, one thousand yards, more or less, in length, and containing seven acres, more or less, in and on the following described lands," namely, the half of a quarter section, *London v. Sample Lumber Co.*, 91 Ala. 606; *Parker v. Fort Worth*, etc., R. Co., 84 Tex. 333, 51 Am. & Eng. R. Cas. 643; and where, after stating the starting point as "about ten rods north of the centre"

of a certain eighty acre tract, the description was "a strip through said land, running east and west at the point aforesaid, about one hundred feet wide," *Midland R. Co. v. Smith*, 109 Ind. 488, following *Indianapolis, etc., R. Co. v. Newsom*, 54 Ind. 121, where the description was "extending diagonally through said tract of land, from a point near the northeast corner to a point near the southwest corner." See also, to same effect, *Toledo, etc., R. Co. v. Munson*, 57 Mich. 42, where a map and survey were also referred to but not attached to the petition.

Where the Petition Mentioned Three Separate Surveys over which the right of way was desired, but did not elect which one should be followed, it was held to contain no description at all. *Galveston, etc., R. Co. v. Mud Creek, etc., Co.*, 1 Tex. App. Civ. Cas., § 396.

A Description by Governmental Subdivision is insufficient, where the land lies within an incorporated city and has been laid out and platted into lots and blocks. *Omaha, etc., R. Co. v. Rickards*, 38 Neb. 847.

Where One Company Seeks to Condemn the Right of Way of Another railway for a conjoint use, it must describe it as a right of way. Describing the tracts of land simply, over which such prior way is located, making no reference to such other road or company, is insufficient. *Cincinnati, etc., R. Co. v. Danville, etc., R. Co.*, 75 Ill. 113.

2. *Farmer v. Pauley*, 50 Ind. 583.

3. *De Long v. Schimmel*, 58 Ind. 64.

4. *Smith v. Weldon*, 73 Ind. 454; *Midland R. Co. v. Smith*, 109 Ind. 488, though it is held otherwise where the context limits and restrains its meaning. *Adams v. Harrington*, 114 Ind. 66.

5. *Scraper v. Pipes*, 59 Ind. 158; *Clement v. Burns*, 43 N. H. 609.

Water Rights.—A complaint in an action to condemn water rights which describes them generally as all the rights of each of the defendants, whether as riparian owners or acquired by appropriation, adverse use, or pre-

Effect of Imperfect Description.—Where there is a description of the land sought to be condemned, the fact that it is inexact and insufficient will not deprive the court of jurisdiction to impanel a jury.¹ Nor will the landowner be deprived of the right to consequential damages to land adjoining the location and not described.² The description being sufficient to indicate to the owner the land wanted, his appearance in the proceeding, without objecting, is a waiver of other defects in the description.³ The location as filed is conclusive and any variation from it is a trespass.⁴

c. REFERENCES TO MAPS, SCHEDULES, ETC.—The petition may refer to a map or plat filed with it for an accurate description of the property sought to be condemned.⁵ So, also, a

scription, except for domestic use and reasonable irrigation of their riparian lands, is uncertain in not showing definitely what water rights are proposed to be condemned, and is insufficient as against a special demurrer. *Aliso Water Co. v. Baker*, 95 Cal. 268.

If a statute giving the right to a water company to take land by the right of eminent domain requires it to file a description of the land taken "sufficiently accurate for identification," and the land is taken in two towns, a description which states the land to be in one town, which does not state the width of the land taken, and which is vague as to the termini, is insufficient. *Woodbury v. Marblehead Water Co.*, 145 Mass. 509.

1. *Ex p. Bennett*, 26 S. Car. 317.

2. *Drury v. Midland R. Co.*, 127 Mass. 571.

Illustration.—Plaintiff was owner of one hundred and twenty acres of land, consisting of three forties in line from east to west. The land was occupied and used by him as one farm, his residence being on the easterly forty. The defendant, having located the line of its railway across the two westerly forties, instituted proceedings for condemnation. It was held that in assessing the compensation to be paid to the plaintiff, he was entitled to have the effect of the appropriation of the right of way across the two westerly forties upon the easterly forty considered and taken into account, although the petition for the appointment of commissioners described the two westerly forties only. *Wilmes v. Minneapolis*, etc., R. Co., 29 Minn. 242, 10 Am. & Eng. R. Cas. 161, reviewed in *Atchi-*

son, etc., R. Co. v. *Boerner*, 34 Neb. 240.

Where the Petition Describes only a Part of the Tract through which the proposed right of way passes, the landowner is not required to take steps to have such description corrected or enlarged, so as to include the whole tract. *Sheldon v. Minneapolis*, etc., R. Co., 29 Minn. 318.

And the owner cannot avoid the proceedings, of which he was duly notified, on the sole ground that the property described in the petition is the tract through which the road is located and not the particular part thereof appropriated for right of way purposes. *Fremont*, etc., R. Co. v. *Mattheis*, 39 Neb. 98.

3. *St. Joseph Hydraulic Co. v. Cincinnati*, etc., R. Co., 109 Ind. 172, following *Indiana Oolitic Limestone Co. v. Louisville*, etc., R. Co., 107 Ind. 301.

4. *Hazen v. Boston*, etc., R. Co., 2 Gray (Mass.) 574; *Matter of New York*, etc., R. Co., 62 Barb. (N. Y.) 85.

After having Gone into Occupation the condemning party cannot object that the description is inaccurate. *Callender v. Painesville*, etc., R. Co., 11 Ohio St. 516.

5. *Cory v. Chicago*, etc., R. Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *St. Louis*, etc., R. Co. v. *Fowler*, 113 Mo. 458; *Fremont*, etc., R. Co. v. *Mattheis*, 35 Neb. 48; *Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341.

Where Such Map is Not Attached to the Files, the appellate court will assume that it was all that was asserted concerning it in the petition with which it was filed. *Cory v. Chicago*, etc., R. Co., 100 Mo. 282.

schedule firmly attached to the petition, and referred to therein as containing a description of the property to be taken, and which in fact contains such a description, forms a part of the petition, and satisfies a statute requiring such description to be given in the body of the petition.¹

7. Allegations of Quantity and Value—Quantity.—To make a valid and permanent appropriation of land or water the quantity must be definitely ascertained and described so that the owner may know how much has been taken and for what he is entitled to compensation.² But the petitioning company is not bound to take and pay for the land described in the petition if less is needed for its purposes. It is not estopped by the allegations in the petition as to the quantity of land to be taken when its engineer is of opinion that a less quantity is sufficient.³

Value.—In *Colorado* the petition is required to state the value of the property sought to be taken.⁴ But this would seem to be immaterial and unnecessary to be either alleged or proved on the part of the condemning party.⁵

8. Stating the Purpose—Public Use.—The application should state distinctly that the land is to be devoted to a public use;⁶

1. *Matter of Washington Park*, 52 N. Y. 131.

Reference to Deed.—But in proceedings under the New York General Railroad Act, which requires the petition itself to contain such a description of the land sought to be condemned as will show its location and the boundaries thereof, a defect in description cannot be remedied by a reference in the petition to a deed. *Matter of New York Cent., etc.*, R. Co., 70 N. Y. 191.

2. *Hayden v. State*, 132 N. Y. 533.

3. *Peoria, etc., R. Co. v. Bryant*, 57 Ill. 473.

Highways.—The petition for a highway need not state the width of the road. *Watson v. Crowsore*, 93 Ind. 220.

A petition not stating the width must be construed to be a petition for a road at least forty feet wide. *Hill v. Ventura County*, 95 Cal. 239.

Telegraphs and Telephones.—The petition must indicate the size of the poles to be erected and the positions in which they will be placed. *Broome v. New York, etc., Telephone Co.*, 49 N. J. L. 624; *Winter v. New York, etc., Telephone Co.*, 51 N. J. L. 83; *New York, etc., Telephone Co. v. Broome*, 50 N. J. L. 432.

Water.—A petition in proceedings to take water for the use of a waterworks company which states the size of pipe

to be used, its grade, and estimated flow through such pipes, sufficiently describes the quantity of water desired to be taken. *Matter of Malone Water Works Co.* (Supreme Ct.), 38 N. Y. St. Rep. 95.

4. *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193.

5. *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309. But it seems that the defendant may tender the plaintiff an issue, in its answer on this point, which the latter must meet in its replication, or the fact as pleaded will, for the purposes of the action, be admitted. *U. S. v. Oregon R., etc., Co.*, 9 Sawy. (U. S.) 61, 16 Fed. Rep. 524, 14 Am. & Eng. R. Cas. 23.

6. *Evergreen Cemetery Assoc. v. Beecher*, 53 Conn. 551; *Fork Ridge Baptist Cemetery Assoc. v. Redd*, 33 W. Va. 262. See *supra*, III. 4. *Determining whether Use Is a Public One.*

Cemetery Addition.—A petition to annex land to a public cemetery which states that the petitioner is a corporation owning and controlling a public cemetery in, etc., and that, in the opinion of its trustees and directors, it has become necessary to purchase the real estate therein described for its use as an addition to such cemetery, etc., sufficiently shows a purpose to condemn the land for a public use. *Farn-*

the particular use or purpose intended must be shown, and that it is within the power conferred by statute; also a clear right to condemn the property, and that the intended use is within the particular statute under which the proceedings are had.¹

Railroad Purposes.—In the condemnation of a right of way over a tract of land it is sufficient to state generally that the land is needed for railroad purposes, without stating further particulars, such as the number of tracks proposed to be laid, or a purpose to allow other companies to use the same.²

eman v. Mount Pleasant Cemetery Assoc., 135 Ind. 344.

Drain.—The petition for the construction of a drain must allege, and the proof must show, that such drain will be conducive to the public health, convenience, or welfare, or will be of public benefit or utility. *McKinsey v. Bowman*, 58 Ind. 88.

Irrigation.—A complaint alleging plaintiff's organization into an irrigation district, and the purpose of its organization, and showing that the object sought by the use is to provide water for irrigating lands within the district, particularly describing them; that the defendants own the land over which the right of way is sought, particularly describing it; that in order properly to irrigate the lands of the district it is necessary to construct a pipe line, which is particularly described, across the defendants' land at the point designated; and that the right of way is sought for the purpose of establishing and maintaining such pipe line, the complaint being accompanied by proper maps made a part thereof, showing survey and delineation of the proposed line upon the ground, is sufficient to show that the use is a public one, and that the taking is necessary for such use. *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384; *Cummings v. Peters*, 56 Cal. 593.

A complaint in an action by a water company to condemn water rights and a strip of land which alleges that it is necessary to condemn and take the water rights in order to carry out the purpose of the water company to supply a "farming neighborhood," composed of land riparian to the creek, with water for domestic use and irrigation, but does not otherwise show whether the "farming neighborhood" is inhabited, not only fails to show that the use for which condemnation is sought is a public use, but shows

affirmatively that it is not. *Aliso Water Co. v. Baker*, 95 Cal. 268.

1. *Chicago, etc., R. Co. v. Galt*, 133 Ill. 657, 44 Am. & Eng. R. Cas. 43; *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272; *Indianapolis, etc., R. Co. v. Newsom*, 54 Ind. 121; *Matter of New York Cent., etc., R. Co.*, 5 Hun (N. Y.) 86, *affirmed* in 66 N. Y. 407.

Mineral Lands.—Where the statute provides that a railroad company shall only acquire a right to use lands condemned for the purposes of the corporation, and during its corporate existence, a petition is not defective where it specifies that the object is only to acquire an interest in the surface of the land, the object being to avoid payment for certain ores supposed to be beneath the surface. *Matter of Hartford, etc., R. Co.*, 65 How. Pr. (N. Y. Supreme Ct.) 133.

Track Already Constructed.—In a petition under Wis. Rev. Stat., § 1852, to condemn land on which a spur track has been constructed and used for two years, the petition need not allege that "it is the intention of the corporation, in good faith," to use the land for the purpose of operating its road, as is required by section 1846, in a case where the track has not been constructed. *Chicago, etc., R. Co. v. Richardson*, 86 Wis. 154.

Demurrer.—If a petition is defective in not stating the purpose and the manner in which the land is to be used, the objection may be raised by demurrer. *Suver v. Chicago, etc., R. Co.*, 123 Ill. 293.

2. *Chicago, etc., R. Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558. But it was held in Texas that a petition for condemnation of land for the purpose of "right of way" and "other necessary railway purposes" did not authorize a judgment of condemnation for "use as right of way, depot

The Particular Manner in which the land is to be used should appear from the plans and specifications, which may be given in evidence, or which the defendant may have produced on motion.¹

Two Uses or Purposes.—Where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, which are so inseparably blended in the petition and orders as not to be severable, it cannot be sustained.²

grounds, terminal grounds, and all other necessary railway purposes." *Barnes v. Chicago, etc., R. Co.* (Tex. Civ. App. 1895), 33 S. W. Rep. 601.

Illustrations of Sufficient Statement.—A petition to condemn a strip of land one hundred and fifty feet wide over defendant's land alleged that petitioner was a corporation organized and existing under the general railroad laws of Illinois; that the object of its organization was to construct and operate a railroad, under the laws of the state, from F to G; that it was authorized to exercise the right of eminent domain, and that in accordance with the purposes of its organization the petitioner had surveyed, staked off, and located its railroad. From these averments it was held to be apparent that the proceeding was to condemn private property for a public purpose, and for no other. *De Buol v. Freeport, etc., R. Co.*, 111 Ill. 499.

A petition for the condemnation of land, after stating that the company had located its line of road over certain tracts of land specifically described, averred "that a part of each of said lands is necessary to petitioner for its right of way, side-tracks, depot, and depot grounds, freight yards, shops, and appurtenances for the construction and operation of its said line of railroad." This averment was held to be a sufficient statement of the purposes for which the property was sought to be taken. *Suver v. Chicago, etc., R. Co.*, 123 Ill. 293.

Intention to Build Part of Road.—In *Michigan* the petition need not show an intention to build the entire road if a division of fifteen miles has been lawfully designated; but in such case it must appear affirmatively in the petition that such division has been lawfully made in such manner as to conform to the statute. *Chicago, etc., R. Co. v. Sanford*, 23 Mich. 418.

Number of Tracks.—A petition which does not state that the company intends to lay more than one track, the

line of which is located according to its map and survey, is not open to the objection that it does not show the number of tracks intended to be laid, as under it the company would have no right to lay more than the one track thus indicated. *Bay City Belt-Line R. Co. v. Hitchcock*, 90 Mich. 533.

Taking for Construction Purposes Only.—When lands are condemned for construction purposes only, under Ohio Gen. Incorp. Act., § 10, the petition should be so specific in its description of the use intended as to leave no doubt as to the extent of the interest sought to be acquired. *Valley R. Co. v. Bohm*, 34 Ohio St. 114.

Lateral Railroad.—It is not a valid objection to the petition under the *Pennsylvania* lateral railroad acts that it represents the desire of the petitioner to make, construct, and use his proposed railroad with double or single track, as may be found most suitable for carrying his coal, or coal of other parties thereon; for the law not only authorizes such a petition, but the owner of a lateral railroad may be required to carry the coal of other parties upon it. Nor is it necessary that the grades of the road should appear in the petition or on the plot. *Boyd v. Negley*, 40 Pa. St. 377.

1. *Suver v. Chicago, etc., R. Co.*, 123 Ill. 293; *New Rochelle Water Works v. Brush* (Supreme Ct.), 47 N. Y. St. Rep. 388.

More than Statutory Strip.—Where, for a special purpose provided for in the statute, a wider strip than the statutory one hundred feet is wanted, the petition must allege that purpose, and the lands sought to be condemned must be particularly described, so that they may be certainly located. *Brown v. Rome, etc., R. Co.*, 86 Ala. 206, 36 Am. & Eng. R. Cas. 571.

2. So held where a company, empowered by its charter to condemn for railroad purposes only, filed a petition stating that the land sought was "needed by said company for their

9. Alleging the Necessity of the Taking.—The right to take land *in invitum* being limited to cases of necessity, it should be averred and proved that the land sought is necessary, and that the petitioner has not been able to contract with the owner for its purchase.¹ This allegation is jurisdictional,² and in its absence evidence of such necessity cannot be given.³ It is sufficient to allege that the property is required for the public use, the word "required," as thus used, being synonymous with "necessary."⁴

10. Averments as to Title.—The condemning party must, as a general rule, set out the title and ownership of the property sought to be taken, and is estopped to deny, before the commissioners, the ownership so set out.⁵ The petitioners' allegations as to title may be disputed by the defendants,⁶ and are admitted unless denied.⁷

When the Landowner Petitions he should show a title or interest in

right of way and for the alteration of R street," etc. Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 44 Am. & Eng. R. Cas. 43.

1. San Francisco, etc., Water Co. v. Alameda Water Co., 36 Cal. 639, Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323; Grand Rapids, etc., R. Co. v. Van Drielle, 24 Mich. 409. See *supra*, III. 3. *Determining Questions of Necessity and Propriety*.

2. Portland, etc., Turnpike Co. v. Bobb, 88 Ky. 226; Colville v. Judy, 73 Mo. 651.

3. Helena v. Harvey, 6 Mont. 114. But the petition need not show how the corporation made or expressed its determination of the necessity to take the lands. Kountze v. Morris Aqueduct (N. J. L. 1895), 33 Atl. Rep. 252.

Particular Purposes.—The allegation is necessary where lands are wanted for stations or engine houses. Matter of Union El. R. Co., 55 Hun (N. Y.) 611, 30 N. Y. St. Rep. 164; or for stables, offices, etc., Matter of Broadway, etc., R. Co., 73 Hun (N. Y.) 7.

4. Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350.

Where a street surface railroad company is seeking to condemn additional lands for the purpose of stables, offices, etc., averments in the petition that the premises then occupied by the company are inadequate to the proper management of its corporate business, and that the land sought to be condemned will be adequate and sufficient, show the necessity of acquiring the additional property. Matter of Broadway, etc.,

R. Co., 73 Hun (N. Y.) 7, *distinguishing* Matter of New York, etc., R. Co., 99 N. Y. 12; Rensselaer, etc., R. Co. v. Davis, 55 N. Y. 145.

An allegation that one hundred and fifty feet in width is needed because the road passes through hills and valleys sufficiently shows the necessity for the extra width, under a statute giving a general right to condemn a strip of such width in such localities. North Missouri R. Co. v. Gott, 25 Mo. 540. And see Virginia, etc., R. Co. v. Lovejoy, 8 Nev. 100.

5. Peoria, etc., R. Co. v. Laurie, 63 Ill. 264; Mansfield, etc., R. Co. v. Clark, 23 Mich. 519. See *infra*, X. 2. g. (3) *Power to Condemn and Question of Title*.

Title in Petitioning Company.—A company cannot at the same time, in the same suit and petition, set up a title in fee in itself and ask an adjudication upon it, since its right to ask condemnation depends on the fact that the property belongs to another. Colorado Midland R. Co. v. Croman, 16 Colo. 381.

6. Brisbane v. St. Paul, etc., R. Co., 23 Minn. 114.

7. Golden Boulder, etc., R. Co. v. Haggart, 9 Colo. 346, 27 Am. & Eng. R. Cas. 375.

The Remedy for a Misstatement as to the title is either by an abandonment of the proceedings, or by motion to amend the petition, or, if discovered after verdict, by motion for a new trial. Wilcox v. St. Paul, etc., R. Co., 35 Minn. 439; Chesapeake, etc., R. Co. v. Bradford, 6 W. Va. 220.

the property for which he claims compensation.¹

Exactness.—Such averment need not be made with exactness, as the damages will be assessed according to the title proved at the hearing.²

11. Showing Nature of Injury or Damage.—In a proceeding by the landowner to obtain compensation for injuries to his remaining property caused by the taking, the same strictness is not required in the averments as in pleadings in a court of record.³ It is not necessary, in such cases, to set forth in detail all the elements of the damages claimed;⁴ but he must set out the nature of the alleged injury and the particular ground of complaint, so that it may appear whether the law provides a remedy for the injury, or whether it be *damnum absque injuria*.⁵ He must submit his whole claim for damages, or he will waive such ground of damage as is not alleged.⁶

12. Alleging Inability to Agree with Owner⁷—a. NECESSITY OF THE ALLEGATION.—Where, as in most of the states, the statutes withhold compulsory condemnation until after an ineffectual attempt to agree with the owner as to the price of the land, the petition must allege the inability of the parties to agree,⁸ or that the owner is incapable of consenting, or absent, or unknown.⁹

1. *Schoff v. Upper Connecticut River, etc., Imp. Co.*, 57 N. H. 110; *Faville v. Greene*, 12 Wis. 11.

2. *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 564.

Presumption of Title in Fee.—When the petition for the appointment of commissioners alleges the claimant's ownership, it is to be taken as ownership in fee, and if no issue is taken on it, it is admitted of record and need not be proved. *St. Paul, etc., R. Co. v. Matthews*, 16 Minn. 341; *Knauff v. St. Paul, etc., R. Co.*, 22 Minn. 173.

Tenants in Common.—An authority by one tenant in common to another to proceed to an assessment of the damages which had been suffered by the location and construction of a railroad through their farm will not authorize the latter to proceed in his own name, treating the farm as his own. The title of the petitioners ought to be rightly set forth in the petition. Nor will such irregularity be cured by the subsequent formal release of the tenant in common not joined in the proceeding. *Harrisburg, etc., R. Co. v. Bucher*, 7 Watts (Pa.) 33.

3. *Martinsville, etc., R. Co. v. Bridges*, 6 Ind. 400, reviewed in *Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74.

4. *Stone v. Heath*, 135 Mass. 561.

5. *Union Canal Co. v. O'Brien*, 4 Rawle (Pa.) 358.

Cause of Injury.—The written statement of the claim should show whether the injury was occasioned by the passing through and appropriation of the claimant's land, or by the taking of timber and other materials for which the statute provides. *Martinsville, etc., R. Co. v. Bridges*, 6 Ind. 400.

Not Essential but Better Practice.—In *Lake v. Loysen*, 66 Wis. 424, it is said not to be essential—though perhaps the better pleading—to state the manner in which the land not taken is injured.

Conclusion from Facts Alleged need Not be Stated.—In a complaint to recover damages resulting from a change of grade, it is sufficient to set out the specific facts upon which the claim is based, without alleging, as a conclusion from those facts, that the plaintiff sustained "special damage." *Cook v. Ansonia*, 66 Conn. 413.

6. *Pusey v. Allegheny*, 98 Pa. St. 522.

7. See also *supra*, III. 5. *Effort to Agree with Landowner*.

8. *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Mahoney v. San Francisco*, 53 Cal. 383; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

9. *Lieberman v. Chicago, etc., R. Co.*, 141 Ill. 140, 51 Am. & Eng. R.

If it does not so allege it fails to state a cause of action,¹ and will not confer jurisdiction on the court nor entitle the petitioner to condemnation.² If made and not contested by the owner below, it cannot be controverted on appeal.³

In some jurisdictions the allegation is not required to be made, the fact of inability to agree being otherwise made to appear,⁴ or a presumption being indulged in that they cannot agree.⁵ The allegation is unnecessary in a landowner's petition, its necessity being confined to proceedings instituted by the condemning party.⁶ In *Illinois* it is unnecessary in street cases, but necessary under the general eminent domain act.⁷

b. ITS SUFFICIENCY.—A general allegation in the language of the statute is a sufficient averment of disagreement to put the adverse party to his defense upon the merits.⁸ But the statutory language need not be followed; any allegation showing affirmatively an inability to agree will suffice.⁹

Cas. 581; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

1. *Lincoln v. Colusa County*, 28 Cal. 662.

2. *Illinois*.—*Reed v. Ohio, etc.*, R. Co., 126 Ill. 48, 36 Am. & Eng. R. Cas. 234; *O'Hare v. Chicago, etc.*, R. Co., 139 Ill. 151; *Lieberman v. Chicago, etc.*, R. Co., 141 Ill. 140, 51 Am. & Eng. R. Cas. 581.

Kentucky.—*Portland, etc., Turnpike Co. v. Bobb*, 88 Ky. 226.

Michigan.—*Grand Rapids, etc., R. Co. v. Weiden*, 69 Mich. 572.

Missouri.—*Ells v. Pacific R. Co.*, 51 Mo. 200.

Pennsylvania.—*Darlington v. U. S.*, 82 Pa. St. 382.

Cured by Amendment.—The omission of the allegation, however, may be cured by amendment. *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165.

3. *Grand Rapids v. Grand Rapids, etc.*, R. Co., 58 Mich. 641; *Dyckman v. New York*, 5 N. Y. 434; *U. S. v. Reed*, 56 Mo. 565.

Allegation Estops Condemning Party.—The railroad cannot insist that the court acquired no jurisdiction of the condemnation proceeding because no efforts at agreement had been made by the parties, the company's petition having averred that such efforts were made, and no issue having been tendered by defendant on that question. *Chicago, etc., R. Co. v. Randolph Town-Site Co.*, 103 Mo. 451, 47 Am. & Eng. R. Cas. 118.

4. *Mississippi, etc., R. Co. v. Rosseau*, 8 Iowa 373; *Hartley v. Keokuk, etc.*, R. Co., 85 Iowa 455; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

5. *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440, 47 Am. & Eng. R. Cas. 64.

6. *Hill v. Glendon, etc., Min., etc., Co.*, 113 N. Car. 259.

Landowner's Petition.—A railroad company may be proceeded against for compensation for right of way taken by it, not only where the landowner has refused his consent in writing, but also where the road has been constructed without objection, or by the implied permission of the landowner. And a petition which alleges that it was taken without consent is sufficient. *Aull v. Columbia, etc., R. Co.*, 42 S. Car. 431.

7. *Cahill v. Norwood Park*, 149 Ill. 156; *Danville v. McAdams*, 153 Ill. 216; *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656.

8. *Hannibal, etc., R. Co. v. Muder*, 49 Mo. 165; *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Tucker v. Erie, etc., R. Co.*, 27 Pa. St. 281.

9. *Reed v. Ohio, etc., R. Co.*, 126 Ill. 48, 36 Am. & Eng. R. Cas. 234; *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272; *Fore v. Hoke*, 48 Mo. App. 254.

Form of Allegation.—In *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333, an allegation that the company "has not been able to acquire the

Reasons for Nonagreement.—In some states the reasons why the parties cannot agree must be stated, or the court will not acquire jurisdiction.¹

13. Sufficiency of Petition to Confer Jurisdiction.—Where the requirements of the petition are recited in the statute, a petition following the phraseology of the statute is sufficient to confer jurisdiction.²

title to said several tracts, etc., from the persons interested therein, by voluntary grant or otherwise," was held sufficient. To the same effect is *Booker v. Venice*, etc., R. Co., 191 Ill. 333; *Bowman v. Venice*, etc., R. Co., 102 Ill. 459.

In *Cincinnati*, etc., R. Co. v. Bay City, etc., R. Co. (Mich. 1895), 64 N. W. Rep. 471, an allegation that the petitioner had not been able to acquire title to the land by purchase because the owner refused to sell was held sufficiently to allege a *bona fide* effort first to obtain the property by purchase.

If **Objected to as Too General**, the remedy is to move to make the allegation more definite and certain. *Oregon Code Civ. Pro.*, § 84; *U. S. v. Oregon R.*, etc., Co., 9 Sawy. (U. S.) 61, 16 Fed. Rep. 524.

1. *Matter of Marsh*, 71 N. Y. 315; *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 502, followed in *Matter of Long Island R. Co.*, 66 Hun (N. Y.) 631, 21 N. Y. Supp. 489.

Reasons Stated.—An averment that the petitioner has not been able to acquire title by agreement with the owner for the purchase of the land, for the reason that such owner asks what the petitioner considers an unreasonable price, and refuses to accept the reasonable sum offered by the petitioner, is sufficient. *Grand Rapids*, etc., R. Co. v. *Weiden*, 69 Mich. 572; *Matter of New York*, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 216; *Matter of Suburban Rapid Transit Co.*, 38 Hun (N. Y.) 553.

Indiana Rule.—Under the Indiana statute, an effort by the company seeking to condemn lands to agree with the owner must clearly appear, and such effort is a condition precedent to the exercise of the power to condemn; it is not sufficient to set out in the petition that the company has located its road through certain lands, and has attempted, and failed, and is unable, to agree with the owner "in

regard to the terms of, or in regard to the compensation therefor." *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430, *disapproving Swinney v. Ft. Wayne*, etc., R. Co., 59 Ind. 205; *Ney v. Swinney*, 36 Ind. 454; *distinguishing Borland v. Mississippi*, etc., R. Co., 8 Iowa 148.

An Allegation "upon Information and Belief," where no facts are stated which justify the conclusion that the land cannot be purchased, is insufficient. *Metropolitan El. R. Co. v. Dominick*, 55 Hun (N. Y.) 198.

2. *Rochester R. Co. v. Robinson*, 133 N. Y. 242, reversing 38 N. Y. St. Rep. 1022.

It is sufficient to give the court jurisdiction of both the subject-matter and of the owner of the land to allege that the latter has refused to relinquish the land or to make a voluntary conveyance, and that the company has given him five days' notice, prior to the filing of the petition, of its intention to institute condemnation proceedings. *Quayle v. Missouri*, etc., R. Co., 63 Mo. 465.

Instances of Sufficient Petitions.—A petition under the *Pennsylvania Act of May 24, 1878*, averring that the change of grade "was made without the consent of the petitioner, and that no compensation for the injury inflicted upon his property by reason thereof has been agreed upon by the said borough and the petitioner," contains a sufficient averment to give the court full jurisdiction to entertain the petition. *Seaman v. Washington*, 172 Pa. St. 467.

A petition in proceedings to condemn a mining tunnel which alleged that the tunnel was constructed by petitioner, conferred jurisdiction on the court to authorize petitioner to retain possession of the tunnel pending the proceedings. *Byrnes v. Douglass* (Nev. 1895), 42 Pac. Rep. 798.

When Insufficient.—A petition for the appointment of commissioners of

14. Objections and Defenses—*a. IN GENERAL.*—The whole matter of opposition to the proceedings, what objections may be interposed, and how they are to be disposed of, depends upon the provisions of the particular statute under which the proceedings are begun, and the statutes vary so greatly that no general rules as to the practice can be found in the books. Some of the statutes are silent upon this subject; others provide for the contesting of certain questions; but there is no uniformity as to procedure.

Where the matter comes up before a court, if the statute prescribes how objections are to be disposed of, it must be closely followed; if not, the court may adopt the usual modes of passing upon such questions. In such cases, objections which challenge the right of the petitioner to maintain the proceeding are generally disposed of before entering upon the assessment of damages.¹

appraisal stated that the company had established and surveyed its road over the land sought to be acquired for its main line, and had actually staked out the centre line of its proposed road over the lands desired for such railroad. It was held that this was not a compliance with Wis. Rev. Stat., § 1846, which requires that the petition shall state "that the route of said road has been located by its board of directors upon the line so staked out, and that the real estate so described is required for the purpose of constructing and operating the proposed railroad." The petition was insufficient, therefore, to give the court jurisdiction of the subject-matter. *Winnebago Furniture Mfg. Co. v. Wisconsin Midland R. Co.*, 81 Wis. 389.

Quashing Insufficient Petitions.—The filing of a petition with the clerk of the county commissioners, within three years after the filing of the location of a railroad, is not a sufficient application to the commissioners, under Mass. Rev. Stat., c. 39, § 58; and if the commissioners first take action thereon, after the expiration of three years, their proceedings will be quashed on certiorari. *Charles River Branch R. Co. v. Norfolk County*, 7 Gray (Mass.) 389.

When the land of several persons is sought to be appropriated, each parcel must be distinctly described, the owner thereof designated, and the purposes for which it is wanted, with the reasons why it is necessary to proceed under the statute to take it, must be given. A petition that does not do this is too

defective to maintain the proceedings, and the proceedings thereon must be quashed. *Chicago, etc., R. Co. v. Sanford*, 23 Mich. 418.

If, under the general railroad act (N. J. Rev., p. 925), a corporation presents a petition for the condemnation of more land than it is authorized to condemn, averring its inability to agree with the owner for the purchase of the whole, the proceedings will, on certiorari, be set aside *in toto*. *Central R. Co. v. Hudson Terminal R. Co.*, 46 N. J. L. 289, 20 Am. & Eng. R. Cas. 294.

Foreign Railroad Company.—It is not necessary, in a proceeding by a railroad corporation of a sister state to condemn land in Missouri, for it to aver and prove that it had built its line of railroad to the boundary line of the state, in order to give the court jurisdiction of the subject-matter of the proceeding. *St. Louis, etc., R. Co. v. Lewright*, 113 Mo. 660.

1. *Cincinnati, etc., R. Co. v. McFarland*, 22 Ind. 459; *Burt v. Brigham*, 117 Mass. 307; *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 847; *Cincinnati, etc., R. Co. v. Bay City, etc., R. Co.* (Mich. 1895), 64 N. W. Rep. 471.

Where the Application Is to a Ministerial Officer or Board, or even to a judge acting ministerially by force of the statute, only such objections can be passed upon as go to the sufficiency of the papers on which the application

b. TIME AND MANNER OF RAISING OBJECTIONS.—Matters relating to mere irregularities in the proceedings, such as the want of proper parties,¹ or lack of verification of the petition,² or other formal defects in the petition, must generally be raised when the appointment of commissioners or the summoning of a jury to assess damages is applied for. Such objections are too late if made after the report or verdict has come in.³

Objections for matter apparent on the face of the papers are generally made by motion to dismiss the application.⁴ An appearance by the landowner, after due notice, before the tribunal to assess damages is a waiver of technical objections to the petition.⁵ Such defects cannot ordinarily be reached by motion in arrest of judgment, but only by motion to make more definite and certain.⁶ A default may be set aside in a proper case to let in a defense, though the award of damages has been filed.⁷ Objections to the petition and award must be clearly specified,⁸ and the burden is upon the petitioner to sustain the petition, so far as it may be controverted,⁹ unless the statute casts the burden upon the landowner.¹⁰

c. QUESTIONING PETITIONER'S LEGAL STATUS AND POWER TO CONDEMN—*Controverting Legal Incorporation.*—A corporation being the petitioner, the landowner may deny its corporate existence,¹¹ whereupon the petitioner must prove it; but the

is founded. Such officer or board cannot act judicially, and all objections going to the merits and involving the legal rights of the landowner are reserved for determination at a later stage of the condemnation. The refusal of such officer or board to grant the application in such cases will be corrected by mandamus. *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353; *Chicago, etc., R. Co. v. Wilson*, 17 Ill. 128; *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 17, *affirmed* in 38 N. J. L. 548; *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343, *reversing* 37 Hun (N. Y.) 442; *Western Union R. Co. v. Dickson*, 30 Wis. 389.

1. *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291.

2. *New York, etc., R. Co. v. Corey*, 5 How. Pr. (N. Y. Supreme Ct.) 177.

3. *Thayer v. Worcester County*, 10 Cush. (Mass.) 151.

Exceptions to Report.—While objections to the taking or condemnation of the land may be raised by exceptions to the commissioners' report, yet it is a practice that should be discouraged. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

4. *South Chicago R. Co. v. Dix*, 109 Ill. 237; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 112 Ill. 598.

5. *Matter of Washington St. (Supreme Ct.)*, 14 N. Y. Supp. 470.

But if he have no notice, such objections are in time if made after report or verdict. *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

6. *Bryan v. Moore*, 81 Ind. 9.

7. *In re Minneapolis R. Terminal Co.*, 38 Minn. 157.

8. *Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222.

9. *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 264; *Wisconsin Cent. R. Co. v. Cornell University*, 52 Wis. 537.

10. *Matter of New York Bridge Co.*, 4 Hun (N. Y.) 635; *Buffalo, etc., R. Co. v. Reynolds*, 5 How. Pr. (N. Y. Supreme Ct.) 96. These cases conflict with *Matter of New York Cent. R. Co.*, 66 N. Y. 407, and seem to be impliedly overruled thereby.

11. *St. Joseph, etc., R. Co. v. Shambaugh*, 106 Mo. 557; *Orrick School Dist. v. Dorton*, 125 Mo. 439; *Matter of Brooklyn, etc., R. Co.*, 72 N. Y. 245; *Matter of Staten Island Rapid Transit R. Co.*, 38 Hun (N. Y.) 381; *Miller v. Prairie du Chien, etc., R.*

proof need only show an existence as a *de facto* corporation.¹ Whether a denial upon information and belief is sufficient is a question upon which there is a conflict of authority.² In some jurisdictions this proof must be given, even though incorporation be not denied.³

Contesting Petitioner's Power to Condemn.—Where the court in which the proceedings are instituted has jurisdiction to hear and determine the questions of the power to take lands by condemnation, or whether the land is liable to be condemned, such questions must be litigated before that tribunal; but if not urged there, a court of equity has not jurisdiction to determine them in a collateral injunction proceeding.⁴ The existence of the power to condemn may be controverted at any stage of the pro-

Co., 34 Wis. 533. To the contrary, see *Wellington, etc., R. Co. v. Cashie, etc., R., etc., Co.*, 114 N. Car. 690. And see generally article CORPORATIONS, vol. 5, p. 52.

1. *McAuley v. Columbus, etc., R. Co.*, 83 Ill. 348; *Peoria, etc., R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 112 Ill. 589; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755, *reversing* 31 N. J. Eq. 475.

In New York, however, the corporation must show an existence as a corporation *de jure*. *Matter of Broadway, etc., R. Co.*, 73 Hun (N. Y.) 7; *Matter of New York, etc., R. Co.*, 99 N. Y. 12.

2. That such a denial is sufficient, see *Matter of Broadway, etc., R. Co.*, 73 Hun (N. Y.) 7, *distinguishing* *Matter of New York, etc., R. Co.*, 99 N. Y. 12, *affirming* 35 Hun (N. Y.) 220, which latter case holds the contrary.

3. *Ward v. Minnesota, etc., R. Co.*, 119 Ill. 287; *Hopkins v. Kansas City, etc., R. Co.*, 79 Mo. 98; *Atlantic, etc., R. Co. v. Sullivan*, 5 Ohio St. 276; *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio St. 21; *Powers v. Hazelton, etc., R. Co.*, 33 Ohio St. 429.

An answer denying the valid organization of the petitioner, and averring that it was acting simply in the interest of another corporation, is insufficient. *Aurora, etc., R. Co. v. Miller*, 56 Ind. 88, *following* *Aurora, etc., R. Co. v. Lawrenceburgh*, 56 Ind. 80.

The Issue Raised by the Denial is not waived by an admission by the landowner on the trial that the officers of the company are as stated in the petition. *Matter of Broadway, etc., R. Co.*, 73 Hun (N. Y.) 7.

Proof of Corporate Existence, if required to be made, is addressed to the court and not to the jury called to assess the damages. *Ward v. Minnesota, etc., R. Co.*, 119 Ill. 287.

4. *Cumberland, etc., R. Co. v. Pennsylvania R. Co.*, 57 Md. 267, 10 Am. & Eng. R. Cas. 351, *distinguishing* *Baltimore, etc., Turnpike Co. v. Union R. Co.*, 35 Md. 224, *following* *Baltimore, etc., Turnpike Co. v. Northern Cent. R. Co.*, 15 Md. 198.

Arkansas.—The statutory proceeding to condemn land for right of way for railroads is a special one, to ascertain the compensation to be paid the owner for the land to be taken. No provision is made for any issue upon the right to condemn, and the owner cannot in that proceeding question the legality of the corporation. *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark. 111, 20 Am. & Eng. R. Cas. 174.

Ohio.—In a proceeding by a railroad company before a probate judge, under the Act of April 30, 1852, for the assessment of compensation to be paid for land appropriated for its road, it was incompetent for the landowner to prove, for the purpose of defeating the proceeding, that the corporators procured the incorporation of the company not for a public use, but for their private purposes merely, and were exercising the corporate privileges in abuse of the law; nor was it competent to prove for that purpose that there was no public necessity for the road. These questions were not committed by the law to the determination of the probate judge nor to the jury, but pertained to other proceedings and other tribunals. *Powers v. Hazelton, etc., R. Co.*, 33 Ohio St. 429.

ceeding,¹ but a third party not interested in the lands in question cannot raise the objection.²

*d. DENYING PUBLIC CHARACTER OF USE OR NECESSITY OF TAKING*³—*Public Use*.—Under a constitutional provision that “whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question,” a landowner may question the right of a railroad company to take his lands, notwithstanding another provision declaring all railroads to be public highways.⁴

Necessity.—This question, considered as a prerequisite to the power to condemn, has already been examined.⁵ Where constitutional or statutory provisions provide a mode for contesting the question of necessity in condemnation proceedings, that mode must be followed.⁶ If the statute prescribes what quantity of land may be taken the courts cannot interfere;⁷ but if it does not so prescribe, the courts are to decide whether the taking is justified by the necessity of the case, and where the application is directly to the court, this question should be raised and decided *in limine*.⁸

Where the necessity of the taking is denied the burden is on

1. *Hopkins v. Kansas City, etc., R. Co.*, 79 Mo. 98.

2. *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 40 Am. & Eng. R. Cas. 449.

3. See, for further treatment of this subject, *supra*, III. 3. *Determining Questions of Necessity and Propriety*; III. 4. *Determining whether Use is a Public One*; VII. 8. *Stating the Purpose—Public Use*; VII. 9. *Alleging the Necessity of the Taking*.

4. Colo. Const., art. 2, § 15; *Denver R., etc., Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386.

Where such use is not required for the purpose of the local traffic of the petitioning company, but for the purpose of enabling it to fulfil the obligations of a contract made with a foreign railroad company, whereby it has bound itself to furnish to such company accommodations over its road, the object for which the land is sought will be deemed a public use. *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251, *affirming* 40 Hun (N. Y.) 637, 27 Am. & Eng. R. Cas. 348. On this subject, see also *supra*, III. 4. *Determining whether Use is a Public One*.

5. See *supra*, III. 3. *Determining Questions of Necessity and Propriety*.

6. *Spofford v. Bucksport, etc., R.*

Co., 66 Me. 41; *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519; *Grand Rapids, etc., R. Co. v. Van Driele*, 24 Mich. 409.

7. *Stockton, etc., R. Co. v. Brown*, 9 H. L. Cas. 246.

8. *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 259; *New-Orleans Pac. R. Co. v. Gay*, 32 La. Ann. 474; *In re St. Paul, etc., R. Co.*, 34 Minn. 227; *Matter of New York Cent. R. Co.*, 66 N. Y. 407; *Rensselaer, etc., R. Co. v. Davis*, 43 N. Y. 137; *Carolina Cent. R. Co. v. Love*, 81 N. Car. 434; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

No Presumption of Necessity.—There is no presumption that a railroad is necessary, or that any land ought to be given up to its use. Every landowner, therefore, has a right to object to giving up his land, and is not confined to objections relating to the price or value. He may object because of a lack of necessity for the road at all, or to its location or extension over his land, at any price or on any conditions. *Grand Rapids, etc., R. Co. v. Weiden*, 70 Mich. 390; *Jefferson, etc., R. Co. v. Hazeur*, 7 La. Ann. 182; *In re Minneapolis R. Terminal Co.*, 38 Minn. 157.

the company to prove it,¹ but a failure to deny admits the necessity of the taking.² The petitioner's application should be granted on a reasonable showing of necessity and good faith,³ and should only be denied where the taking would be a clear abuse of power.⁴

e. NONCOMPLIANCE WITH STATUTORY CONDITIONS.—Where the statute imposes conditions upon the exercise of the power to condemn, such conditions must be strictly performed;⁵ and the petition must allege such performance,⁶ which allegation may be controverted by the respondent.⁷

f. PRIOR OCCUPATION—FORMER PROCEEDINGS TO CONDEMN.—Prior Occupation of the land without authority of law, even though it be a trespass, will not preclude the company from taking subsequent measures authorized by law to condemn the land.⁸

1. Wisconsin Cent. R. Co. v. Cornell University, 52 Wis. 537.

2. South Carolina R. Co. v. Blake, 9 Rich. (S. Car.) 242.

3. Matter of New York, etc., R. Co., 99 N. Y. 12, affirming 35 Hun (N. Y.) 220.

4. South Chicago R. Co. v. Dix, 109 Ill. 237.

As where the object is to acquire lands for speculation, or to prevent competition, or for purposes not strictly within the condemning powers vested in the petitioner, Rensselaer, etc., R. Co. v. Davis, 43 N. Y. 137; or where more land than is necessary is asked for, in which case the application should be wholly denied, Central R. Co. v. Hudson Terminal R. Co., 46 N. J. L. 289.

5. See *supra*, II. 3. *Strict Compliance with Statute Essential*; III. 5. *Effort to Agree with Landowner*.

6. See *supra*, VII. 12. *a. Necessity of the Allegation*.

7. Gilmer v. Lime Point, 19 Cal. 60; Matter of Lockport, etc., R. Co., 77 N. Y. 557.

If the objection that the petitioner failed to endeavor to purchase the land is seasonably and properly made, there is no room for the presumption that the landowner has waived such effort to agree. Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

But the condemning party cannot defeat a claim for damages by raising the objection that it had failed to take the preliminary steps required by statute, and consequently was not authorized to proceed. Parker v. Bos-

ton, etc., R. Co., 3 Cush. (Mass.) 107.

8. State v. Baker, 20 Fla. 616, 17 Am. & Eng. R. Cas. 15; Hopson v. Louisville, etc., R. Co., 71 Miss. 503; Cory v. Chicago, etc., R. Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; Hannibal, etc., R. Co. v. Morton, 27 Mo. 317; Matter of Metropolitan El. R. Co. (Supreme Ct.), 12 N. Y. Supp. 506; Harrisburg v. Crangle, 3 W. & S. (Pa.) 460.

Occupation under License.—A wharf company was by special act authorized to lay down railroad tracks so as to connect with the different railroads entering the city, and having laid its tracks over certain lots under a license for a term of years, after the lapse of the term it instituted condemnation proceedings to condemn the ground. The owners of the lots set up as a defense that they had entered into an agreement with the wharf company that it was to lay its tracks over the lots, to be used temporarily until it had made other connection with the railroads, and that it had already made such connection and was therefore estopped from proceeding to condemn the land. It was held that such transaction between the parties in no way affected the right to condemn. Southern Cotton Press, etc., Co. v. Galveston Wharf Co., 3 Tex. App. Civ. Cas., § 255.

Or Lease.—A temporary lease of land by one company for private business use will not prevent another company from condemning the land for public railroad use. Matter of Rochester, etc., R. Co., 110 N. Y. 119, affirming 45 Hun (N. Y.) 126.

Former Proceedings to Condemn.—Making one appropriation for railroad uses does not exhaust the power—new appropriations may be made from time to time, as the necessities of the road may require.¹

g. DEFENSES TO PROCEEDINGS INSTITUTED BY OWNERS.—Where the owner of the land taken institutes a proceeding for the assessment of his damages, the condemning party may set up any defense which goes to the petitioner's right to damages, and such issue should be disposed of before the tribunal to assess damages is appointed.² Among the defenses that may thus be interposed are a release,³ acts of owner recognizing respondents' title,⁴ title by prescription,⁵ or a former award for the same claim duly performed.⁶

1. *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *Peck v. Louisville, etc., R. Co.*, 101 Ind. 366, 22 Am. & Eng. R. Cas. 193; *Central Branch Union Pac., etc., R. Co. v. Atchison, etc., R. Co.*, 26 Kan. 669, 5 Am. & Eng. R. Cas. 389; *Ewing v. Alabama, etc., R. Co.*, 68 Miss. 551; *Deitrichs v. Lincoln, etc., R. Co.*, 13 Neb. 361; *Matter of New York Cent. R. Co.*, 20 Barb. (N. Y.) 419; *Cincinnati Southern R. Co. v. Haas*, 42 Ohio St. 239; 22 Am. & Eng. R. Cas. 164.

A Futile Effort to Condemn cannot be set up as a defense to effective measures taken to that end. *Lehigh Valley R. Co. v. Dover, etc., R. Co.*, 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87.

Limits of the Rule.—But a party, after procuring an order for the condemnation of property to public use, cannot lay by for four years without complying at all with those requirements of the proceeding which are of service to the owner, and then, without notice, give effect to the previous and initiatory acts through which he derails his title. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306.

Parties Not the Same.—A railway company is not precluded from maintaining a proceeding by a decision in a former one brought by a village to condemn the same property for a street.

2. *Howard v. Locks & Canals*, 12 Cush. (Mass.) 259; *Hadley v. Citizens Sav. Inst.*, 123 Mass. 301, and cases cited; *Jones v. Clarke*, 7 Jones (N. Car.) 418; *Church v. Northern Cent. R. Co.*, 45 Pa. St. 339.

3. *Fuller v. Plymouth County*, 15 Pick. (Mass.) 81.

But proof of a written agreement to sell land to a railroad company for a

specified price, within a certain time, and of a tender and refusal within that time, will not defeat a petition for damages sustained by reason of such location. *Whitman v. Boston, etc., R. Co.*, 3 Allen (Mass.) 133.

4. *Keokuk, etc., R. Co. v. Donnell*, 77 Iowa 221, 38 Am. & Eng. R. Cas. 650.

Contract between Owner and Another Company.—The defendant company obtained an assignment of a contract by which the plaintiff agreed to convey a strip of land to another company, in consideration of its building its road between certain points. Previous to obtaining this assignment it had entered upon the land and commenced to construct its road. In proceedings by the landowner to recover compensation for the land taken, the company set up the above contract as a defense. The court held (1) that having entered upon the land and built its road without reference to the agreement, the company could not claim any right thereunder to have that land conveyed which it had already appropriated under the power of eminent domain, the owner's right to compensation having accrued when the company entered upon the land; (2) that the landowner was not estopped from claiming compensation by his previous contract, the company having acted independently, and not upon the faith of the contract, which was not assigned to it until after its road was commenced. *Oregon R., etc., Co. v. Day*, 3 Wash. Ter. 252, 30 Am. & Eng. R. Cas. 333.

5. *Williams v. Nelson*, 23 Pick. (Mass.) 141; *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301.

6. *Brigham v. Holmes*, 14 Allen (Mass.) 184.

15. Plea or Answer—*a*. NECESSITY.—Upon this question the decisions are wholly irreconcilable. In several states no plea or answer is required on the part of the defendant,¹ or is even allowable,² unless the defendant claims special damages.³ The court will frame an issue without any answer, and, notwithstanding its allegations, if an answer be filed;⁴ or will strike out such plea or answer;⁵ or will compel the landowner to proceed to trial in disregard of it.⁶

***b*. SUFFICIENCY.**—Where corporate land is sought to be taken, upon the theory that it is not held for the corporate use or business, an answer averring that the land is necessary for the corporate business of the defendant, naming that business, is good on demurrer; but an answer, in such a case, that the petitioner is a private corporation, not averring that its railroad when built will only serve private interests, is bad.⁷ So an answer to an owner's petition, pleading in bar to the entire application that some of the petitioners had conveyed the right of way, is bad.⁸ Again, an answer averring entry and occupancy under an agreement to convey in consideration of the company's fencing the right of way is bad.⁹ But the necessity of fences

1. *Chicago, etc., R. Co. v. Hopkins*, 90 Ill. 318; *Corbin v. Wisconsin, etc., R. Co.*, 66 Iowa 269; *Chicago, etc., R. Co. v. Baker*, 102 Mo. 553; *Springfield, etc., R. Co. v. Calkins*, 90 Mo. 538; *West End Narrow Gauge R. Co. v. Almeroth*, 13 Mo. App. 91; *Cincinnati, etc., R. Co. v. Pfitzer*, 1 Ohio Prob. Rep. 248; *Dallas, etc., R. Co. v. Day*, 3 Tex. Civ. App. 353.

If, however, an answer is filed, it will neither enlarge nor restrict the burden cast by law upon the company to make such a case as clearly entitles it to take and appropriate the land sought. *Reed v. Ohio, etc., R. Co.*, 126 Ill. 48, 36 Am. & Eng. R. Cas. 234.

Whether the railroad company should file an answer to a petition for the appointment of commissioners to appraise the damages for an alleged taking of land, and whether, in the absence of any answer, the burden is upon the petitioner to establish the facts alleged, not determined. *First Congregational Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158, 43 Am. & Eng. R. Cas. 182.

2. *Goodwillie v. Lake View*, 137 Ill. 51; *Gage v. Chicago*, 141 Ill. 642; But see *Byron v. Blount*, 97 Ill. 65, where an answer seems to be recognized as permissible.

3. *Bentonville R. Co. v. Stroud*, 45 Ark. 278; *Fayetteville, etc., R. Co. v.*

Hunt, 51 Ark. 330, 39 Am. & Eng. R. Cas. 130.

4. *Miller v. Newark*, 35 N. J. L. 460.

5. *Johnson v. Freeport, etc., R. Co.*, 111 Ill. 413, 25 Am. & Eng. R. Cas. 192; *Smith v. Chicago, etc., R. Co.*, 105 Ill. 511, 14 Am. & Eng. R. Cas. 384. But see *Metropolitan City R. Co. v. Chicago West Div. R. Co.*, 87 Ill. 317.

6. *Henry v. Centralia, etc., R. Co.*, 121 Ill. 264, 30 Am. & Eng. R. Cas. 273.

The Better Practice, and, indeed, that tacitly permitted in many jurisdictions, is to raise objections to the condemnation by proper plea or answer to the petition, thus stating the defense with legal precision and raising a definite issue under which all preliminary questions may be settled before entering upon the question of compensation. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444; *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 264; *In re St. Paul, etc., R. Co.*, 34 Minn. 231; *St. Joseph Terminal R. Co. v. Hannibal, etc., R. Co.*, 94 Mo. 535; *Matter of Lockport, etc., R. Co.*, 77 N. Y. 558.

7. *Denver R., etc., Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386.

8. *Shortle v. Terre Haute, etc., R. Co.*, 131 Ind. 338, 51 Am. & Eng. R. Cas. 576.

9. The duty to fence the road was a

and cattle guards must be alleged in the answer, or the court need not find upon such issue.¹

The title of one named as respondent in the petition is admitted, unless it is expressly denied; and an averment by the respondent of title to property not covered by the petition will entitle him to damages in respect thereto if such averment is not denied.²

16. Demurrer.—Objections to the proceedings for defects apparent on their face may be taken by demurrer,³ or by exceptions in the nature of a demurrer.⁴ Such a demurrer is equivalent to a motion to dismiss.⁵

Where the landowner is the petitioner, the company must raise the defense of an intended abandonment of the land by answer and not by demurrer.⁶

17. Cross-petition.—In *Colorado* and *Illinois*, where no answer or plea is necessary, the statutes provide for the filing of a cross-petition by any person interested in the property sought to be taken who has not been made a party to the proceeding;⁷ or

duty imposed upon the railroad company by law, and a promise to perform that duty was no consideration for an agreement on the part of the petitioners. *Shortle v. Terre Haute, etc., R. Co.*, 131 Ind. 338, 51 Am. & Eng. R. Cas. 576.

1. *Moran v. Ross*, 79 Cal. 159.

2. *Golden Boulder, etc., R. Co. v. Haggart*, 9 Colo. 346, 27 Am. & Eng. R. Cas. 375.

What must be Specially Pleading.—The damages sustained by the defendant arising out of the shape in which his land is cut, the raising of a railroad track across it by an embankment, and the cutting off the remainder of the tract from a road, so as to injure its sale for homestead purposes, are not special damages, and may be proved without being pleaded specially. *North Pac. R. Co. v. Reynolds*, 50 Cal. 90, 280.

Reply.—An answer alleging that the proceeding is barred by the statute of limitations, that the plaintiff is not the owner of the land in question, but that the defendant is the owner thereof by virtue of a purchase at a foreclosure sale under a mechanic's lien, and through proper condemnation proceedings, and pleading an estoppel, does not require a reply. *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455.

Verification.—In *Indiana* the answer must be verified, *Bradley v. Frankfort*, 99 Ind. 417; but in *California* it need not be, *Monterey County v. Cushing*, 83 Cal. 507.

3. *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

4. *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211.

5. *Spahr v. Schofield*, 66 Ind. 168.

Alabama.—Although a petition is necessary which should properly allege such a state of facts as would seem to make it expedient to grant the proposed change of road, yet a demurrer does not lie to the petition on account of the supposed insufficiency of its allegations; and the overruling of such demurrer is therefore not revisable on error or appeal. *Lowndes County v. Bowie*, 34 Ala. 461.

California.—In a proceeding to condemn land, including certain streets in a city, for the use of the plaintiff's railroad, it was objected on demurrer that the complaint did not allege that the authorities of the city had granted plaintiff the right to use the streets in question. The demurrer was properly held to be overruled. *California Southern R. Co. v. Kimball*, 61 Cal. 90.

6. *Marion, etc., R. Co. v. Ward*, 9 Ind. 123. In this case the company filed a pleading assigning as a reason why the assessment should be set aside "that the writ of assessment does not contain a sufficient description of the real estate to be taken." It was held that this, though deficient in form, was a demurrer to the writ, and not an answer.

7. *Denver, etc., R. Co. v. Griffith*,

where property not described in the petition is sought to be taken or injured; in which latter case a cross-petition must be filed, or the assessment of damages will be confined to the property described,¹ and no evidence in regard to adjoining land of the same owner will be received.²

Defects in the cross-petition are properly met by demurrer, so as to give an opportunity to amend it.³

18. Amendments—*a.* POWER TO ALLOW.—Under the statutes,

17 Colo. 598; Grand Tower, etc., R. Co. v. Walton, 150 Ill. 428.

1. Jones v. Chicago, etc., R. Co., 68 Ill. 380; Mix v. Lafayette, etc., R. Co., 67 Ill. 319; Johnson v. Freeport, etc., R. Co., 111 Ill. 413; Johnson v. Freeport, etc., R. Co., 116 Ill. 521, 24 Am. & Eng. R. Cas. 266. Metropolitan West Side El. R. Co. v. Johnson, 159 Ill. 434. But an owner whose land is sought to be condemned may prove its situation and the facilities for ingress to and egress from it, as affecting its value, although no cross-petition is filed, as is necessary where recovery of damages to other lands is sought. Sanitary Dist. v. Loughran, 160 Ill. 362.

2. Peoria, etc., R. Co. v. Sawyer, 71 Ill. 361; Chicago, etc., R. Co. v. Hopkins, 90 Ill. 316.

Exceptions to this Rule.—Where no cross-petition is filed and evidence is given as to the entire damages, without objection, and the court protects the petitioner as to the balance of the land by requiring the owner to execute a release thereto, the judgment of the court will not be reversed at the instance of the petitioner, as the error, if any, works no injury. Galena, etc., R. Co. v. Birkbeck, 70 Ill. 208.

Where a petition shows that defendant is the owner of an entire tract of land, and the petitioner proposes to appropriate a strip running through the tract, it is not necessary to present a counter-petition in order to obtain damages for land not taken. Illinois Western Extension R. Co. v. Mayrand, 93 Ill. 591.

Where a part of a lot is sought to be condemned by a city for a street, damages as to the part not sought to be appropriated may be allowed without any cross-petition by the owner. Bloomington v. Miller, 84 Ill. 621.

Sufficiency of Cross-petition.—A pleading in which the defendant says that "he is the owner of the lands mentioned in the petition, and other land

contiguous thereto, making a farm of seven hundred and thirty acres in a compact body; that said railroad company takes about twelve acres out of his farm, dividing wood, water, and timber from the balance of the farm; that the land thus taken is of the value of one hundred and fifty dollars per acre, and the damage by reason of cutting the farm is ten thousand dollars, and he respectfully asks that his compensation and damages may be awarded to him as shall be just and proper," is a sufficient cross-petition for damages to contiguous lands. Chicago, etc., R. Co. v. Hopkins, 90 Ill. 316.

Effect.—If other property than that described in the petition is brought in by cross-petition, it is incumbent on the party thus bringing it in to show in the first instance that it was taken or damaged, and the petitioner is entitled to give evidence in rebuttal. Hyde Park v. Dunham, 85 Ill. 569.

The filing of such a cross-petition may be regarded as an admission of the corporate capacity of the petitioner. The defendant, by asking the court for a rule on the petitioner to exhibit the plan and profile of its road over and across the lands sought to be condemned, may be regarded as admitting that the petitioner is a *de facto* corporation. (M. Gruder, J., dissenting.) Ward v. Minnesota, etc., R. Co., 119 Ill. 287.

And where the cross-petition alleges that the petitioner has located its right of way over and across the premises, describing them, this will be regarded as an admission, within the meaning of the law, that the petitioner has located its line of road. Brown v. Calumet River R. Co., 125 Ill. 600, affirming 37 Ill. App. 113.

3. Johnson v. Freeport, etc., R. Co., 111 Ill. 413, 25 Am. & Eng. R. Cas. 192; Johnson v. Freeport, etc., R. Co., 116 Ill. 521, 24 Am. & Eng. R. Cas. 266.

amendments of the pleadings and proceedings are freely allowed within the discretion of the court, whenever necessary to perfect the jurisdiction of the court of the parties or subject-matter,¹ or to a fair trial and final determination of the controversy.² New parties may be brought in by amendment,³ in the discretion of the court, which discretion is reviewable only in case of its abuse.⁴

b. WHAT ALLOWABLE.—Amendments have been held proper as to the description of the land to be taken,⁵ or its territorial location,⁶ and to show the incorporation of the village in which it is located.⁷ It is proper to amend so as to show the residences of the different landowners,⁸ or the absence of the owner from the state, or inability to agree with him as to the damages.⁹ And an amendment increasing the amount of damages claimed may be made,¹⁰ or stipulations as to fences and crossings added, in reduction of consequential damages.¹¹ So, also, the petition

1. *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489.

Discretionary Power to Allow or Refuse.

—An amendment in a defective petition for appointment of viewers to condemn property sought to be taken by a water company is not of right, but of favor, and lies within the sound discretion of the court; and where it appears that such property is practically *in gremio legis*, and is about to be sold at judicial sale at the suit of a creditor whose bill was filed before the petition for viewers, and who is diligently pursuing his legal remedy for securing his debt, such amendment is properly disallowed. *Philadelphia Water-Supply Co. v. Susquehanna Canal Co.*, 4 Pa. Dist. Rep. 637.

Terms may be imposed on allowing amendments or not, within the discretion of the court. *Robinson v. Pennsylvania R. Co.*, 174 Pa. St. 199.

2. *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193; *Pennsylvania R. Co. v. First German Lutheran Cong.*, 53 Pa. St. 445; *Philadelphia, etc., R. Co. v. Reading, etc., R. Co.*, 2 Pa. Dist. Rep. 857.

County Commissioners have power to allow an amendment of a petition for the assessment of damages, after hearing the parties and before issuing a warrant for a jury. *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 553.

3. *Bowman v. Venice, etc., R. Co.*, 102 Ill. 459, 14 Am. & Eng. R. Cas. 338.

4. *Wood v. West Boston, etc., Bridges*, 122 Mass. 394.

5. *Hunt v. New York, etc., R. Co.*, 99 Ind. 593, 20 Am. & Eng. R. Cas. 436; *Midland R. Co. v. Smith*, 125 Ind. 509, 44 Am. & Eng. R. Cas. 222; *Fremont, etc., R. Co. v. Mattheis*, 39 Neb. 98.

Altering Width of Strip, etc.—A railroad company may amend its petition to condemn land for a right of way by altering the width of the strip required, and by inserting a provision that the company will put in such bridges and tile drains as may be needed to give proper drainage across the right of way. *Indiana, etc., R. Co. v. Rinehart* (Ind. App. 1896), 43 N. E. Rep. 238.

6. *Ball v. Keokuk, etc., R. Co.*, 71 Iowa 306.

7. *Eslick v. Mason City, etc., R. Co.*, 75 Iowa 443.

8. *Matter of Rochester, etc., R. Co.*, 44 Hun (N. Y.) 625, 9 N. Y. St. Rep. 560; *Matter of Rochester, etc., R. Co.*, 45 Hun (N. Y.) 126.

9. *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165.

10. *Pennsylvania, etc., R., etc., Co. v. Bunnell*, 81 Pa. St. 427.

11. *Chicago, etc., R. Co. v. Jones*, 103 Ind. 386.

Withdrawal of Offer.—In proceedings by a railroad corporation to acquire title to lands under the water of the Hudson river, which had been granted by the state to the owners of the uplands, the petition contained an offer on the part of the company to construct

may be amended so as more clearly to show the object of the petitioner in condemning the land.¹

An "amended petition" filed by leave of court is not to be considered as a distinct pleading, but as an amendment to the original petition.²

VIII. MAPS, PLANS, PROFILES, AND SURVEYS—1. Necessity of Filing or Production.—The location of the improvement should appear on record. In the case of a railroad, a survey or plan of it showing its course and width should be filed before instituting condemnation proceedings,³ or at least before any attempt to assess the damages is made.⁴ In some states the filing of a map and profile is jurisdictional, failure therein rendering the proceedings void,⁵ and subjecting the condemning party to an action of trespass.⁶

a drawbridge to give access from the river to the docks of the landowners. After an order appointing commissioners had been made and appealed from, on application of the company an order was granted giving it leave to withdraw the offer and to amend the petition accordingly. It was held that the court had no power so to amend the petition; that no such power was given by the provision of the N. Y. General Railroad Act (§ 20, c. 140, Laws of 1850) which authorizes the correction of "any defect or informality." *Matter of New York, etc., R. Co.*, 89 N. Y. 453, *reversing* 27 Hun (N. Y.) 57, *following* *Matter of New York Cent., etc., R. Co.*, 77 N. Y. 248.

1. *Matter of Metropolitan Transit Co.*, 45 Hun (N. Y.) 159.

2. *Pennsylvania, etc., R., etc., Co. v. Bunnell*, 81 Pa. St. 414.

3. *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Strang v. Beloit, etc., R. Co.*, 16 Wis. 635.

Proof of Filing.—Where the allegation, in a petition by a railroad company for condemnation of land, of the filing of a map and survey of its line is not denied, proof of such filing is unnecessary. *Cincinnati, etc., R. Co. v. Bay City, etc., R. Co.* (Mich. 1895), 64 N. W. Rep. 471.

4. *Chicago, etc., R. Co. v. Abbott*, 44 Kan. 170; *Missouri River, etc., R. Co. v. Shepard*, 9 Kan. 647; *Doughty v. Somerville, etc., R. Co.*, 7 N. J. Eq. 69.

Time to Produce.—On the day a condemnation proceeding was set for hearing in vacation, and after the jury

was selected, but before any evidence was heard, the defendants moved the court to require the petitioner to produce the plans, profiles, etc., of the proposed improvement. It was held that the motion was not made too late. *Tedens v. Sanitary Dist.*, 149 Ill. 87.

Compelling Exhibit of Plan and Profile.

—In a proper case, the petitioner may be compelled, before the trial is begun, to exhibit the plan and profile of its proposed railroad across the land, and to file such plans as will show to what use the petitioner designs devoting the land it seeks to condemn, and what it proposes to put upon said land, as tracks, bridges, abutments, or otherwise. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 112 Ill. 589, 25 Am. & Eng. R. Cas. 158.

5. *Madison v. Daley*, 58 Fed. Rep. 751; *Indianapolis, etc., R. Co. v. Reed*, 52 Ind. 357; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286.

Effect of Failure to File.—A railroad corporation which has constructed its track upon land without filing a written location, or presenting a plan, or paying or tendering damages, cannot enter upon the land for the purpose of removing rails laid and structures placed upon it; such property becomes a part of the realty, and the fact that the original entry and construction were made without objection by a mortgagor in possession cannot avail against the title acquired by the mortgagee by subsequent foreclosure. *Meriam v. Brown*, 128 Mass. 391.

6. *Bonaparte v. Camden, etc., R. Co.*, *Baldw.* (U. S.) 205.

Some of the decisions hold the filing unnecessary to the validity of the subsequent proceedings,¹ unless it is ordered by the court in its discretion.²

2. Sufficiency.—A map or plan accompanying the petition which, in connection with the petition, gives intelligible information respecting the *locus* and condition of the land sought to be taken is sufficient.³ The question of the sufficiency of the map and survey is a jurisdictional one to be determined by the court on the application for commissioners.⁴ Although it fails wholly to comply with the statutory requirements, the map may be the proper legal definition of lands by act of the parties for many, if not for most, purposes;⁵ if deficient as respects the delineation of courses, it can be amended by order of the court;⁶ and formal defects are waived, unless objected to

1. San Francisco, etc., R. Co. v. Mahoney, 29 Cal. 112; Burke v. Sanitary Dist., 152 Ill. 125; Hornellsville Electric R. Co. v. New York, etc., R. Co., 83 Hun (N. Y.) 407.

Failure to Furnish Plan.—A railroad company's title to land is not affected, nor the running of the time for applying for damages suspended, by the failure of the company to furnish the owner of land taken by it with a plan of the location. Brock v. Old Colony R. Co., 146 Mass. 194, 33 Am. & Eng. R. Cas. 96.

Additional Lands.—A company made a map and profile of its road, showing that it desired to take land of the statutory width of ninety feet and no more, but in constructing its road through a deep cut, it was found necessary to take more than the ninety feet. It was held that the company might take additional land without making a new profile and map. Matter of South Brooklyn R., etc., Co., 50 Hun (N. Y.) 405.

2. Wheeling Bridge, etc., R. Co. v. Camden Consol. Oil Co., 35 W. Va. 205, 47 Am. & Eng. R. Cas. 27.

3. Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

Course, Distance, and Quantity of Land.—The map and profile should show the courses, distances, and quantity of land to be taken, so exactly as to be understood by an ordinary person not a surveyor. Matter of New York, etc., R. Co., 62 Barb. (N. Y.) 85; Convers's Appeal, 18 Mich. 459.

A map where the route of the road is only shown by a single line, without

anything to indicate whether it is a center or a side line, and with nothing to indicate the width of the right of way, is defective. Matter of Boston, etc., R. Co., 10 Abb. N. Cas. (N. Y. Supreme Ct.) 104; Matter of New York, etc., R. Co., 62 Barb. (N. Y.) 85.

Map of Whole Road Unnecessary.—So far as the condemnation of a particular piece of property is concerned, a map and profile of that part of the road which will pass through such property is sufficient; a map of the whole road need not be filed. Hunt v. Smith, 9 Kan. 137; Doughty v. Somerville, etc., R. Co., 21 N. J. L. 442; State v. Hop-ping, 18 N. J. L. 423.

4. Toledo, etc., R. Co. v. Campau, 83 Mich. 33.

5. Manistee, etc., R. Co. v. Fowler, 73 Mich. 217.

Illustration.—There was evidence tending to show that by reason of the small scale upon which the plan was drawn it was difficult to apply it, with the accompanying descriptions, to the land; but there was evidence that the lines over the lands were surveyed and the location was pointed out to the landowner before the filing of the petition, and that the location so pointed out was substantially the actual location of the road as constructed. It was held that by allowing the company to take possession the parties treated the location as sufficient, and that mere uncertainty or ambiguity of description was thereby cured, and rendered sufficient as against the company. Drury v. Midland R. Co., 127 Mass. 571.

6. State v. Miller, 23 N. J. L. 383.

before the hearing on the merits.¹

3. Effect.—The mere filing of a survey gives a railroad company neither title nor possession, and is not notice to purchasers of lands within the survey.² The map of the route proposed is not the only evidence to show the land condemned for the right of way.³

If the road is constructed in accordance with the profile the owner cannot recover further damages because of mistake by the jury in determining the amount of damages;⁴ but if the profile be departed from in the construction of the road, so as to do greater damage to a landowner, he may recover for such additional damages.⁵

IX. TRIBUNAL TO ASSESS DAMAGES—1. Powers of the Legislature.⁶—Except as restrained by constitutional provisions, the mode of exercising the right of eminent domain and of ascertaining the compensation to be paid is in the discretion of the legislature,⁷ and the remedy may be changed at the will of the legislature.⁸ The tribunal to assess the damages must be an impartial one, and the parties interested must have an oppor-

1. Logansport, etc., R. Co. v. Buchanan, 52 Ind. 163.

2. Central R. Co. v. Hetfield, 18 N. J. Eq. 323.

3. Chicago, etc., R. Co. v. Grovier, 41 Kan. 685, 39 Am. & Eng. R. Cas. 146.

Limits of the Rule.—But a plan or map, filed with the location and expressly made "a part of the description of said location," may be referred to in order to explain, but not to modify or control the written location. Hazen v. Boston, etc., R. Co., 2 Gray (Mass.) 574.

The survey of the route of the railroad, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description, properly construed; and an order for the condemnation of the located route of a railroad for a crossing by another road cannot be sustained where the petition therefor describes lands not included in the description in the original survey of the located route. United New Jersey R., etc., Co. v. National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226.

Spurs and Terminal Branches.—If the map and survey include spurs and terminal branches, land for these may be condemned before completing any part of the main line. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co., 72 Mich. 206, 36 Am. & Eng. R. Cas. 553.

4. Chicago, etc., R. Co. v. Brinkman, 47 Ill. App. 287. Nor by reason of a failure to allow a sufficient sum as damage to contiguous lands, or as compensation for lands taken; nor by a wrong description of the profile, where it is open alike to be described by witnesses offered by the railroad company, or by the landowner; and all damages consequent on the construction of the road, in accordance with the implied agreement made by the company that it would be constructed according to the profile, when it is so constructed, are, by the condemnation proceedings, *res adjudicata*. Chicago, etc., R. Co. v. Brinkman, 47 Ill. App. 287.

5. Chicago, etc., R. Co. v. Brinkman, 47 Ill. App. 287.

6. See also *supra*, II. 2. *Must be Authorized by Statute.*

7. McCormick v. Lafayette, 1 Ind. 48; Henderson, etc., R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; Wilkin v. First Div. St. Paul, etc., R. Co., 16 Minn. 271; Langford v. Ramsey County, 16 Minn. 375; Virginia, etc., R. Co. v. Elliott, 5 Nev. 358; Beekman v. Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Livingston v. New York, 8 Wend. (N. Y.) 85; People v. Smith, 21 N. Y. 595; Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

8. Springfield, etc., R. Co. v. Hall, 67 Ill. 99.

tunity to be heard,¹ but of what the tribunal shall consist—whether a jury, a court without a jury, or commissioners appointed by the court—is for the determination of the legislature.² It is no objection to the tribunal that neither party to the proceedings had a direct voice in its selection.³

2. Right to Jury Trial.—*a. IN GENERAL.*—Inasmuch as the legislature cannot itself fix the compensation to be paid to the owner for his land, such compensation must be awarded by a jury in case the parties cannot agree, and the constitution of the forum provides for a jury in such proceedings.⁴ Where the constitution so provides, the right to a jury is absolute regardless of statutory provisions; the constitutional provision is self-executing.⁵

1. *Langford v. Ramsey County*, 16 Minn. 375; *Zimmerman v. Canfield*, 42 Ohio St. 470.

An act of the legislature, empowering the town council of a municipal corporation to fix the amount of compensation to be paid for private property taken for streets, is not open to the objection that the tribunal so provided is not an impartial one, and hence in conflict with the Federal Constitution, prescribing that no state shall deprive any person of life, liberty, or property without due process of law, nor with section 8 of article 1 of the Delaware Constitution, prescribing that no man's property shall be taken or applied to public use without compensation, since the determination of the town council is not final, but an appeal therefrom to a commission of five freeholders is provided in said act. *Fulton v. Dover*, 8 Houst. (Del.) 78.

2. *Ames v. Lake Superior, etc.*, R. Co., 21 Minn. 241; *New Orleans, etc.*, R. Co. *v. Drake*, 60 Miss. 621.

Condemnations by the United States.—The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain. As this limitation forms no part of the power to take private property for public uses, the government of the United States may delegate to a tribunal created under the laws of a state the power to fix and determine the amount of compensation to be paid by the United States for private property taken by them in the exercise of their right of eminent domain; or it may, if it pleases, create a special tribunal for that purpose. On this point, see

Kohl v. U. S., 91 U. S. 367, cited and approved in *U. S. v. Jones*, 109 U. S. 513.

Colorado.—By the terms of the constitution, the compensation for taking or damaging private property, against the owner's consent, must be ascertained by a jury or board of commissioners. This requirement cannot be dispensed with by legislative enactment. And under the statute the ordinary civil action cannot be resorted to, but the object can only be reached by special proceedings under the act on the subject of eminent domain. *Tripp v. Overocker*, 7 Colo. 72.

New York.—The provision of the constitution intends that one jury or one commission, conducted so that it reaches its results by proper methods, is to fix the rights of the parties in respect to the compensation for land taken for a public use. *Schneider v. Rochester*, 8 Misc. Rep. (N. Y. Supreme Ct.) 652.

3. *People v. Michigan Southern R. Co.*, 3 Mich. 496; *Long's Appeal*, 87 Pa. St. 114.

4. *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 60 Md. 263, 14 Am. & Eng. R. Cas. 79.

5. *Arkansas.—Ex p. Reynolds*, 52 Ark. 330.

California.—*Weber v. Santa Clara County*, 59 Cal. 265; *Trahern v. San Joaquin County*, 59 Cal. 320.

District of Columbia.—*Dixon v. Baltimore, etc.*, R. Co., 1 Mackey (D. C.) 78, 3 Am. & Eng. R. Cas. 201, *Quackenbush v. District of Columbia*, 20 D. C. 300.

Florida.—*Jacksonville, etc.*, R. Co. *v. Adams*, 33 Fla. 608.

Illinois.—*Mitchell v. Illinois, etc.*,

Common-law Jury.—Where the constitution is silent upon the question, the great weight of authority is that a common-law jury is not a matter of constitutional right, inasmuch as a well-settled practice existed both in England and in America, before the adoption of any of our constitutions, of ascertaining the compensation by means of other agencies than a common-law jury.¹ The provision found in most of the constitutions that the right of trial by jury shall remain inviolate has been relied upon, in some decisions, as raising an insuperable barrier to the assessment of damages by less than twelve men, but the better opinion is that neither that provision, nor the provision forbidding the depriving of an individual of his property without due process of law, applies to these proceedings, but only to issues raised in ordinary civil and criminal actions.²

R., etc., Co., 68 Ill. 286; *People v. Stuart*, 97 Ill. 123.

Iowa.—*Hartley v. Keokuk, etc.*, R. Co., 85 Iowa 455.

Maine.—*Day v. Stetson*, 8 Me. 365.

Michigan.—*Port Huron, etc.*, R. Co. v. *Callanan*, 61 Mich. 12.

Mississippi.—*Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *White v. Memphis, etc.*, R. Co., 64 Miss. 566.

Missouri.—*St. Joseph, etc.*, R. Co. v. *Cudmore*, 103 Mo. 634, 47 Am. & Eng. R. Cas. 249; *Chicago, etc.*, R. Co. v. *Miller*, 106 Mo. 458; *St. Joseph, etc.*, R. Co. v. *Shambaugh*, 106 Mo. 557; *Chicago, etc.*, R. Co. v. *Elliott*, 108 Mo. 321; *Chicago, etc.*, R. Co. v. *Bates*, 109 Mo. 53; *Chicago, etc.*, R. Co. v. *McGrew*, 113 Mo. 390; *Kansas City, etc.*, R. Co. v. *Cox*, 41 Mo. App. 499.

New York.—*House v. Rochester*, 15 Barb. (N. Y.) 517; *Clark v. Utica*, 18 Barb. (N. Y.) 451.

North Carolina.—*Norfolk Southern R. Co. v. Ely*, 101 N. Car. 8.

Ohio.—*Lamb v. Lane*, 4 Ohio St. 167; *In re Wells County Road*, 7 Ohio St. 16; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343.

Pennsylvania.—*Williams v. Pittsburgh*, 83 Pa. St. 71.

West Virginia.—*Chesapeake, etc.*, R. Co. v. *Patton*, 9 W. Va. 648; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Ward v. Ohio River R. Co.*, 35 W. Va. 481.

Jury of County.—The question of amount of land damages being of a local nature, it should be determined by a jury of the county. *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707; *Clarke v. Chicago, etc.*, R. Co., 23

Neb. 616; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 36 Am. & Eng. R. Cas. 606.

1. *Arkansas.*—*Cairo, etc.*, R. Co. v. *Trout*, 32 Ark. 17.

Indiana.—*Evansville, etc.*, R. Co. v. *Miller*, 30 Ind. 209; *Anderson v. Caldwell*, 91 Ind. 451; *Indianapolis, etc.*, *Gravel Road Co. v. Christian*, 93 Ind. 360.

Nevada.—*Virginia, etc.*, R. Co. v. *Elliott*, 5 Nev. 358.

New Hampshire.—*Backus v. Lebanon*, 11 N. H. 19; *Mount Washington Road Co.'s Petition*, 35 N. H. 134; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 66.

New Jersey.—*Morris v. Heppenheim*, 54 N. J. L. 268; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694.

New York.—*Beekman v. Saratoga, etc.*, R. Co., 3 Paige (N. Y.) 45.

Ohio.—*Kramer v. Cleveland, etc.*, R. Co., 5 Ohio St. 140.

Pennsylvania.—*Pennsylvania R. Co. v. First German Lutheran Cong.*, 53 Pa. St. 445.

Texas.—*Buffalo Bayou, etc.*, R. Co. v. *Ferris*, 26 Tex. 588; *Houston Tap, etc.*, R. Co. v. *Milburn*, 34 Tex. 224; *Rhine v. McKinney*, 53 Tex. 354.

Vermont.—*Gold v. Vermont Cent. R. Co.*, 19 Vt. 478.

2. *Arkansas.*—*Cairo, etc. R. Co. v. Trout*, 32 Ark. 17, explaining *Whitehead v. Arkansas Cent. R. Co.*, 28 Ark. 461, reviewing *Cairo, etc.*, R. Co. v. *Turner*, 31 Ark. 506; *Lamb v. Lane*, 4 Ohio St. 167.

California.—*Koppikus v. State Capitol Com'rs*, 16 Cal. 248; *Heyne-man v. Blake*, 19 Cal. 579.

b. JURY ON APPEAL AFTER TRIAL WITHOUT JURY.—Constitutional provisions securing the right of trial by jury in these proceedings are satisfied by providing a jury trial on appeal from the primary trial by commissioners, viewers, or other ministerial boards or officers;¹ and statutes providing for appeals in such cases will be construed, if possible, to afford a jury on such appeals, in order to harmonize them with the constitu-

Delaware.—Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514.

Illinois.—Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Indiana.—Dronberger *v.* Reed, 11 Ind. 420; Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53; Anderson *v.* Caldwell, 91 Ind. 451; Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360; Ross *v.* Davis, 97 Ind. 79; Lipes *v.* Hand, 104 Ind. 503; Drebert *v.* Trier, 106 Ind. 510; Lavery *v.* State, 109 Ind. 217; Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5.

Kansas.—Central Branch Union Pac. R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453, 10 Am. & Eng. R. Cas. 528.

Maryland.—Baltimore Belt R. Co. *v.* Baltzell, 75 Md. 94, 51 Am. & Eng. R. Cas. 669.

Minnesota.—Bruggerman *v.* True, 25 Minn. 123.

New Hampshire.—Backus *v.* Lebanon, 11 N. H. 19; Dalton *v.* North Hampton, 19 N. H. 362.

New Jersey.—American Print Works *v.* Lawrence, 21 N. J. L. 248.

New York.—Livingston *v.* New York, 8 Wend. (N. Y.) 85.

North Carolina.—Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. (N. Car.) 451; Chowan, etc., R. Co. *v.* Parker, 105 N. Car. 246.

Ohio.—Willyard *v.* Hamilton, 7 Ohio (Pt. II.) 111.

Oregon.—Kendall *v.* Post, 8 Oregon 141.

Texas.—Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

United States.—Bonaparte *v.* Camden, etc., R. Co., Baldw. (U. S.) 205; U. S. *v.* Engerman, 46 Fed. Rep. 176.

Contrary Decisions.—*Georgia*.—Southwestern R. Co. *v.* Southern, etc., Tel. Co., 46 Ga. 53.

Illinois.—Rich *v.* Chicago, 59 Ill. 286.

Indiana.—Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558; Louisville, etc.,

Air Line R. Co. *v.* Dryden, 39 Ind. 393.

Maryland.—Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 252.

1. *Arkansas*.—*Ex p.* Reynolds, 52 Ark. 330, 44 Am. & Eng. R. Cas. 60.

Georgia.—Atlanta *v.* Central R., etc., Co., 53 Ga. 120; Oliver *v.* Union Point, etc., R. Co., 83 Ga. 257, 39 Am. & Eng. R. Cas. 107.

Illinois.—Toledo, etc., R. Co. *v.* Darst, 61 Ill. 231.

Indiana.—Bachelor *v.* Cole, 132 Ind. 143.

Iowa.—Deaton *v.* Polk County, 9 Iowa 594.

Maine.—Kimball *v.* Kennebec, etc., R. Co., 35 Me. 255.

Maryland.—Steuart *v.* Baltimore, 7 Md. 500.

Massachusetts.—Smith *v.* Boston, 1 Gray (Mass.) 72; Whitman *v.* Boston, etc., R. Co., 16 Gray (Mass.) 530; Drury *v.* Midland R. Co., 127 Mass. 571.

Missouri.—Quincy, etc., R. Co. *v.* Ridge, 57 Mo. 599; Chicago, etc., R. Co. *v.* McGrew, 113 Mo. 390; Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451; Chicago, etc., R. Co. *v.* Miller, 106 Mo. 458; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458; Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599; West End Narrow Gauge R. Co. *v.* Almeroth, 13 Mo. App. 91.

New Hampshire.—Upper Coos R. Co. *v.* Parsons, 66 N. H. 181.

New Jersey.—Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, 39 Am. & Eng. R. Cas. 101.

New York.—People *v.* Haverstraw, 80 Hun (N. Y.) 385.

Ohio.—Lamb *v.* Lane, 4 Ohio St. 167.

South Dakota.—Dell Rapids *v.* Irving (S. Dak. 1895), 64 N. W. Rep. 149.

Tennessee.—Hord *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 497.

tion.¹ The landowner's right to appeal in such cases should not be fettered by compelling him to give a bond with sureties;² but he must seasonably demand an appeal, or he will be deemed to have waived his right.³

c. WAIVER OF JURY.—A constitutional guaranty that the compensation shall be assessed by a jury may be waived,⁴ and it is waived by failure to demand a jury,⁵ or by failure to appeal from the decision of the primary tribunal.⁶

An Appearance, however, by the landowner, with a request for the appointment of commissioners, is not a waiver of his right to a jury on appeal.⁷

3. Application for Jury.—The decisions as to who may apply for a jury and the time when such an application should be made do not admit of the formulation of any general rule. They are gathered in the notes.⁸

1. *Alabama.*—Montgomery Southern R. Co. v. Sayre, 72 Ala. 443, 20 Am. & Eng. R. Cas. 203; Woodward Iron Co. v. Cabaniss, 87 Ala. 328.

Missouri.—Kansas City, etc., R. Co. v. Story, 96 Mo. 611, 36 Am. & Eng. R. Cas. 584; Kansas City, etc., R. Co. v. Cox, 41 Mo. App. 499.

Pennsylvania.—Horner's, etc., Lateral R. Co., 37 Pa. St. 333; Pusey's Appeal, 83 Pa. St. 67; Bachler's Appeal, 90 Pa. St. 207; Fitzpatrick v. Pennsylvania R. Co., 10 Phila. (Pa.) 107.

Tennessee.—Mississippi R. Co. v. McDonald, 12 Heisk. (Tenn.) 54.

Vermont.—Gold v. Vermont Cent. R. Co., 19 Vt. 478.

2. *Weir v. St. Paul, etc., R. Co.*, 18 Minn. 155. *Contra*, Reckner v. Warner, 22 Ohio St. 275; *People v. Haverstraw*, 80 Hun (N. Y.) 385.

3. See *infra*, IX. 3. *Application for Jury*, note.

No time is fixed in the Pa. Act of May 3, 1878, for taking the appeal. It is to be under such regulations as the court may prescribe for bringing the matter to a trial by jury in due course of law. *In re Towanda Bridge Co.*, 91 Pa. St. 216.

4. *Chicago, etc., R. Co. v. Hock*, 118 Ill. 587; *Thorndike v. Norfolk County*, 117 Mass. 566; *Borgman v. Detroit*, 102 Mich. 261; *People v. Haverstraw*, 80 Hun (N. Y.) 385.

5. *Mascall v. Drainage Dist.*, 122 Ill. 620; *Chicago, etc., R. Co. v. Randolph Town-Site Co.*, 103 Mo. 451, 47 Am. & Eng. R. Cas. 118; *Chicago, etc., R. Co. v. McGrew*, 113 Mo. 390;

Chowan, etc., R. Co. v. Parker, 105 N. Car. 246; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343.

6. *Tharp v. Witham*, 65 Iowa 566; *Steuart v. Baltimore*, 7 Md. 500; *Kansas City, etc., R. Co. v. Cox*, 41 Mo. App. 499.

Where the condemning party applies for a jury and afterwards abandons such application and accepts the award appealed from, the landowner, not having petitioned for a jury, has no right to insist upon a trial by jury. *Fall River R. Co. v. Chase*, 125 Mass. 483.

7. *Kansas City, etc., R. Co. v. Story*, 96 Mo. 611, 36 Am. & Eng. R. Cas. 584.

Temporary Waiver.—Though in a case where a railroad company is seeking to condemn lands for its track, the defendant, with a view to certain preliminary steps proposed to be taken by him, waives for the time a right to have his damages assessed by a jury of twelve freeholders, yet when these preliminary matters are disposed of by the court's refusal to entertain them, he may ask the court to have his damages assessed by such a jury, and his request should be granted. *Grafton, etc., R. Co. v. Foreman*, 24 W. Va. 662, 20 Am. & Eng. R. Cas. 215.

8. **Who may Apply.**—In *Colorado* only the respondent can apply for a jury. *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489.

In *Massachusetts* one tenant in common may apply without joining his cotenants. *Dwight v. Hampden County*, 7 Cush. (Mass.) 533. The case of

The Application and How Determined.—No complaint is necessary on an application for a jury, after the coming in of the report of the appraisers;¹ nor is it necessary to allege the owner's refusal to grant the right of way.² The application should be made, and the trial by jury had, at the bar of the court.³ The petition for the jury need not be served upon the opposite party.⁴ When there are issues both of law and of fact, the demand for a jury trial should be confined specifically to the latter.⁵

Jurisdictional facts, such as the right to condemn, necessity, etc., should be determined summarily by the court, and, if found to exist, a jury should be ordered; if not, the application should be dismissed.⁶

4. Summoning and Impaneling—*a.* **SUMMONING**—**GENERALLY.**—The general rules applicable to the summoning of a jury in other civil cases apply to a jury to assess damages in condemnation proceedings. There are, however, some decisions which may be specially noticed. They are gathered in the notes.⁷

Merrill v. Berkshire, 11 Pick. (Mass.) 269, to the contrary, is superseded by statute.

Where the land taken belongs to a trust estate, the trustee and not the *cestui que trust* is the proper party to apply. *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506.

In *Missouri* the fact that some of the defendants are incorporated companies does not give other defendants a right to demand a jury. *Kansas City v. Vineyard*, 128 Mo. 75; *Kansas City v. Smart*, 128 Mo. 272.

Time to Apply.—In *Illinois* a judge may, in vacation, note a day when he will hear the cause, and order a jury, although a term may have intervened, or the date noted be one of the days of a term of court. *Hercules Iron Works v. Elgin*, etc., R. Co., 141 Ill. 491.

In *Massachusetts*, the statute limits the time within which the application must be made, but not the time within which it must be acted upon. *Porter v. Norfolk County*, 13 Met. (Mass.) 479; *Walker v. Boston*, etc., R. Co., 3 Cush. (Mass.) 1; *Eaton v. Framingham*, 6 Cush. (Mass.) 245; *Russell v. New Bedford*, 5 Gray (Mass.) 31; *Brookline v. Norfolk County*, 114 Mass. 548; *Roberts v. Boston*, etc., R. Corp., 115 Mass. 57.

In *New Hampshire* it is seasonable if made at the term next after the acceptance of the report of the primary tribunal. *Concord R. Co. v. Greely*, 20 N. H. 157.

In *New York* a delay of eleven

months in calling for a new jury after a disagreement by the first jury was held an abandonment of a reassessment. *People v. Lewis*, 26 How. Pr. (N. Y. Supreme Ct.) 378.

In *North Carolina* the landowner cannot demand an issue on the question of damages after the report of the commissioners and exceptions to it are filed, *Chowan*, etc., R. Co. *v. Parker*, 105 N. Car. 246; but he can in *Missouri*, *Kansas City*, etc., R. Co. *v. Story*, 96 Mo. 611, 36 Am. & Eng. R. Cas. 584; *Chicago*, etc., R. Co. *v. Miller*, 106 Mo. 458.

1. *Lake Erie*, etc., R. Co. *v. Heath*, 9 Ind. 558.

2. *Hartley v. Keokuk*, etc., R. Co., 85 Iowa 455.

The Application may Be by Petition, although a year has elapsed since the laying out of the improvement. *Fall River Print Works v. Fall River*, 110 Mass. 428.

3. *Wyman v. Eastern R. Co.*, 128 Mass. 346, 1 Am. & Eng. R. Cas. 22.

4. *Ex p. Bacot*, 36 S. Car. 125, 50 Am. & Eng. R. Cas. 597.

5. *Chadbourne v. Zilsdorf*, 34 Minn. 43.

6. *O'Hare v. Chicago*, etc., R. Co., 139 Ill. 151; *Lieberman v. Chicago*, etc., R. Co., 141 Ill. 140, 51 Am. & Eng. R. Cas. 581; *Boyd v. Negley*, 40 Pa. St. 377.

7. Who may Summon.—Where the statute calls for an ordinary jury the regular panel may be resorted to. The sheriff's jury may be summoned by the constables of the towns whence

b. WARRANT.—The writ or warrant issued to the sheriff to summon a jury to assess damages in condemnation proceedings, as to its sufficiency, purpose, effect, etc., is governed almost entirely by local and constantly-changing statutes, which should of course be consulted. The cases which have been decided under these statutes are grouped in the notes.¹

the jurors are taken, or partly by such constables and partly by the deputy sheriff. *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291.

Service of the Notices by the Petitioner is not reversible error if the jurors so served attend, and are unobjectionable. *Folmar v. Folmar*, 71 Ala. 136.

Having Summoned One Jury Who Fail to Agree, the sheriff may summon another jury without further order from the court. *Hicks v. Foster*, 32 Ga. 414.

Special Venire.—Where the case is fixed for hearing in vacation, a special venire may be summoned to meet during a regular term. *Haslam v. Galena, etc.*, R. Co., 64 Ill. 353.

Number to be Summoned.—Where the jury is to consist of twelve, a larger number may be summoned, provided twelve only are impaneled. *Fitchburg R. Co. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 58; *Hosmer v. Warner*, 15 Gray (Mass.) 46.

But one stricken off a special jury cannot be resummoned. *In re Detroit, etc.*, R. Co., 2 Dougl. (Mich.) 367.

A Jury of View must be summoned by the sheriff or his deputy and not by a constable, *Com. v. Norfolk County*, 5 Mass. 435; nor can they be appointed by name by the court, *Tipton v. Miller*, 3 Yerg. (Tenn.) 423.

Interest of Sheriff.—A sheriff or deputy sheriff who lives in a town through which the improvement will run cannot summon the jury, *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; the coroner should act in such cases, *Barre Turnpike Corp. v. Appleton*, 2 Pick. (Mass.) 430.

Territory within Which to Obtain Jurors.—In *Massachusetts* the statutes provide that in proceedings to assess damages in highway and railway condemnations jurors shall be taken from "the three nearest towns not interested;" this means the three towns nearest the town in which the land in question lies, without regard to the situation of the land within that town. *Rev. Stat.*, c. 24, § 19; c. 39, § 57; *Wyman v. Lexington, etc.*, R. Co., 13

Met. (Mass.) 316; *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303.

Several Applications.—When several applications are made at the same time by owners of land in different towns for a jury to assess damages caused by the laying out of a highway or railroad, the jurors are to be taken from three towns nearest to the town in which the land of either of the applicants is situated. And when a single application for such purpose is made by one who owns lands in different towns, the jurors are to be taken from three towns nearest to either of the towns in which his lands are situated. *Wyman v. Lexington, etc.*, R. Co., 13 *Met. (Mass.)* 316.

Objections.—If some of the jurors, summoned on a sheriff's jury, are drawn from the town in which the land lies, this is an objection to those jurors only, and not to the others, and must be taken at the time the jury is impaneled, in which case the sheriff may set aside the jurors so disqualified, and fill their places with others; but if the respondent proceed to trial without taking the exception, it will be considered as waived, and cannot afterwards be taken on appeal to the Supreme Court. *Walker v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 1.

Talesmen to Fill Deficient Panel.—The statutes do not apply to talesmen called to fill a deficient panel. *Mass. Pub. Stat.*, c. 49, § 41; *Wellington v. Boston, etc.*, R. Co., 158 Mass. 185.

In *Michigan* the jury should be chosen from the body of the county and not solely from the municipality interested in the condemnation. *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547.

1. *Alabama.*—*Folmar v. Folmar*, 68 Ala. 120.

Illinois.—*Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353.

Kentucky.—*Shine v. Kentucky Cent. R. Co.*, 85 Ky. 177.

c. IMPANELING, DRAWING—NUMBER.—If the hearing is in term time the jury must be selected from the regular panel for the term;¹ and, if that be insufficient, talesmen may be called.²

A statute requiring twelve jurors does not mean the first twelve drawn. Those set aside on challenge are not part of the twelve drawn, but the drawing should continue until a qualified jury is obtained.³ But a new juror cannot be selected in place of one who acted at a previous meeting, and who subsequently fails to attend.⁴

d. QUALIFICATIONS—(1) *Freeholders—Householders.*—Many of the constitutions and statutes require that the jurors shall be “free-

Maine.—Cassidy v. Kennebec, etc., R. Co., 45 Me. 263.

Maryland.—George's Creek Coal, etc., Co. v. New Cent. Coal Co., 40 Md. 425.

Massachusetts.—Carpenter v. Bristol County, 21 Pick. (Mass.) 258; Walker v. Boston, etc., R. Co., 3 Cush. (Mass.) 1; Childs v. New Haven, etc., R. Co., 133 Mass. 253, 14 Am. & Eng. R. Cas. 352; Davidson v. Boston, etc., R. Co., 3 Cush. (Mass.) 91; Wilmarth v. Knight, 7 Gray (Mass.) 294; Smith v. Boston, 1 Gray (Mass.) 72.

Michigan.—Mansfield, etc., R. Co. v. Clarke, 2 Mich. N. P. (Supp.) 119.

Mississippi.—Brown v. Beatty, 34 Miss. 227.

Pennsylvania.—Heise v. Pennsylvania R. Co., 62 Pa. St. 67.

United States.—Chesapeake, etc., Canal Co. v. Key, 3 Cranch (C. C.) 599.

See also article JURIES.

1. Warner v. Gunnison, 2 Colo. App. 430; Hercules Iron Works v. Elgin, etc., R. Co., 141 Ill. 491.

2. Wellington v. Boston, etc., R. Co., 158 Mass. 185.

3. Peninsular R. Co. v. Howard, 20 Mich. 18.

Number.—A jury consisting of a less number than twelve is not a lawful jury, unless an appeal is given to a higher court, where a jury of twelve men may be impaneled on demand. Woodward Iron Co. v. Cabaniss, 87 Ala. 328.

A jury of twelve, called from the general panel in attendance in term time, is not a legal jury in condemnation proceedings, under Colo. Civ. Code, § 243, providing that the landowner may demand “a jury of six freeholders,” to be drawn as provided in the succeeding sections. Colorado Cent. R. Co. v. Humphrey, 16 Colo. 34.

The statute provides that the jury appointed to reassess damages shall consist of six persons. Where a jury of six had been appointed, but one was not able to attend, and the respondent town agreed to go on with five jurors, it was held (1) that it was a case of defective organization of the tribunal, not of want of jurisdiction, and (2) that the defect was one that could be waived, and that the town, by its agreement to proceed, had waived it. Avery v. Groton, 36 Conn. 304.

A general law for the assessment of damages for land condemned by commissioners of highways for roads may constitutionally provide for a jury of six men, and their assessment will be valid and binding on the landowner. Such a proceeding before a justice of the peace is a civil case. McManus v. McDonough, 107 Ill. 95.

List of Names.—After the selection of a jury from the sixty-four names written by the clerk in a condemnation proceeding, a second condemnation proceeding was commenced; thereupon the clerk took the residue of the names before written, which remained after the drawing of the prior jury, examined them, rejecting such as appeared to be interested in the second case, and, writing new names of freeholders sufficient to make sixty-four, from these names selected another jury of twelve. The array thus selected was challenged on the ground that the clerk did not, at the time of issuing the summons, write the names of the fifty-two freeholders remaining after the drawing of the first jury. The challenge was held to be properly disallowed, the rewriting of the names on new slips not being necessary. Kiernan v. Chicago, etc., R. Co., 123 Ill. 188.

4. Gilkerson v. Scott, 76 Ill. 509.

holders" or "freeholders or householders,"¹ and that it so appear by the record of the proceedings,² the want of this qualification being good cause of challenge,³ but not ground of objection after verdict, unless the objection is founded on matter apparent on the record.⁴

(2) *Disqualification of Interest or Bias*—**In General.**—An owner of land taken, or one benefited and assessed therefor, is disqualified to act as juror or commissioner.⁵ So is one who has a claim against the condemning party of like character to that in controversy, and who feels himself aggrieved by the improvement in question;⁶ one who has given his note to a railroad company to aid in the construction of the road,⁷ and one who has expressed an opinion on the question of damages.⁸

Citizens and Taxpayers.—The better opinion is that the interest of a juror as a citizen and taxpayer of a municipality which is a party, or in which the land lies, does not disqualify him.⁹

1. *Owosso v. Richfield*, 80 Mich. 328; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

Resident Citizens and Taxpayers of a city are competent jurors in an action by a lot owner to recover damages against the city for injury done by the city to his premises. *Kemper v. Louisville*, 14 Bush (Ky.) 87.

2. *Levee Com'rs v. Allen*, 60 Miss. 93; *White v. Memphis, etc., R. Co.*, 64 Miss. 566; *Tipton v. Miller*, 3 Yerg. (Tenn.) 423; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263; *U. S. v. Summit*, 1 Pin. (Wis.) 566.

Exceptions.—In *Kentucky* it need not appear of record that the jurors holding an inquest were qualified to serve. If in fact any of them were not qualified, it should be questioned either by special plea, or by an assignment of error in fact. *Gay v. Caldwell*, Hard. (Ky.) 68.

In *West Virginia*, if the record shows that the jurors were "drawn, selected, tried, and sworn in the manner required by law," it will be presumed that they were freeholders. *Ohio River R. Co. v. Blake*, 38 W. Va. 718.

3. *Colorado Cent. R. Co. v. Humphrey*, 16 Colo. 34; *Hercules Iron Works v. Elgin, etc., R. Co.*, 141 Ill. 491.

4. *Ohio River R. Co. v. Blake*, 38 W. Va. 718.

The jurors need not, however, be freeholders in the county where they are convened, and one in possession of land under a bond for a deed is a free-

holder within the rule, although he has not paid for the land. *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

5. *Daggy v. Green*, 12 Ind. 303; *State v. Crane*, 36 N. J. L. 394; *State v. Union Tp.*, 37 N. J. L. 268. *Contra*, see *Matter of Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 447; *People v. Landreth*, 1 Hun (N. Y.) 544.

Otherwise, where he owns contiguous lands which may be benefited, but for which he is not assessed (*Webster v. Washington County*, 26 Minn. 220); or where he holds the title as a mere naked trustee, in no way beneficially interested in the award (*Matter of South Seventh St.*, 48 Barb. (N. Y.) 12); or is the trustee of a religious corporation owning premises liable to assessment for benefits. *People v. Syracuse*, 63 N. Y. 291.

6. *Flagg v. Worcester*, 8 Cush. (Mass.) 69.

7. *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383. But see *Detroit Western Transit, etc., R. Co., Crane v.* 50 Mich. 182.

8. *Readington v. Dilley*, 24 N. J. L. 209, where it is held, however, that the objection is waived if the fact be known at the time of the impaneling of such juror, and not then taken advantage of.

9. *Warner v. Gunnison*, 2 Colo. App. 430; *Bridgeport v. Giddings*, 43 Conn. 304; *Johnston v. Rankin*, 70 N. Car. 556; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812,

Jurors in Former Proceedings are also generally held incompetent to sit in new proceedings to condemn the same land for the purposes mentioned in the first petition.¹

Stockholders in the condemning corporation are disqualified to act as jurors,² as are also those of the corporation whose land is sought to be taken.³ But a stockholder in a company other than the petitioner, and which has already acquired its right of way,⁴ or whose proceeding is to be tried immediately after the one at bar, is not incompetent.⁵

(3) *Consanguinity—Affinity*.—In what cases relationship by blood or by affinity to the petitioner, or to the owner of the land taken or affected, will disqualify a juror, see the cases cited below.⁶

e. CHALLENGES, AND HOW WAIVED—Grounds of Challenge.—A challenge for cause good in a common-law action is good in these proceedings,⁷ whether held in term time or in vacation.⁸

10 Am. & Eng. R. Cas. 444. *Contra*, see *Nashua's Petition*, 12 N. H. 425; *Gray v. Middletown*, 56 Vt. 53.

1. *Folmar v. Folmar*, 68 Ala. 120; *Hester v. Chambers*, 84 Mich. 562; *Hunter v. Matthews*, 12 Leigh (Va.) 228. *Contra*, see *Cowan v. Glover*, 3 A. K. Marsh. (Ky.) 356; *Palmer v. Highway Com'r*, 49 Mich. 45; *Road in Chartiers Tp.*, 34 Pa. St. 413.

Appraiser in Former Proceedings.—A statute providing for "twelve competent and disinterested jurors" in condemnation proceedings is not violated by allowing a juror to act who has been an appraiser upon another railroad in the same county, and who is a stockholder in another road which has long before obtained the lands necessary for its use. *People v. First Judge*, 2 Hill (N. Y.) 398.

Juror Who Served within a Year.—Jurors selected under section 6 of the Ill. Eminent Domain Act do not belong to the "regular panel" mentioned in section 14 of the act concerning jurors, and if a juror selected under the former section has served on a jury within a year past, such previous service is a good ground of challenge. The "regular panel" is the panel selected under the act relating to jurors. *Chicago, etc., R. Co. v. Eaton*, 136 Ill. 9.

2. *Rock Island, etc., R. Co. v. Lynch*, 23 Ill. 645; *Peninsular R. Co. v. Howard*, 20 Mich. 18.

Company cannot Object.—A railroad company is presumed to know who its stockholders are, and, where a company is proceeding to condemn land

and one of its stockholders is summoned as a juror, it is bound at its own peril to raise the objection, and cannot be allowed to take any benefit from the action of a jury thus constituted as against parties who were ignorant of the fact at the time the jury was sworn. *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Strang v. Beloit, etc., R. Co.*, 16 Wis. 635.

3. *Friend, Appellant*, 53 Me. 387.

4. *People v. First Judge*, 2 Hill (N. Y.) 398.

5. *Com. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 25.

6. *Indiana*.—*High v. Big Creek Ditching Assoc.*, 44 Ind. 356; *Bradley v. Frankfort*, 99 Ind. 417; *Fulton v. Cummings*, 132 Ind. 453.

Kentucky.—*Phillips v. Tucker*, 3 Metc. (Ky.) 69.

Maine.—*Clifford, Appellant*, 59 Me. 262.

Massachusetts.—*Taylor v. Worcester County*, 105 Mass. 225.

New Hampshire.—*March v. Portsmouth, etc., R. Co.*, 19 N. H. 372.

New York.—*People v. Cline*, 23 Barb. (N. Y.) 197.

Pennsylvania.—*Road in Lower Windsor*, 29 Pa. St. 18.

Vermont.—*Chase v. Rutland*, 47 Vt. 393.

See also, upon this subject generally, article JURIES.

7. *Kundinger v. Saginaw*, 59 Mich. 355.

8. *Chicago, etc., R. Co. v. Aldrich*, 134 Ill. 9.

Challenge to the Array.—The party

Peremptory Challenges are matter of right only when given by statute.¹

Waiver of Challenges.—Challenges to jurors must be made before they are sworn and before they enter on their duties.² If the landowner is then present, knowing a ground of challenge, and does not object, the right of challenge is waived,³ and it will be thereafter intended, though it be not shown by the record, that the jurors were competent.⁴ Objections to jurors on the ground

whose land was sought to be condemned objected to the array of jurors, and supported his challenge by an affidavit showing that the sixty-four jurors were all selected from four out of twenty-two towns in the county; that these four towns were greatly interested in behalf of the road, and that one of the jurors was a stockholder and two of them were not freeholders, as required by statute. The affidavit further showed that a large number of inhabitants of the four towns were subscribers to the stock, and that many had given the right of way. The affidavit, not being controverted, was held to show that the sixty-four persons had been unfairly selected, and that they furnished sufficient reasons for allowing the challenge. *Haslam v. Galena, etc., R. Co.*, 64 Ill. 353.

In a street-opening case, a challenge to the array was interposed on the ground that, under the charter of the city, the persons listed to serve as jurors in the court where the proceedings were pending, and from which persons the jury had been drawn, were required to be qualified electors, of fair character and sound mind, freeholders in said city, and capable of understanding and speaking intelligibly the English language, while the constitution provided that when private property was taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, should be ascertained by a jury of twelve freeholders residing in the vicinity of such property. There was held to be no constitutional objection to the legislature imposing the additional qualifications mentioned in said charter. *Saginaw v. Campau*, 102 Mich. 594.

A general objection, on appeal, to the whole panel, in proceedings to condemn land, is insufficient as an objection to a particular juror on the ground that he was a member of the

council when the ordinance providing for the proposed improvement was passed. *Kansas City v. Smart*, 128 Mo. 272.

1. *Brown v. Rome, etc., R. Co.*, 86 Ala. 206, 36 Am. & Eng. R. Cas. 571; *Davis v. Bangor, etc., R. Co.*, 60 Me. 303; *Convers's Appeal*, 18 Mich. 459.

2. *Molett v. Keenan*, 22 Ala. 484; *Burnham v. Goffstown*, 50 N. H. 560, and cases cited; *Hilltown Road*, 18 Pa. St. 233; *Road in Allen Tp.*, 18 Pa. St. 463.

3. *Hallock v. Franklin County*, 2 Met. (Mass.) 558; *Smith v. School Dist. No. 2*, 40 Mich. 143; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167.

Rule Applied.—A challenge to the favor in proceedings to condemn land is properly overruled if the judge knows at the time of nothing which would give the juror a bias; and if the challenger knows of facts which would do so, it is not enough to present them for the first time as a reason for refusing to confirm proceedings which have been long in progress at considerable cost, and in which the juror has taken part without any showing of legal cause against his acting. *Detroit Western Transit, etc., R. Co. v. Crane*, 50 Mich. 182, 10 Am. & Eng. R. Cas. 502.

Exception.—But where a stockholder is summoned as a juror, knowledge of the fact being peculiarly within the possession of the company, either the company or the juror ought to make the objection without waiting for a challenge; and, if it is not done, the opposite party may make the objection after the assessment is returned, and even in the appellate court. *Peninsular R. Co. v. Howard*, 20 Mich. 18, 1 Mich. N. P. [Supp.] vi.

4. *Long v. Commissioner's Ct.*, 18 Ala. 482; *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519; *People v. Taylor*, 34 Barb. (N. Y.) 481.

that they were not regularly certified or summoned are waived, unless taken on the trial.¹

5. Assessment by Commissioners—*a.* POWER TO APPOINT, AND WHEN PROPER.—In *Maine* the statute directs compensation to be assessed by the county commissioners, on the application either of the owner of the land or on that of the corporation.² In *Missouri* the constitution empowers the legislature to authorize commissioners to assess the damages in the first instance;³ and the legislature has this power everywhere, unless the constitution provides a tribunal for such purpose.⁴

b. PREREQUISITES TO APPOINTMENT.—Commissioners appointed by a judge are not officers, and there can be no *de facto* commissioners. They must be legally appointed or their award will be invalid.⁵ Before the appointment can be made all the preliminary

After Damages Paid.—One who has taken compensation for land condemned for a private way cannot afterwards object to the validity of the proceedings on the ground of a juror's incompetency; it was his duty to inquire therein while proceedings were pending. *Chatterton v. Parrott*, 46 Mich. 432.

1. *Lowndes County v. Bowie*, 34 Ala. 461; *Avery v. Groton*, 36 Conn. 304; *Fowler v. Middlesex County*, 6 Allen (Mass.) 92.

2. Me. Rev. Stat., c. 81; *Hall v. Pickering*, 40 Me. 548.

3. Const., art. 2, § 21; art. 12, § 4; *Rothan v. St. Louis, etc., R. Co.*, 113 Mo. 132.

Number of Commissioners.—Where the charter of a company provides that three commissioners or viewers shall be appointed to assess damages for land taken, that mode is properly followed where there is no evidence that the company has accepted the provisions of a subsequent act requiring the appointment of five commissioners. *North Missouri R. Co. v. Gott*, 25 Mo. 540.

4. See *supra*, IX. 1. *Powers of the Legislature.*

Court or Executive.—There is no more reason why the commissioners to condemn the land should be appointed by the executive than by the judiciary. *Virginia, etc., R. Co. v. Elliott*, 5 Nev. 358; *Kramer v. Cleveland, etc., R. Co.*, 5 Ohio St. 140.

Constitutionality of Charter Provision.—A provision in a railroad charter to ascertain, by commissioners, the value of lands taken, and vesting the lands in the company upon a tender of such as-

essment, although an appeal is given from such assessment to a jury, does not render the appointment of such commissioners unconstitutional. *Doughty v. Somerville, etc., R. Co.*, 21 N. J. L. 442. See also *In re Minneapolis, etc., R. Co.*, 36 Minn. 481, 30 Am. & Eng. R. Cas. 279.

Appointment after Judgment.—Where a judgment is entered in condemnation proceedings, but the commissioners of appraisal are not appointed, as required by the N. Y. Code Civ. Pro., § 3369, the omission may be supplied, on notice, under section 724, authorizing courts to supply omissions and to make amendments to the record. *Manhattan R. Co. v. Stroub*, 68 Hun (N. Y.) 90.

Where a Right of Way is Conveyed on Condition that the company shall pay therefor a sum to be fixed by a third person, which is not done, the case is a proper one for the appointment of commissioners. *Iowa Code*, § 1244; *Corbin v. Wisconsin, etc., R. Co.*, 66 Iowa 269.

Taking Additional Lands.—Commissioners are properly appointed where the evidence taken before a referee shows the necessity for additional lands, the taking of which is authorized by statute. *New York, etc., R. Co. v. Franz* (Supreme Ct.), 30 N. Y. St. Rep. 367.

5. *Lewis v. St. Paul, etc., R. Co.*, 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612, holding that recitals in the award that the commissioners were duly appointed by the judge and legally summoned by the sheriff are not facts required to be stated in the award, and do not prove that the commis-

provisions of the statute,¹ such as the service of notices and the expiration of the time given the landowner to apply, must be strictly and chronologically complied with, or the company will secure no right to have the property condemned against the opposition of the owners.² But if the landowner fails to appear it is not necessary to enter his default before appointing the commissioners.³ And if the petition states that a proper map of the road was filed in the proper county it need not appear that more was done in the construction of the road.⁴

sioners who purport to sign the award were duly and legally appointed.

1. *New York, etc., R. Co. v. Godwin*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 21, 62 Barb. (N. Y.) 85. See also *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 270.

2. *Matter of Long Island R. Co.*, 45 N. Y. 364; *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 270.

Want of Power to Condemn.—A landowner objected to the condemnation of lands on the ground that the company was incapable of exercising the right of eminent domain, but the trial court overruled the objection, both parties agreed to the appointment of commissioners, and no appeal was taken. Subsequently the court of last resort decided in a similar case that the company could not exercise the right of eminent domain, whereupon the landowner moved to set aside the order appointing the commissioners. The want of power in the company to condemn the lands was held to be a jurisdictional defect, and the right to make the motion to set aside was not waived by the landowner agreeing to the appointment of commissioners. *Matter of Niagara Falls, etc., R. Co.*, 121 N. Y. 319, *affirming* 51 Hun (N. Y.) 637.

Use Not Public.—Where an objection is made by a landowner that the use to which the land is to be devoted is a private use, a failure to appeal from an adverse decision and consent to appointment of appraisal commissioners is not a waiver of the right subsequently to move to set aside the order. *Matter of Niagara Falls, etc., R. Co.* (Supreme Ct.), 4 N. Y. Supp. 485.

Landowner Estopped.—Proceedings were instituted under the New York Act of 1880 (c. 191, Laws of 1880) to acquire title to lands for a public market in the city of New York. C, the owner of lands sought to be ac-

quired, joined in the proceedings by a petition asking for the appointment of a person named as one of the commissioners of estimate and assessment, who was appointed. The commissioners duly executed their office, appraising among other lands that of C, who thereupon moved to set aside the order appointing the commissioners, because of the alleged unconstitutionality of said act, and of noncompliance by the moving party with certain statutory conditions. It was held that C was estopped from raising these questions. *Matter of Cooper*, 93 N. Y. 507.

The Route of the Road over the lands in question must be determined, a survey thereof duly filed, and the proceedings must show on their face the inability of the parties to agree. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189.

3. *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17.

4. **Stating More than Required.**—If more is stated than the statute requires, it will be no reason for refusing the appointment, if the statutory requisites appear and are substantiated before the court making the appointment. *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co.*, 72 Mich. 206, 36 Am. & Eng. R. Cas. 553.

Partial Location.—It seems that under N. J. Act of February 26, 1847, incorporating the Somerville & Easton R. Co., the company cannot apply for commissioners of valuation and damages until the route of the whole road be located; but an injunction should be refused which seeks to restrain the company when applying for commissioners to value a part located, though the whole route is not located, where it appears that no irreparable or serious injury will result to the landowner, as the want of a strict legal right to do an act will not always warrant an injunction. *Doughty v. Somerville, etc., R. Co.*, 7 N. J. Eq. 51, *fol-*

c. THE APPLICATION AND HOW DETERMINED—FILLING VACANCIES—Time.—The owner of land taken who fails to agree as to the damages must apply for their assessment by commissioners within the time fixed by statute.¹

What Questions are to be Considered.—Where the proceedings are regular and the commissioners proper and suitable persons, it is the duty of the court to appoint them,² regardless of the question of the necessity of the taking, which is for the condemning party to determine,³ or of the question as to whether a good title can be acquired.⁴ The petitioner must prove its incorporation,⁵ and the application must be supported by affidavit. If it appears by counter-affidavits that the applicant has no color of right, the application should be refused,⁶ but if no sufficient cause is shown in opposition the court must appoint the commissioners, leaving further judicial action to the coming in of their report.⁷

lowed in *Redman v. Philadelphia, etc., R. Co.*, 33 N. J. Eq. 165, 1 Am. & Eng. R. Cas. 1.

1. *Davis v. Russell*, 47 Me. 443, holding, however, that where no application has been made to the county commissioners to estimate the damages, an action of trespass, brought against the company or its agent within three years after the location, cannot be maintained.

Where the statute gives the appointment of commissioners to the chancellor, or, in vacation, to his clerk, the appointment should be properly made, without the ordinary delay of a chancery suit. *Louisville, etc., R. Co. v. Dickson*, 63 Miss. 380, *followed* in *Canton, etc., R. Co. v. French*, 68 Miss. 22.

Effect of Removal to Federal Court.—Where a condemnation proceeding is instituted under a state statute, and the cause is removed to a federal court on the return day of the summons, commissioners will not be appointed until the next regular term after the removal, under the Missouri statutes providing that the landowner in condemnation proceedings shall have ten days' notice of the time when the petition will be heard. *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 36 Fed. Rep. 9.

2. *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353; *Albany St. Opening*, 6 Abb. Pr. (N. Y. Supreme Ct.) 273.

3. *Ex p. South Carolina R. Co.*, 2 Rich. (S. Car.) 434, *explained* in *Gear v. Dubuque, etc., R. Co.*, 20 Iowa 523.

4. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215.

5. *Chicago, etc., R. Co. v. Porter*, 43 Minn. 527, 43 Am. & Eng. R. Cas. 170.

Contrary Doctrine.—On an application for the appointment of commissioners to estimate the damages on a condemnation of land for the use of a railroad, the defendant cannot file an answer putting in issue the legal existence of the corporation, or its right to take the land. *West End Narrow Gauge R. Co. v. Almeroth*, 13 Mo. App. 91.

6. *West End Narrow Gauge R. Co. v. Almeroth*, 13 Mo. App. 91.

Counter-Affidavits Inadmissible.—Where a company is unable to agree for the purchase of land, and applies for the appointment of commissioners under the N. Y. General Railroad Act, the issues formed by a denial of any of the allegations of the petition must be supported by legal evidence adduced by the landowners, and not by mere affidavits. *Buffalo, etc., R. Co. v. Reynolds*, 6 How. Pr. (N. Y. Supreme Ct.) 96.

7. *Matter of Southern Boulevard R. Co.*, 146 N. Y. 352.

Naming the Proposed Commissioners.—Under the New York General Railroad Act of 1850, where the lands of several owners are involved, all such owners, collectively, may name six of the proposed commissioners, and the company a like number; but each owner is not entitled to name six persons. *Troy, etc., R. Co. v. Cleveland*, 6 How. Pr. (N. Y. Supreme Ct.) 238.

New Application.—Where an inquisition is set aside, the court may direct

Filling Vacancies.—Upon the death or refusal to serve of a commissioner the court may fill the vacancy.¹

d. ORDER OF APPOINTMENT—COMPELLING APPOINTMENT.—The Order need not be made *instantly*, but the judge may take time for decision; and an order of appointment subsequently made and signed is not invalid.² The order ought expressly to define and specify the property condemned.³ Delay on the part of the commissioners does not *ipso facto* annul the order, so that other proceedings can be instituted, so long as the proceedings in which the order was made are not discontinued.⁴

Mandamus to Compel Appointment.—Where, upon a proper application, a judge refuses to appoint commissioners, a mandamus will be granted compelling him to do so.⁵ The judge in such a case

another to be taken in the manner prescribed by the act; and the power so to direct continues and remains in the court until the company seeking the condemnation may choose to call for its exercise. It may be exerted at the term at which the first inquisition is set aside, or at any subsequent term, so long as the power to condemn under the company's charter exists. *George's Creek Coal, etc., Co. v. New Cent. Coal Co.*, 40 Md. 425.

Application Denied.—After the appointment of commissioners, and especially after a hearing upon the merits, it is too late to object to the regularity of the proceedings and the petition; neither can the objecting party move for the appointment of new commissioners. An application for the appointment of new commissioners is not a proceeding *de novo*, but a mere continuance of the original proceeding. *Matter of Rochester, etc., R. Co. (Supreme Ct.)*, 26 N. Y. St. Rep. 753, 54 Hun (N. Y.) 634, 4 Silv. Sup. Ct. (N. Y.) 92.

1. *United New Jersey R., etc., Co. v. National Docks, etc., Connecting R. Co.*, 54 N. J. L. 180; *Dallas, etc., R. Co. v. Day*, 3 Tex. Civ. App. 353.

And this empowers the court to vacate an order appointing commissioners on the ground of the bias of the persons appointed; but independent of the statute the court has the power, in its discretion, to vacate such an order and appoint new commissioners, and such order, being discretionary, is not appealable. *Matter of New York, etc., R. Co.*, 40 How. Pr. (N. Y. Supreme Ct.) 335.

2. *Lehigh Valley R. Co. v. Dover*,

etc., R. Co., 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87.

3. *Matter of New York, etc., R. Co.*, 62 Barb. (N. Y.) 85.

Form of Order.—An appointment of commissioners "to examine and appraise the said lands, and to assess the damages to be paid by the said company for the said lands so required as aforesaid," is sufficient; but if it was defective the words "pursuant to the provisions of the above recited act" would end all difficulty. *Doughty v. Somerville, etc., R. Co.*, 21 N. J. L. 442.

Lands "Proposed to be Taken."—Where the statute provides for commissioners to examine and appraise damages for lands "proposed to be taken," an order of appointment will be nugatory as to lands already appropriated, but valid as to lands thereafter to be taken. *Warren v. First Div. St. Paul, etc., R. Co.*, 18 Minn. 384.

4. *Matter of South Market St.*, 76 Hun (N. Y.) 85.

5. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353; *People v. McRoberts*, 62 Ill. 38.

Where there is No Appeal.—Where the general statutes relating to the powers and duties of a county judge do not authorize him to appoint commissioners, but provide for a right of appeal from his decision "in all cases not otherwise provided for," but the jurisdiction as to such proceedings is conferred by a special statute which contains no provision as to appeals, the provision in the general statutes will be held not to apply, and, therefore, no appeal will lie. Should the county judge refuse to act upon the proper application for the appoint-

acts as a ministerial officer and cannot refuse to act upon a proper application.¹

c. QUALIFICATIONS—In General.—The commissioners are *quasi* jurors, and should be free from all legal disability.²

Freeholders and Residents.—Ordinarily, the commissioners should be freeholders, but this statutory requirement may be waived, and failure to object, with knowledge, is a waiver.³

Disqualification of Interest.—A commissioner interested in the result of the proceedings is not competent to sit.⁴ But the objection

ment of such commissioners, or make such appointment without proper authority, the remedy in the former case will probably be by mandamus, and in the latter by common-law certiorari. *Western Union R. Co. v. Dickson*, 30 Wis. 389.

1. *Chicago, etc., R. Co. v. Wilson*, 17 Ill. 123.

But mandamus will not lie to compel the appointment where the petition and proceedings thereunder do not show that the land sought to be taken is subject to condemnation. *Detroit, etc., R. Co. v. Wayne Circuit Judge*, 95 Mich. 318.

2. *Rock Island, etc., R. Co. v. Lynch*, 23 Ill. 645.

Age.—Where the three county commissions to whom was referred a petition for a highway were unanimous in their report, it was held that even if one of them, who was more than seventy years of age at the time of the hearing, was to be regarded as disqualified on that account, the other two would constitute the committee, and could make their report as the entire board. *Betts v. New Hartford*, 25 Conn. 180.

They must Be Fair and Impartial as between the parties, and should be indifferently chosen or appointed, and their investigation should be open and known to both parties, giving to each an equal opportunity to appear and be heard. *Powers v. Bears*, 12 Wis. 214.

3. *Doddridge County v. Stout*, 9 W. Va. 703.

Where one of the landowners is an infant represented by a guardian *ad litem*, a report of commissioners will not be set aside for the reason that a commissioner was not a freeholder, where no objection was made in the court below, and there is no suggestion of improper conduct on the part of the commissioners. *Matter of New York, etc., R. Co.*, 35 Hun (N. Y.) 575.

Residence—Waiver.—So the statutory requirement as to the residence of the commissioners may be waived. *Matter of Gilroy*, 85 Hun (N. Y.) 424.

Disinterested Freeholders.—A statute requiring the commissioners to be "disinterested freeholders" means that they should be freeholders not pecuniarily interested in the proposed improvement. *Chase v. Rutland*, 47 Vt. 393.

Householders.—A statute calling for freeholders is not satisfied by the appointment of householders. *Fore v. Hoke*, 48 Mo. App. 254.

4. *Mitchell v. Holderness*, 29 N. H. 523.

Lack of Interest must Appear on Record.—When, by statute, proceedings to condemn lands may be commenced by application to a ministerial officer—*e. g.*, the clerk of court—and no judicial action by the court is required, it must appear of record that the terms of the statute have been strictly complied with; and if it nowhere appears, either in the appointment of commissioners, in their return, or in an order entered thereon, that they were "disinterested" as required by law, the proceedings are invalid. *Madden v. Louisville, etc., R. Co.*, 66 Miss. 258, 39 Am. & Eng. R. Cas. 95.

Power of Legislature to Remove the Disability.—Disqualifications by reason of interests that are common to all taxpayers may be removed by the legislature, but the legislature has not the power, where the interest is peculiar and direct, to authorize an interested commissioner to decide his own cause, or to give effect, by a retrospective act, to any action of the commissioners in which he took part. *State v. Crane*, 36 N. J. L. 394.

New York Rule.—A commissioner appointed by special statute to award damages for property taken in laying out a highway is not rendered incom-

of interest must be promptly made or it will be too late,¹ and the appointees will be presumed to be disinterested.²

Relationship by blood or affinity to one of the parties is also often a disqualification.³

Stockholders in the petitioning company are disqualified from acting as commissioners on the objection of the landowner.⁴

6. Assessment by Appraisers or Viewers—In General.—Similar rules to those just examined apply to this method of assessment. Inability to agree must be shown before appraisers or viewers can be appointed;⁵ and it should appear that the lands in question have been surveyed, located, and marked.⁶

Appointment.—They must be appointed by the court or judge, and not selected by the condemning party.⁷

petent from the fact of his owning land which has been taken for the improvement. A commissioner is a *quasi* judicial officer only, and is not within the application of the maxim precluding a person from acting as judge in his own case. *Matter of Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 447.

Expression of Opinion.—A commissioner should be rejected who has expressed opinions in connection with the proceeding which, if carried out, would defeat it. *Albany St. Opening*, 6 Abb. Pr. (N. Y. Supreme Ct.) 273.

Son in Employ of Company.—And a commissioner should be rejected who has a son in the employ of the petitioning company. *New York, etc., R. Co. v. Townsend*, 36 Hun (N. Y.) 630.

1. *Matter of Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 447.

2. *Gulf, etc., R. Co. v. Fort Worth, etc.*, R. Co., 86 Tex. 537.

3. *Matter of Middletown*, 21 Civ. Pro. Rep. (Orange County Ct.) 201, reversed in 63 Hun (N. Y.) 188, so far as proceedings for street opening are concerned.

Instances.—Thus a father-in-law to one whose property will be affected (*Bradley v. Frankfort*, 99 Ind. 417), or a brother-in-law of such a person (*Taylor v. Worcester County*, 105 Mass. 225, *contra*, *Groton v. Hurlburt*, 22 Conn. 178; *Matter of Middletown*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 12, unless there is proof of some direct interest of his own), is held disqualified, but a cousin by marriage is not. *Albany Northern R. Co. v. Cramer*, 7 How. Pr. (N. Y. Su-

preme Ct.) 164; *Chase v. Rutland*, 47 Vt. 393.

This Objection is Waived by going to trial with knowledge of the fact and without objection. *Crowell v. Londonderry*, 63 N. H. 42. *Contra*, *Taylor v. Worcester County*, 105 Mass. 225.

4. *Rock Island, etc., R. Co. v. Lynch*, 23 Ill. 645.

But the petitioning company cannot object upon this ground. *Strang v. Beloit, etc., R. Co.*, 16 Wis. 635.

5. *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165.

Proof of Inability to Agree.—To evince this fact no particular acts are to be done or forms observed, nor is a formal negotiation necessary; any circumstances which conduce to show that the parties could not agree are proper to be considered in the decision of the question. *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397. See *supra*, III. 5. *Effort to Agree with Landowner.*

6. *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

7. *Powers v. Bears*, 12 Wis. 213, 78 Am. Dec. 733.

The Clerk can appoint them only in vacation, and then as representing the court. *Click v. Western North Carolina R. Co.*, 98 N. Car. 390.

Duty of Court to Appoint.—If the petitioner brings its case within the statute the court is bound to appoint viewers, to the statutory number. *Hays v. Risher*, 32 Pa. St. 169; *Pittsburgh Nat. Bank v. Shoenberger*, 111 Pa. St. 95, 25 Am. & Eng. R. Cas. 177.

Form of Application.—An assessment of damages upon a petition for the ap-

Qualifications.—The qualifications of appraisers or viewers to assess damages in condemnation proceedings are almost entirely governed by statute.¹

Powers and Duties.—The duty of the viewers is performed when they have ascertained the quantity and value of the lands taken, and filed their report.² They should give notice of the time and place of their meeting to the owners through whose land the road will pass.³

pointment of "proper persons to view and adjudge the value of so much improved land as was taken up for the use of a turnpike road," cannot be sustained. The application should be for the appointment of proper persons to view and adjudge the amount of damages done by making a turnpike road over the land of the petitioner. *Quigley's Case*, 3 P. & W. (Pa.) 139.

1. **Indiana.**—Under the General Railroad Act of Indiana, appraisers appointed by the court, either originally or upon ordering a new appraisal, must be freeholders; and if the court, upon exceptions, order a new appraisal, the appraisers must possess the same qualification; but if either of the parties excepting to the first appraisal insist upon a jury trial, the jurors need only be reputable freeholders. It is otherwise if the proceedings are under the act relating to the writ for the assessment of damages. *Louisville, etc., Air Line R. Co. v. Dryden*, 39 Ind. 393, followed in *Louisville, etc., Air Line R. Co. v. Duvall*, 39 Ind. 398.

In **New Jersey** viewers must be citizens. But the Supreme Court will not quash condemnation proceedings on appeal because the record does not show affirmatively that the viewers were citizens of the county. *Hannibal, etc., R. Co. v. Morton*, 27 Mo. 317.

Disqualification.—Ownership of land along the proposed road disqualifies a viewer, *Daggy v. Green*, 12 Ind. 303; and so does the fact that he signed the petition for the road, *Thompson v. Multnomah County*, 2 Oregon 34.

Relationship to Owner.—An appraiser appointed to appraise the benefits and damages to accrue to landowners along the line of a ditch, whose sister-in-law, niece, and nephew own land along the line of the ditch, is not a disinterested party, and is disqualified from acting. *High v. Big Creek Ditching Assoc.*, 44 Ind. 356.

Taxpayer.—But the simple fact that

he is a taxpayer in the township where the improvement is located will not disqualify him. *Parsell v. State*, 30 N. J. L. 530.

Waiver of Objection to Competency.—If the contestant does not object to the competency of viewers either at the time of their appointment or on the coming in of their report, he cannot do so on appeal. *Lowndes County v. Bowie*, 34 Ala. 461. There being no averment to the contrary it will be presumed that they were duly qualified. *American Cannel Coal Co. v. Huntington, etc., R. Co.*, 130 Ind. 98, 51 Am. & Eng. R. Cas. 653.

2. *Crangle v. Harrisburg*, 1 Pa. St. 132.

A majority may act; it is not necessary that all should meet. *Van Steenberg v. Bigelow*, 3 Wend. (N. Y.) 42.

3. *Damrell v. San Joaquin County*, 40 Cal. 154.

Sufficiency of Notice.—Where the appraisers gave notice in writing of the time and place of appraisal to the party interested, who resided within eighty rods of the place and received the notice on the day previous to the time appointed, and who, instead of requesting delay, returned a written answer to the appraisers protesting against their authority to act, and declaring that he should not appear, such notice was held sufficient in point of time. *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397.

Where the subject of appraisal was described in the notice as land owned by the plaintiff, of which the state of Connecticut was mortgagee, when in fact the state was not mortgagee of all but of only a part of the land appraised, but the notice also referred, for further description, to a petition and the proceedings thereon, to which the plaintiff was a party, in which the boundaries of all the land to be appraised were defined with precision, such notice was held sufficient in point

7. **Assessment by Arbitrators—Validity.**—In condemnations by railroad and other private corporations or individuals, agreements to submit the question of compensation to the decision of arbitrators are valid and binding.¹ Such an arbitration is a bar to a subsequent appraisement by commissioners.²

Qualifications.—Arbitrators should be free from interest or relationship in all cases, unless such disqualifications are waived by the parties.³

X. CONDUCT OF THE TRIAL—1. Time and Place—*a.* IN GENERAL.—Where the statute requires the commissioners to view the land and hear evidence as to damages, they must give personal notice or have notice entered in the minutes of the court of the time and place of their meeting to assess the damages.⁴ A majority

of form. *Williams v. Hartford, etc.*, R. Co., 13 Conn. 397.

1. *Knoche v. Chicago, etc.*, R. Co., 34 Fed. Rep. 471; *Viele v. Troy, etc.*, R. Co., 20 N. Y. 184.

Even though a statute provides for a compulsory arbitration where the value of the land cannot be agreed upon. *La Crosse, etc.*, R. Co. *v. Seeger*, 4 Wis. 268.

2. *Tunbridge v. Tarbell*, 19 Vt. 453.

But where the Public Is the Condemning Party, as in street and highway cases, and the method of fixing compensation is prescribed by statute, the statute must be strictly followed, and a voluntary submission to arbitration cannot be sustained. *Eastman v. Stowe*, 37 Me. 86; *McCann v. Otoe County*, 9 Neb. 324; *Paret v. Bayonne*, 39 N. J. L. 564, and cases cited.

In *Indiana* it is held that no person owning land within one mile of a proposed railroad is competent to act as an arbitrator. *McMahon v. Cincinnati, etc.*, Short-Line R. Co., 5 Ind. 413.

Freeholders.—The statute provided that, for the purpose of determining the damages to be allowed for land taken for the use of the company, each party might select one disinterested freeholder of the county, and give notice to the other party to select another, to act as arbitrators. It was held that the claim filed need not show that the arbitrator selected by the claimant was a disinterested freeholder. *Centerville, etc.*, Turnpike Co. *v. Jarrett*, 4 Ind. 213.

3. *Stephenson v. Oatman*, 3 Lea (Tenn.) 462, holding that where a railroad is located over mortgaged lands, and the question of damages is sub-

mitted by agreement to arbitrators who are related to the landowner, which fact is known to the railroad company, but the fact of the mortgage was not known, the award should be set aside on the application of the company.

Hearing.—Where the submission contains a provision that the arbitrators may refuse to hear testimony, and may proceed in a manner that the majority may decide upon, such provision is not violated by one of the arbitrators, without the knowledge of the landowner, using information derived from evidence in another similar proceeding to support his views as to the value of the land. *Matter of Bennett* (Supreme Ct.), 30 N. Y. St. Rep. 166.

4. *Skinner v. Lake View Ave. Co.*, 57 Ill. 151.

Time and Place Fixed by Court.—The Ill. Act of 1852 provides that the court appointing the commissioners shall fix the time and place of their first meeting, but it is not explicitly required that such time and place shall be designated in the order of appointment. So where the order left the day of meeting in blank, but the copy of the order of appointment annexed to the report of the commissioners designated the day of their first meeting, and the report stated that the first meeting was held on the day thus designated, and that the commissioners proceeded "to hear the allegations and testimony of the parties in interest, and, upon request of parties, adjourned from time to time for that purpose," etc., it was held that this tended to show that there was a day fixed, or at least that the parties attended, and an objection that the time of meeting was not properly appointed was regarded as not well

of the commissioners must meet at the time and place fixed, and this must appear from their report.¹ An appeal to a jury from the report of commissioners is usually triable at the next term of the court after the appeal is perfected.²

b. CHANGE OF VENUE.—Where condemnation proceedings are pending in one county and the land to be taken lies in another, the place of trial must be changed to the latter county,³ or subsequent proceedings in the first county will be without jurisdiction and void.⁴ A change should also be ordered upon a credible showing that a fair trial cannot be had either before the court or the jury where the proceeding is pending.⁵ Where the statute

taken. *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333.

Notice Entered in Minutes.—A provision in a charter that the court shall make an order fixing the time and place at which commissioners shall meet to organize and hold their first meeting, and that notice of such meeting shall be entered in the minutes of the court, which shall be notice to all the parties, is not sufficiently complied with by stating that the commissioners shall meet to organize and hold their first meeting in a certain place which is a populous village, embracing two square miles of territory, and where no notice of the meeting was entered in the minutes of the court. *Minneapolis, etc., R. Co. v. Kanne*, 32 Minn. 174, 17 Am. & Eng. R. Cas. 122.

Length of Notice.—Under N. Y. Code Civ. Pro., § 3369, eight days' notice of the appointment of commissioners of appraisal shall be given, and of the time and place of their first meeting, and the court has no power to shorten the time of notice. *Manhattan R. Co. v. Stroub*, 68 Hun (N. Y.) 90.

1. Nev. Stat. 1864-65, 427, § 30; *Virginia, etc., R. Co. v. Lovejoy*, 8 Nev. 100.

If the First Meeting is Not Held at the time and place fixed in the order, a second order made at a subsequent term may fix a new time and place of meeting. *Gill v. Milwaukee, etc., R. Co.*, 76 Wis. 293.

2. *Chicago, etc., R. Co. v. Wilkins*, 42 Kan. 337.

Retrial after Reversal.—When a condemnation case has been appealed, and there has been a trial and judgment thereon, which has been reversed on error, and the case remitted, it is lawful for the justice holding the circuit to strike a jury, and set the case for trial on a day fixed by him. *Pennsyl-*

vania R. Co. v. National Docks Co. (N. J. 1896), 34 Atl. Rep. 753.

3. *Lehmicke v. St. Paul, etc., R. Co.*, 19 Minn. 464; *Curtis v. St. Paul, etc., R. Co.*, 20 Minn. 28.

A statute allowing a change of venue in any "civil suit" authorizes a change of venue of proceedings for the condemnation of land. *St. Louis, etc., R. Co. v. Fowler*, 113 Mo. 458.

Iowa.—The provisions of the Code, § 2590, for a change of venue in civil cases are applicable to proceedings on appeal to the Circuit Court from an award of damages for right of way by a sheriff's jury. *Whitney v. Atlantic Southern R. Co.*, 53 Iowa 651.

Pennsylvania.—The proviso of the first section of the Act of April 14, 1834, relative to the removal of suits brought by and against railroad companies to the common pleas of any adjacent county through which the road of the company is not located, etc., does not apply to the case of an appeal from the report of the viewers appointed to assess the damages occasioned by the location and construction of the road, when it assumes the form of a suit or action against the railroad company. *Pinneo v. Lackawanna, etc., R. Co.*, 43 Pa. St. 361.

4. *Allport v. Helena, etc., R. Co.*, 12 Mont. 279.

5. *Parks v. Wisconsin Cent. R. Co.*, 33 Wis. 413, where it is held that every person is presumed to be credible until the contrary is shown, within the meaning of a provision in a railroad charter that "any credible person" may make an affidavit for a change of venue in condemnation proceedings.

Pointing Out Proper County.—Upon an application for a change of venue on appeal from the award of commissioners, under the charter, if the party applying does not furnish to the court

requires the application for the change to be founded upon an affidavit, a verified petition will be regarded as an affidavit.¹

c. ADJOURNMENTS AND CONTINUANCES—Adjournments.—Commissioners duly appointed and duly convened may adjourn from time to time, and all persons notified of the first meeting must take notice of such adjournments.² A majority of the commissioners has power to adjourn,³ but an adjournment must not protract the proceedings beyond the time allowed for their completion.⁴ In the absence of a regular postponement a new notice is necessary to the validity of a subsequent meeting.⁵ A charter provision allowing the judge and each juror a certain sum "for each day" employed, impliedly authorizes the judge to adjourn the proceedings from day to day.⁶

Continuances.—Surprise is a ground for the continuance of the

proof as to which is the nearest county in which a fair trial can be had, the court may deny the application. *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184.

1. *Parks v. Wisconsin Cent. R. Co.*, 33 Wis. 413. See also *supra*, IV. 1. *In General*.

2. *Board of Supervisors v. Magoon*, 109 Ill. 142; *Leavenworth, etc., R. Co., v. Meyer*, 50 Kan. 25.

Irregular Adjournment.—Where commissioners proceeded to lay off a railroad route after proper notice by publication had been given, and after continuing their labors for several days adjourned subject to the call of the president of the board, embodying their doings in a written report and filing the same in the office of the county clerk of the county through which the proposed railroad was located, and thereafter convened again without notice to any one and proceeded to lay off a further route, it was held that such subsequent proceedings were utterly void as to all parties without notice of the subsequent meeting, as the adjournment of the commissioners under the circumstances stated was an abandonment by them of the proceedings commenced under the notice originally given. *Memphis, etc., R. Co. v. Parsons Town Co.*, 26 Kan. 503, 14 Am. & Eng. R. Cas. 379.

3. *Matter of Newland Ave.* (Supreme Ct.), 38 N. Y. St. Rep. 796, 15 N. Y. Supp. 63.

4. *Wood v. Highway Com'rs*, 62 Ill. 391; *Ruhland v. Hazel Green*, 55 Wis. 664.

5. *McPherson v. Holdridge*, 24 Ill. 38, *followed* in *Road Com'rs v. Hold-*

ridge, 24 Ill. 119; *New York, etc., R. Co. v. Capner*, 49 N. J. L. 555.

Taking Defaults.—After a hearing before commissioners had been adjourned several times because of the absence of a certain landowner, it was proven by the company that counsel for the company had given the landowner notice of the time to which the proceeding was adjourned, at which time the company would proceed to take proofs, and that the counsel for the landowner made no reply. On that day the commissioners took the evidence offered by the company and awarded the landowner nominal damages. It was held that a motion to open the default was properly denied. *Matter of Metropolitan El. R. Co.* (Supreme Ct.), 55 N. Y. St. Rep. 760.

6. *Polly v. Saratoga, etc., R. Co.*, 9 Barb. (N. Y.) 449.

Drawing of Jury.—In a proceeding for the assessment of damages the judge made an order appointing a time and place for drawing the jury, declaring therein that he would continue the drawing from day to day, if necessary, until a full jury should be obtained. This having been duly served upon the parties interested, and a competent number of jurors drawn at the appointed time, the judge adjourned the proceedings for three days for the purpose of then supplying vacancies, if any of the persons drawn should be unable to serve. On the adjourned day, and upon satisfactory evidence that two of the persons drawn could not attend, the judge supplied their places by a second drawing. It was held that the proceeding was regular. *People v. First Judge*, 2 Hill (N. Y.) 398.

proceeding,¹ but the filing of pleadings during the trial term, by order of the court, is not.²

2. The Hearing—Trial of Issues—*a.* IN GENERAL.—The proceedings before the commissioners constitute a mere assessment of damages, not a trial; the trial takes place previous to their appointment.³

b. SEPARATE TRIALS.—It has been held that each owner of each parcel has a right to a separate trial and finding, though all may be embraced in one application;⁴ but the better opinion seems to be that the court is not required to grant separate

1. Illustration.—Although the appropriation of land by a railroad is complete when it pays into the court the amount of damages awarded by the commissioners and takes possession, still, on a subsequent trial of the question of damages before a jury on an appeal from the award, the railroad may in reduction of the damages offer to build and maintain for the owner open crossings to aid in the use of the land as one tract. Such an offer will be considered as being in the nature of an amendment to the petition, and the defendants will be entitled to a postponement of the trial if surprised. *St. Louis, etc., R. Co. v. Clark*, 121 Mo. 169.

2. *Chicago, etc., R. Co. v. Wilkinson*, 42 Kan. 337.

Nor will the reference of claims against a railroad to an auditor entitle a claimant to a continuance of a trial on appeal from an award of arbitrators, where his claim is not yet liquidated, and consequently cannot be reported to the auditor. *Brunswick, etc., R. Co. v. McLaren*, 47 Ga. 546.

In *Michigan* the probate court cannot direct a continuance of a proceeding before commissioners appointed by it. *Michigan Cent. R. Co. v. Probate Judge*, 48 Mich. 638, 14 Am. & Eng. R. Cas. 351.

3. *Manhattan R. Co. v. Kent*, 80 Hun (N. Y.) 559.

All Parties Interested should be fully heard upon the merits and a refusal of such a hearing will be cause for rejecting the report. *Jones v. Goffstown*, 39 N. H. 254.

Other Interested Persons Not Parties.—If the commissioners learn of other interested persons, not parties, they should be brought in and their damages assessed before sending the case to a jury. *Fitchburg R. Co. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 58.

Party Discussing Merits with Commissioner.—One of the parties should not, in the absence of the other, be allowed to discuss the merits with the commissioners. *Louisville, etc., R. Co. v. Barrett*, 91 Ky. 487, 47 Am. & Eng. R. Cas. 169.

The Defendant Owner may Object to the entire assessment, where others are interested, as well as to the amount allowed to him. *Chicago, etc., R. Co. v. Baker*, 102 Mo. 553.

Nonsuit.—A company in possession and operating its railroad on the land by virtue of the proceedings cannot take a nonsuit against the landowner's consent. *Nevada, etc., R. Co. v. De Lissa*, 103 Mo. 125, following *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126.

Dismissal.—Where the estimate made by county commissioners of the damages sustained by a tenant for years, in consequence of the location and construction of a railroad over his estate, is revised by a jury, on the petition of such tenant, the verdict of the jury set aside by the court of common pleas, and the case remanded to the county commissioners, it seems that it is competent to the commissioners, on the motion of the petitioner, to dismiss the petition for a jury, bring forward the original petition and summon the reversioner to become a party thereto, and thereupon to proceed to estimate the whole damages, and to apportion the same between the parties interested. If such proceeding be objectionable, it can only be excepted to by the lessee, and not by the proprietors of the railroad. *Fitchburg R. Co. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 58.

4. *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308; *Philadelphia, etc., Coal, etc., Co. v. Chicago*, 158 Ill. 9; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

trials in such a case,¹ the statute not requiring such a procedure.² Where the parties previously agree thereto, the court may, in its discretion, order several petitions against different owners to be tried together,³ the jury making a separate assessment of damages to each owner.⁴

c. OATH—(1) To Jurors—Necessity.—It is absolutely essential to the validity of the proceedings that the jury should be sworn or affirmed,⁵ and the proceedings will be quashed if this was not done.⁶ But the objection must be raised before verdict, or it will be waived.⁷

Form and Sufficiency.—The jury should, in general, be sworn as in other civil cases.⁸ The oath is to be construed, not by itself, but as a part of the proceedings. If everything the statute requires is embraced, in substance, mere informalities, not prejudicial to the objecting party, will not invalidate the proceedings.⁹

1. Kohl v. U. S., 91 U. S. 367.

2. Fagan v. Chicago, 84 Ill. 227.

3. Burt v. Wigglesworth, 117 Mass. 302.

4. Grayville, etc., R. Co. v. Christy, 92 Ill. 337. Where the rights of one will, in any sense, depend upon the disposition of the case as to the others, then each party has a right to insist on all the others being before the court before proceeding to trial. Bowman v. Venice, etc., R. Co., 102 Ill. 459.

5. Lumsden v. Milwaukee, 8 Wis. 485; *In re* Nicetown Lane, 11 Phila. (Pa.) 377; State v. Oshkosh, 84 Wis. 548.

Statute must Provide for Oath.—In Lumsden v. Milwaukee, 8 Wis. 485, a charter not providing for swearing the jury was held unconstitutional, and a proceeding under it set aside, although the jury were, in fact, sworn; that fact not rendering their acts any more valid, under the circumstances, than if they had acted without oath.

6. Bowler v. Perrin, 47 Mich. 154.

7. Rockford, etc., R. Co. v. McKinley, 64 Ill. 338; Long v. Commissioners' Ct., 18 Ala. 482.

8. State v. Oshkosh, 84 Wis. 548; Knauff v. St. Paul, etc., R. Co., 22 Minn. 173, followed in Wilkin v. St. Paul, etc., R. Co., 22 Minn. 177.

A Jury of View also impaneled to assess damages should be sworn as respects the latter duty also, or the omission will be fatal. Molett v. Keenan, 22 Ala. 484.

9. East Saginaw, etc., R. Co. v. Benham, 28 Mich. 459; Grafton, etc., R.

Co. v. Foreman, 24 W. Va. 662, 20 Am. & Eng. R. Cas. 215.

What Sufficient.—The jury should be sworn "to discharge their duties fairly and to the best of their ability." Owen v. Jordan, 27 Ala. 608.

An oath in the form prescribed by the statute, with the addition of the words "if any," as to the damages, administered to a jury, before a justice of the peace, on a proceeding to establish a road, does not render the proceedings void. The error, if any, does not go to the jurisdiction. Hankins v. Calloway, 88 Ill. 155.

Under the Mich. Union Depot Act of 1881, the following oath to the jury is sufficient, namely, that they would "justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause." Fort-Street Union Depot Co. v. Morton, 83 Mich. 265, 47 Am. & Eng. R. Cas. 41.

What Insufficient.—An oath in the following words: We "do solemnly affirm that we will impartially view and mark out said road, as named in said order, and to us directed, to the best of our skill and ability," taken by the jury appointed to view and mark out the road, is not a substantial compliance with the requisition of the statute. (Clay's Dig. 507, § 4.) Molett v. Keenan, 22 Ala. 484.

It seems that it is not enough for jurors to swear that they will "examine and determine the necessity of locating and constructing a ditch

What the Record must Show.—The proceedings will be quashed unless the record shows that the jurors were properly sworn,¹ but on the question whether their report or the return of the sheriff should set out the oath, the authorities are divided.² A mere recital in the record has been held, in some cases, to be *prima facie* evidence,³ and in others sufficient evidence of the due administration of the oath;⁴ while other decisions require the facts showing a compliance with the statute to appear upon the record.⁵

(2) **To Commissioners—Necessity.**—According to the weight of authority, unless the commissioners are sworn faithfully to discharge their duties, in compliance substantially with the statutory form, if any, all their proceedings will be void.⁶

Sufficiency.—The oath need not be in the precise language of the described as follows," etc., as the constitution requires them to determine the necessity of taking land therefor, and the compensation to be paid for it. *Bowler v. Perrin*, 47 Mich. 154.

Irregularities must be Objected to.—In a proceeding by a city or village to condemn land, the jury were sworn to ascertain and report the just compensation, etc., according to the facts in the case as they should be made to appear from the evidence adduced, "the argument of counsel and the instructions of the court." The oath, as to the arguments of counsel and instructions of the court, was held to be improper, but as there was no objection to the irregularity, and as the record failed to show that the case was argued or that the court instructed the jury, the error was no ground of reversal. *Cahill v. Norwood Park*, 149 Ill. 156.

Place of Taking Oath.—It is not necessary that the jury be sworn on the lot to be condemned; if they meet there, they may be sworn elsewhere. *Baltimore, etc., R. Co. v. Van Ness*, 4 Cranch (C. C.) 595.

1. *Bowler v. Perrin*, 47 Mich. 154; *In re Nicetown Lane*, 11 Phila. (Pa.) 377.

2. That such oath should be set out, see *Walters v. Houck*, 7 Iowa 72; *In re Nicetown Lane*, 11 Phila. (Pa.) 377. That it need not be, see *Bowler v. Perrin*, 47 Mich. 154; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479, where merely the substance of the oath is said to be enough.

3. *Lowndes County v. Bowie*, 34 Ala. 461.

What Not a Mere Recital.—Where a sheriff returns that a jury of inquest

"were duly impaneled and sworn, according to law, to discharge their duties," the return must be considered as a statement that the proper oath was administered to the jury, and not as a mere recital of the substance of the oath administered. *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

4. *McAllilley v. Horton*, 75 Ala. 491; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17; *Hannibal, etc., R. Co. v. Morton*, 27 Mo. 317; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538.

5. *In re Nicetown Lane*, 11 Phila. (Pa.) 377; *Bowler v. Perrin*, 47 Mich. 154; *Walters v. Houck*, 7 Iowa 72; *State v. Van Geison*, 15 N. J. L. 339.

6. *Crossett v. Owens*, 110 Ill. 378; *Virginia, etc., R. Co. v. Lovejoy*, 8 Nev. 100, and cases cited as regards oath to jurors, *supra*.

All the Commissioners must be sworn, and the omission to swear one or two of them is as fatal as though none were sworn. *State v. Davis*, 13 N. J. L. 10; *State v. Ayres*, 15 N. J. L. 479; *State v. Hart*, 17 N. J. L. 185; *In re Broad St. Road*, 7 S. & R. (Pa.) 444.

In Missouri they need not be sworn in the first instance; it is enough if their report is under oath. *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Warren v. Gibson*, 40 Mo. App. 469.

In New Jersey the oath is unnecessary unless the act under which the proceeding is taken requires one. *Miller v. Craig*, 11 N. J. Eq. 175.

New Appraisalment.—Having once been sworn, the commissioners need not be resworn on making a new appraisalment by order of the court. *Low v. Galena, etc., R. Co.*, 18 Ill. 324.

statute so long as it embraces the substance thereof.¹ But it must cover all the requirements of the statute,² and must be administered by an officer duly qualified by law.³

What the Record must Show.—The record must show that the commissioners were duly sworn according to law before entering on their duties.⁴ In some jurisdictions this may be shown by recitals in the record to that effect;⁵ in others the facts must be stated, showing what duties they were sworn to perform,⁶ or the form of oath taken should be set out.⁷

(3) *To Appraisers and Viewers.*—Appraisers or surveyors of highways must not only take, but must subscribe, the oath required by the statute, or their return of a road will be quashed.⁸

1. *Matter of Lexington Ave.* (Supreme Ct.), 44 N. Y. St. Rep. 387.

Illustrations.—Thus the use of the word "declare" in place of the statutory word "promise" is not fatal. *Bassett v. Den*, 17 N. J. L. 432.

The statute required an oath "fairly and impartially to execute the duties imposed upon them by this act." The oath taken was "that they will fairly and impartially execute the duties imposed upon them by the above appointment," and it was held to be sufficient. *State v. Trenton*, 35 N. J. L. 485.

The omission of the word "faithfully" from the constitutional oath required to be taken by commissioners is sufficient to invalidate the proceeding, unless the parties can be held to have waived the objection by going on without calling attention to the defect until the report was made. *Matter of Gilroy*, 85 Hun (N. Y.) 424.

An oath "faithfully to discharge their duties" is insufficient where the statute (Pa. Act June 13, 1836, § 53) requires an oath to perform their duties "impartially and according to the best of their judgment." *Cambria St.*, 75 Pa. St. 357. But in a later case under the same statute an oath "to perform their duties in the premises according to law," was held sufficient. *Paschall St.*, 81 Pa. St. 118.

2. The statute required an oath to support the constitutions of the United States and of the state, and faithfully to discharge their duties, etc. An oath omitting the requirement in italics was held insufficient, and the proceedings were held void for want of jurisdiction. *Bohlman v. Green Bay, etc.*, R. Co., 40 Wis. 157.

Wisconsin Statute.—Wis. General

Railroad Act of 1872 operates as a repeal of all special charters granted prior thereto, so far as the same relate to the condemnation of lands; and its provisions relating to the form of oath that must be taken by commissioners appointed to appraise lands condemned governed after its passage, though the commissioners were appointed before its enactment. *Bohlman v. Green Bay, etc.*, R. Co., 40 Wis. 157.

3. *State v. Bayonne*, 35 N. J. L. 476. If the Statute Prescribes No Form of oath, general language may be employed, such as that they will "faithfully and impartially discharge the trust reposed in them," or "faithfully and impartially perform the service to which they are appointed." *Com. v. Westborough*, 3 Mass. 406.

4. *Breckinridge v. Ward*, 1 T. B. Mon. (Ky.) 57; *Virginia, etc.*, R. Co. v. *Lovejoy*, 8 Nev. 100; *Fisher v. Smith*, 5 Leigh (Va.) 611.

5. *Long v. Commissioners' Ct.*, 18 Ala. 482; *Hannibal, etc.*, R. Co. v. *Morton*, 27 Mo. 317; *Lyon v. Green Bay, etc.*, R. Co., 42 Wis. 538, *distinguishing* *Moore v. Superior, etc.*, R. Co., 34 Wis. 173, and *Bohlman v. Green Bay, etc.*, R. Co., 40 Wis. 157.

6. *Keenan v. Dallas County*, 26 Ala. 568; *Crossett v. Owens*, 110 Ill. 378.

7. *Walters v. Houck*, 7 Iowa 72.

8. *Fisher v. Allen*, 8 N. J. L. 301; *State v. Barnes*, 13 N. J. L. 268.

On Reappraisal.—But when once sworn they need not be resworn when the matter is referred back to them for reappraisal. *Low v. Galena, etc.*, R. Co., 18 Ill. 324.

Form.—In the absence of a statutory form of oath they may be sworn to "faithfully, justly, and impartially

Viewers.—Unless the viewers were sworn before they entered upon their duties their report will be set aside,¹ and a judgment entered thereon will be void.² The oath may be administered by a justice of the peace,³ and should be that they will perform their duties "impartially, and to the best of their judgment."⁴ In some states the due taking of the oath is sufficiently shown by a recital in the juror's report or return;⁵ in others such recital is insufficient, the statute requiring the oath itself to be set out in the record,⁶ or proof of its administration to be made by the official certificate or testimony of the officer before whom it was taken.⁷

(4) *To Arbitrators.*—Where the damages are assessed by arbitrators agreed upon by the parties, such arbitrators and the umpire, if any, should be sworn.⁸

d. SUBMISSION OF SIMILAR ISSUES TO SAME JURY.—Ordinarily the same jury may assess the damages to several tracts of land owned by different persons but embraced in the same petition.⁹ This is discretionary with the court,¹⁰ and the same prin-

appraise the value or values of said parcels of land, and of the respective interests therein, to the best of their skill and judgment." *Shoemaker v. U. S.*, 147 U. S. 282. And see *Com. v. Westborough*, 3 Mass. 406.

1. *Elliot v. Lewis*, 1 A. K. Marsh. (Ky.) 453; *Grimes v. Doyle*, Sneed (Ky.) 58; *In re Broad St. Road*, 7 S. & R. (Pa.) 444; *Bryson's Road*, 2 P. & W. (Pa.) 207.

2. *Frith v. Justices, etc.*, 30 Ga. 723.

3. *State v. Hutchinson*, 10 N. J. L. 242.

4. *In re Road in East Donegal Tp.*, 90 Pa. St. 190.

5. *Wood v. Campbell*, 14 B. Mon. (Ky.) 339; *Hannibal, etc., R. Co. v. Morton*, 27 Mo. 317; *In re Road in East Donegal Tp.*, 90 Pa. St. 190.

6. *Keenan v. Dallas County*, 26 Ala. 568.

7. *Dollarhide v. Muscatine County*, 1 Greene (Iowa) 158.

Collateral Attack.—The oath of the viewers appointed to examine a proposed route for a road not being jurisdictional, the fact of its not being in the form prescribed, or a failure of the record to show that any oath was taken, cannot, in a collateral proceeding, be heard to affect the validity of the order for the road. The same may be said of any other errors not affecting the jurisdiction. *Henline v. People*, 81 Ill. 269.

8. *Anderson v. Ft. Worth*, 83 Tex. 107.

In Maine they need not be sworn even though the submission confers upon them the powers of commissioners, who by law must act under oath. *Bradstreet v. Erskine*, 50 Me. 407.

In Illinois, if the submission does not require the arbitrators to be sworn, the award reached by them without being sworn is valid as a common-law award, whether it be such an award as judgment may be rendered upon or not. *Kankakee, etc., R. Co. v. Alfred*, 3 Ill. App. 511.

9. *Grayville, etc., R. Co. v. Christy*, 92 Ill. 337; *Levee Com'rs v. Allen*, 60 Miss. 93.

Under a statute which directs that when two or more persons apply at the same time to the county commissioners for a jury to assess damages caused by the laying out of a highway or railroad, "the said commissioners shall cause all such applications to be considered and determined by the same jury," the most proper course for the commissioners is to issue a single warrant to an officer, reciting all the cases that are to be heard by the jury. If separate warrants for each case be issued by the commissioners, yet if the officer summon a single jury, who hear and determine each case, their verdicts will not be set aside merely because several warrants were irregularly issued. *Wyman v. Lexington, etc., R. Co.*, 13 Met. (Mass.) 316.

10. *Concordia Cemetery Assoc. v.*

ciple applies where different persons have several and distinct interests in the same tract; but the compensation to each owner should be separately assessed.¹ So two petitions, one for damages for taking land for a highway, and the other for damages to the same land for altering the grade of the way, may be submitted together to one jury.² And a reassessment may be by the same tribunal where the error in the original assessment was merely formal.³

e. QUESTIONS TO BE PASSED UPON BY COMMISSIONERS—In General.—The commissioners, in railroad cases, are the judges of the law as well as of the facts.⁴ It is their sole office to estimate and ascertain the value of the land taken,⁵ and the improvements thereon, with the damages to be sustained by reason of the taking,⁶ or by reason of the acts of the condemning party, where such acts are authorized by its charter.⁷

They may allow amendments to the petition, after hearing the

Minnesota, etc., R. Co., 121 Ill. 199, 30 Am. & Eng. R. Cas. 363.

1. *Bowman v. Venice*, etc., R. Co., 102 Ill. 459, 14 Am. & Eng. R. Cas. 338; *Grayville*, etc., R. Co. *v. Christy*, 92 Ill. 337; *Giesy v. Cincinnati*, etc., R. Co., 4 Ohio St. 308.

Such Cases must be Tried Together.—Where there are two or more conflicting claims to the same parcel, and more than one demands a trial by jury, such trials must be before the jury at one and the same time. *Charleston*, etc., *Bridge Co. v. Comstock*, 36 W. Va. 263. See also *supra*, X. 2. *b. Separate Trials*.

2. *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546.

3. *Readington Tp. v. Dilley*, 24 N. J. L. 209; *Road in Chartiers Tp.*, 34 Pa. St. 413.

But a denial of the petitioner's incorporation and issues as to value and resultant damages cannot be tried together. *Oregon Cent. R. Co. v. Wait*, 3 Oregon 91; *Oregon Cascade R. Co. v. Bailly*, 3 Oregon 164; *Oregon Cent. R. Co. v. Wait*, 3 Oregon 428.

4. *Port Huron*, etc., R. Co. *v. Voorheis*, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227.

Instructions need not be given by the court to the commissioners as to their duties in assessing the damages, unless requested. *Chicago*, etc., R. Co. *v. Randolph Town-Site Co.*, 103 Mo. 451, 47 Am. & Eng. R. Cas. 118. And it has been held not error for the court to refuse to instruct the commissioners at the request of the respondent.

Flint, etc., R. Co. *v. Detroit*, etc., R. Co., 64 Mich. 350.

5. *Matter of Thompson* (Supreme Ct.), 5 N. Y. Supp. 370; *Hooker v. Montpelier*, etc., R. Co., 62 Vt. 47.

Quantity.—Under the act incorporating the Carolina Central R. Co., and providing for the condemnation of land for the construction and operation of the road (N. Car. Laws 1872-73, c. 75, §§ 9, 10), it is the duty of the commissioners appointed by the court not only to ascertain the value, but also the quantity of the land which it is necessary to appropriate; and the landowner does not waive his right to insist on the performance of his duty by failing to answer the allegations of the petitioner as to the quantity necessary. *Carolina Cent. R. Co. v. Love*, 81 N. Car. 434; *Carolina Cent. R. Co. v. Phillips*, 78 N. Car. 49.

If the valuation be made before the company enter, they may, it seems, take any quantity of land they may deem necessary; but if they enter upon the land without having purchased and before valuation, the charter fixes the quantity to the use of which they are entitled at one hundred feet on each side of the road, and that quantity they may be required to pay for. *Greenville*, etc., R. Co. *v. Nunnamaker*, 4 Rich. (S. Car.) 107.

6. *Bennett v. Boyle*, 40 Barb. (N. Y.) 551; *Greenville*, etc., R. Co. *v. Nunnamaker*, 4 Rich. (S. Car.) 107.

7. *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365.

parties and before issuing a warrant for a jury,¹ and hear objections, with a view to the correction of mistakes.²

Title.—The question of title cannot be litigated before the commissioners,³ and they cannot assess the damages of a party claiming an equitable interest in the lands.⁴

Corporate Existence and Right to Condemn.—The commissioners have no power to pass upon the question of the corporate existence of the petitioning party,⁵ or its right to condemn the property for the purposes named.⁶

Consent of Owner.—Nor can they inquire as to the consent of the owner to the taking.⁷

Crossings.—Nor can they establish private crossings, other than farm crossings, or otherwise limit or restrict railroads in the free enjoyment of their roadways within their proper location.⁸

f. FUNCTIONS AND POWERS OF OFFICER PRESIDING OVER JURY.—Interest in the event disqualifies one appointed to preside over the jury.⁹ A deputy may preside in place of the sheriff during his absence.¹⁰ The particular functions of the officer presiding over the jury in condemnation proceedings vary according to the statutes in the jurisdiction where he sits.¹¹ It is, however,

1. *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 553.

2. *In re Clear Lake Water Co.*, 48 Cal. 586.

3. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *San Francisco, etc., R. Co. v. Mahoney*, 29 Cal. 112; *Wilcox v. Oakland*, 49 Cal. 29; *Port Huron, etc., R. Co. v. Voorheis*, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227; *Ross v. Elizabethtown, etc., R. Co.*, 20 N. J. L. 230.

4. *McIntyre v. Easton, etc., R. Co.*, 26 N. J. Eq. 425, holding that their province is to estimate the value of the land and the damages by reason of the taking of it; and all claims of equitable estates or liens in or on the land are to be left to be disposed of by agreement of the parties, or by the appropriate tribunal.

But they may assess damages to particular persons where the question of title is raised, under a statute requiring them to ascertain the ownership of the land. *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56; *Winebiddle v. Pennsylvania R. Co.*, 2 Grant's Cas. (Pa.) 32.

5. *Schroeder v. Detroit, etc., R. Co.*, 44 Mich. 387.

6. *Forbes v. Delashmutt*, 68 Iowa 164.

7. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

8. *Hewett v. County Com'rs*, 85 Me. 308.

9. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269, holding, however, that the objection is waived by proceeding to trial with knowledge of the fact.

Mayor.—In a street opening case, the fact that the mayor of the city was the owner of a lot on the street was held not to disqualify him from presiding in the mayor's court in which the proceeding was tried, his duties being ministerial merely. *Lexington v. Long*, 31 Mo. 369.

10. *Tripp v. Bristol County*, 2 Allen (Mass.) 556.

If the Sheriff is Disqualified by interest the coroner may preside, although he is also a deputy sheriff. *Wood v. Quincy*, 11 Cush. (Mass.) 487.

11. **In Alabama** he may charge the jury. *Owen v. Jordan*, 27 Ala. 608, holding that the record must show that he did so in the manner directed by the statute.

In Maine he is not authorized to charge the jury, under a statute empowering him to keep order and administer oaths to the jury and the witnesses. But where this assumption of power is exercised at the request of one of the parties to the proceedings, he cannot complain, even if the instructions are erroneous. If the presiding officer gives erroneous instruc-

generally made his duty by statute to certify his rulings if requested by either party, but failure so to request is a waiver of the statutory requirement.¹ His official return when made and filed in the appellate court is conclusive and not open to alteration or amendment.²

g. QUESTIONS TO BE CONSIDERED BY JURY—(1) Matters Covered by Award of Commissioners.—The inquiry, on a trial by a jury, on an appeal from an award by commissioners is ordinarily confined to the particular matters covered by the award.³ Thus, where an unqualified right of way is proposed to be taken, the jury cannot consider, on the question of damages, an offer by the company, made on the appeal but not made before the commis-

sions to such jury, whether the party suffering thereby without fault may not obtain relief by certiorari, *quære*. *McKenney v. Penobscot County*, 40 Me. 136.

In *Massachusetts* the officer and not the jury is to determine the construction and effect of a former verdict, *Wilmarth v. Knight*, 7 Gray (Mass.) 294, and to pass upon the admissibility of evidence. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269. And it is within his discretion to question a witness on a material point, *Fowler v. Middlesex County*, 6 Allen (Mass.) 92, and to allow a plan, not proved to be accurate, to be shown to the jury, as a general representation of the situation and area of the land. *Paine v. Woods*, 108 Mass. 160.

In *Michigan* his functions are purely advisory, and his rulings will not be reviewed as such, but only as the action of the jury. *Grand Rapids, etc., R. Co. v. Chesebro*, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159.

In such cases an appellate court will not consider questions raised on merely technical objections to the admission or rejection of testimony by the jury, though in accordance with the magistrate's rulings. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378, followed in *Fort-Street Union Depot Co. v. Jones*, 83 Mich. 415.

1. Me. Rev. Stat., c. 18, § 12; Allen *v. Androscoggin R. Co.*, 60 Me. 494.

Proceedings in Part before Coroner.—Where proceedings for the assessment by a jury of damages for land taken are conducted in part by a coroner, under Mass. Rev. Stat., c. 24, § 23, and in part by the sheriff, it is the duty of each of those officers to certify the pro-

ceedings which take place before him; and in such a case, where the coroner presides, it is no objection to the verdict that the jury are not attended by a deputy sheriff. *Pittsfield, etc., R. Corp. v. Foster*, 1 Cush. (Mass.) 480.

2. *Gay v. Gardiner*, 54 Me. 477.

3. *Chicago, etc., R. Co. v. Grovier*, 41 Kan. 685, 39 Am. & Eng. R. Cas. 146; *Burlington, etc., R. Co. v. Schluntz*, 14 Neb. 421, 14 Am. & Eng. R. Cas. 182.

Property Not Covered by Award.—Any property not included in the report of the award will not be affected by the proceeding; and if other property is occupied or used by the company, the damages for the same is not a proper subject of inquiry upon the appeal. *Chicago, etc., R. Co. v. Grovier*, 41 Kan. 685.

Interests of Party Not Appealing.—The commissioners made separate awards in favor of respondents, as owners, and one K, as mortgagee. Respondents appealed from the award as respected their damages, but K did not. Pending the appeal K became the owner of the property by a foreclosure of his mortgage and the expiration of the period for redemption, but no steps were taken for the substitution of parties to the record by reason thereof. It was held that on the trial of such appeal before the jury the sole question for its determination was the propriety of the amount awarded by the commissioners to respondents as compensation for their interest and estate in the property, so far as it was injuriously affected or taken by the company, and that such compensation must be ascertained by the jury in reference to the same estate and interest, and as of the same time, as was

sioners, to maintain for the owner a perpetual crossing.¹ Nor can they consider negligent or wanton injuries done in constructing the road which were not brought to the attention of the commissioners.²

(2) *Amount of Compensation—In General.*—The sole purpose of the investigation is to ascertain the just compensation to be made to the landowner for the property taken or injured, and the statutes contemplate the submission of no other questions or issues to the jury.³ The submission to them of special questions

done by the commissioners in making their award. The fact that K, the mortgagee, had become the absolute owner of such estate pending such appeal in no way affected the question to be litigated before the jury. The award as to K, as mortgagee, not having been appealed from, was conclusive as between K and the company; and though it was competent evidence as to the amount of his damages—proper for the consideration of the jury in determining the amount of respondents' damages—yet it was not conclusive. *Trodden v. Winona, etc., R. Co., 22 Minn. 198.*

1. *Schermeely v. Stillwater, etc., R. Co., 16 Minn. 506.*

Exceptions.—When a condemning company has not set out in the petition for the appointment of commissioners the plan of construction of its railroad over the condemned land, it may, on the trial before a jury, disclose and announce such plan, and in that case the award should be made in view of the use of the land in any lawful mode within such plan, which plan ought, if required, to be made part of the record; but if it omits or refuses to disclose its plan, then the award should be made in view of the use of the land in any lawful mode whatever. *Packard v. Bergen Neck R. Co., 54 N. J. L. 553.*

Although the appropriation of land for right of way is complete when the amount of damages awarded by the commissioners is paid into court and possession is taken, and the statute declares that any subsequent proceedings shall only affect the amount of compensation to be allowed, the condemning company may, upon a subsequent trial before a jury, and an appeal from the award, announce and make a matter of record, if not done in its petition, that it intends so to construct its roads as to reserve to the landowner

certain crossings, in order to limit the amount of damages to be assessed. *St. Louis, etc., R. Co. v. Clark, 121 Mo. 169, 57 Am. & Eng. R. Cas. 542.*

2. *Burlington, etc., R. Co. v. Schluntz, 14 Neb. 421, 14 Am. & Eng. R. Cas. 182.*

3. *O'Hare v. Chicago, etc., R. Co., 139 Ill. 151; Vandegrift v. Delaware R. Co., 2 Houst. (Del.) 287; Rippe v. Chicago, etc., R. Co., 20 Minn. 187; Horner, etc., Lateral R. Co., 37 Pa. St. 333; Boyd v. Negley, 40 Pa. St. 377; Atchison, etc., R. Co. v. Patch, 28 Kan. 470; Wabaunsee County v. Bisby, 37 Kan. 253; Mississippi, etc., R. Co. v. Rosseau, 8 Iowa 373; Turner v. Holleran, 11 Minn. 253; Warren v. First Div. St. Paul, etc., R. Co., 18 Minn. 384; Rippe v. Chicago, etc., R. Co., 23 Minn. 18.*

The Questions to be Submitted to the jury were whether the property of the complaining parties had been injured by the company's use of the street, whether this injury was permanent, and, if so, to what damages they were entitled. There was no error in restricting the inquiry to these points. *Guess v. Stone Mountain Granite, etc., Co., 72 Ga. 320.*

It is peculiarly for the jury, under the direction of the court, to fix compensation for and damage to the property, concerning which there is always great conflict. *Snodgrass v. Chicago, 152 Ill. 600.*

In a proceeding to ascertain the compensation payable by the national government for flooding lands by the construction and maintenance of a dam to improve the navigation of a river, the question whether the lands, docks, wharves, piers, and structures affected by a rise of water lie within the banks of the river is a question of fact to be determined by the jury, as is also the further question whether any part within the banks of the river is an

is not provided for.¹

Amount of Commissioners' Award Not Binding on Jury.—The amount awarded by the commissioners does not conclude the jury, who may find higher damages.²

(3) *Power to Condemn and Question of Title*—**Power to Condemn.**—This question can only be raised when the application is made for the appointment of commissioners,³ or on review of questions of law by appeal, certiorari, or some other direct proceeding authorized by law.⁴ It cannot be considered on the jury

obstruction to navigation. *Paine Lumber Co. v. U. S.*, 55 Fed. Rep. 854.

On appeal to the Circuit Court from the assessment of damages, an issue was framed and submitted to a jury in the Circuit Court in these words: "How much compensation is the appellant * * * entitled to for the right of way through his lands?" It was held that the submission was sufficiently specific to justify the jury, in accordance with the terms of the statute, in estimating not only the value of the land taken, but also such special damage as the construction of the road through his land would cause to the landowner. *Bowen v. Atlantic, etc., R. Co.*, 17 S. Car. 574, 14 Am. & Eng. R. Cas. 332.

1. *Toledo, etc., R. Co. v. Campau*, 83 Mich. 31, *followed* in *Toledo, etc., R. Co. v. Campau*, 83 Mich. 33.

Illustrations.—Under Mass. Stat. of 1873, c. 189, authorizing the taking of land in Boston for a post office, the only issue to be submitted to the jury is the valuation of the land taken; the question whether a case has arisen to which the statute applies is for the court. *Burt v. Brigham*, 117 Mass. 307.

Where county commissioners, in assessing damages for land taken for a railroad before Mass. Act of 1841, c. 125, was passed, awarded a sum of money to the complainant, and also provided that the proprietors of the road should make and maintain certain fences for his benefit, and such complainant appealed from the award of the commissioners to a jury, who assessed damages in his favor, but made no order in their verdict as to the fences, it was held that the proprietors of the road were under no legal obligation to make and maintain fences, agreeably to the award of the commissioners. *Morss v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 536.

2. *St. Paul, etc., R. Co. v. Murphy*,

19 Minn. 500; *North Eastern R. Co. v. Sineath*, 8 Rich. (S. Car.) 185.

Exceptions.—Where the appraisers appointed to assess the damages reported the amount thereof at three hundred dollars, to which the owner of the property did not except, but the railroad company did, upon the ground that such assessment was excessive, and appealed to the superior court, where the jury returned a verdict for a greater sum, it was held that judgment could not properly be rendered for a greater amount than the original assessment, as the only issue on the appeal was whether such assessment was excessive. *Durham, etc., R. Co. v. Bullock Church*, 104 N. Car. 525, 44 Am. & Eng. R. Cas. 151.

Reading Notice of Appeal.—It is error to permit the notice of appeal to be read to the jury for the purpose of informing them what sum the commissioners awarded, *Seefeld v. Chicago, etc., R. Co.*, 67 Wis. 96; but whether such error would of itself work a reversal of the judgment is not decided.

Period Covering Inquiry.—In *New Jersey* there is no inflexible rule which limits the period over which the inquiry may be extended as to the market value of the lands taken. How long anterior or subsequent to the first appraisalment the investigation may be carried is left, in a great measure, to the sound discretion of the court. *Montclair R. Co. v. Benson*, 36 N. J. L. 557.

But in *Missouri* the jury are confined in their inquiry to the time of the first appraisalment, and cannot consider any change in the condition of the property occurring subsequently thereto. *Missouri Pac. R. Co. v. Wernwag*, 35 Mo. App. 449.

3. See *supra*, IX. 5. *b. Prerequisites to Appointment.*

4. *Miller v. Prairie du Chien, etc., R. Co.*, 34 Wis. 533.

trial,¹ and the landowner, by appearing and consenting to the selection of the jury, and contesting the case on the merits, waives all contest with regard to it.²

Title.—The jury has nothing to do with the question of title, and cannot consider it.³

(4) *Necessity of the Taking*.—Ordinarily the question of the necessity, expediency, or propriety of exercising the right of eminent domain in favor of railroads is for the legislature to determine,⁴ and is not to be tried by the jury in a condemnation proceeding unless the statute requires it.⁵ In other condemna-

1. Packard v. Bergen Neck R. Co., 54 N. J. L. 553.

2. Lieberman v. Chicago, etc., R. Co., 141 Ill. 140, 51 Am. & Eng. R. Cas. 581; Miller v. Prairie du Chien, etc., R. Co., 34 Wis. 533.

3. Mansfield, etc., R. Co. v. Clark, 2 Mich. N. P. [Supp.] 119. But see *contra*, Thurston v. Portland, 63 Me. 149.

Landowner must Prove Title.—Where the plaintiff failed to establish title except to an undivided interest, but the jury assessed and allowed him damages as the owner of the entire tract, it was held that a new trial should be granted. Morin v. St. Paul, etc., R. Co., 30 Minn. 100, 10 Am. & Eng. R. Cas. 223.

Where two contiguous lots constituted but one property, and it was sought to appropriate one of them only for right of way purposes, but the commissioners assessed the damages to the whole property, and the person to whom the notice of condemnation was given as the owner thereof appealed, but the railroad company did not appeal, nor in any other way raise an issue as to the ownership of the other lot, it was held that the legal presumption arises that the appellant is the owner of both lots, and it is not necessary for him to prove his title upon the trial of his appeal. Cummins v. Des Moines, etc., R. Co., 63 Iowa 397, 17 Am. & Eng. R. Cas. 86.

Pleading title, see *supra*, VII. 10. *Averments as to Title*.

Plaintiff cannot raise the issue of defendant's title for the first time after the question of damages has been submitted to the jury. Bellingham Bay, etc., R. Co. v. Strand (Wash. 1896), 44 Pac. Rep. 140.

4. See *supra*, III. 3. *Determining Questions of Necessity and Propriety*, where this branch of the subject is more fully considered. See also *supra*,

VII. 9. *Alleging the Necessity of the Taking*; VII. 14. *d. Denying Public Character of Use or Necessity of Taking*.

5. De Buol v. Freeport, etc., R. Co., 111 Ill. 499; Kansas City v. Baird, 98 Mo. 215; Boyd v. Negley, 40 Pa. St. 377; Brown v. Peterson, 40 Pa. St. 373; Burns v. Milwaukee, etc., R. Co., 9 Wis. 450.

Illustrations.—In proceedings to condemn a railroad right of way in a public street, the respondents, whose mill property fronted on said street, contended before the jury that there was no necessity for taking the street for such right of way, as the petitioner could lawfully condemn a strip of land belonging to another railroad company, and used by it for yard purposes, upon the opposite side of the street from respondents' property; they introduced testimony in support of such contention, and their counsel urged such alleged right in his argument before the jury. The court held that such evidence and argument must have affected the jury in determining the amount of damages to be awarded to respondents, which the petitioner claimed was excessive, and that the jury should not have permitted the testimony to be given, nor listened to arguments thereon. Fort-Street Union Depot Co. v. Backus, 92 Mich. 33.

The question at issue being the value of land proposed to be taken for railroad purposes, it was an error to admit evidence to show that there was no route by which the proposed railroad could be built except across the land in question. Union Depot, etc., Co. v. Brunswick, 31 Minn. 297, 14 Am. & Eng. R. Cas. 233.

If the petitioner already has the right of way sought by another route, that fact is proper evidence to submit to the viewers or to the court below on the

tions, however, the statutes in many of the states expressly provide that the jury, or other tribunal assessing the damages, shall make a finding as to the public convenience or necessity of the proposed improvement.¹

(5) *Route*.—The route of the road is not among the issues submitted to the jury in an expropriation proceeding.²

h. RIGHT TO SWEAR WITNESSES AND HEAR EVIDENCE—Commissioners.—In some decisions it has been held that the commissioners, unless empowered by statute to do so, have no right to swear witnesses and hear evidence; that they are to judge only from inspection of the premises,³ and after hearing the parties or their counsel.⁴ Other cases concede them the option to hear

question of the necessity of the road; but it has nothing to do with the question of damages, and is not evidence for the appellate jury. *Boyd v. Negley*, 40 Pa. St. 377.

California Statute.—Whether land sought to be condemned for workshops is necessary for that purpose is a question of fact on which issue may be joined at the trial, under the Code, §§ 465, 1238. *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223, distinguished in *Moran v. Ross*, 79 Cal. 159, 39 Am. & Eng. R. Cas. 1.

Massachusetts Rule.—It seems that on a claim for damages for land taken for a railroad the claimant may prove, by the testimony of the engineer who made the preliminary surveys and plans for such road, that the same might have been located, pursuant to the charter, in various modes which would not have required the taking of the land of such claimant. *Com. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 53.

Pennsylvania Statute.—Under the act incorporating the Delaware & Schuylkill Canal Company, the jury shall judge whether a bridge or ford be necessary, but cannot find that neither is necessary. *Delaware, etc., Canal Nav. Co. v. Mifflin*, 1 Yeates (Pa.) 430.

1. **Parks and Boulevards**.—Under Act No. 388 of Mich. Local Acts, of 1889, which provides for condemnation proceedings by the commissioners of parks and boulevards of the city of Detroit, and that the jury impaneled therein "shall be sworn to ascertain and determine the necessity of taking the several parcels of land sought to be taken for the purpose set forth in the petition, and, if taken, to determine and award to each person entitled thereto the proper compensation,"

etc., the question of the necessity for taking the property, including the public necessity for making the improvement, is as fully committed to the jury as is the question of compensation. *Parks, etc., Com'rs v. Moesta*, 91 Mich. 149.

2. *New Orleans, etc., R. Co. v. Robertson*, 34 La. Ann. 865.

In *Michigan*, where by statute the jury must find as to the necessity of the public improvement, they cannot refuse to find that fact on the ground that a more suitable location, through lands other than those in question, could have been made. *Grand Rapids, etc., R. Co. v. Chesebro*, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159.

In *Minnesota* the fact that a strip of land sought to be condemned in the railroad's terminal city affords the only route by which the company can connect with other roads terminating there, may be considered by the jury on the question of compensation to the landowner. *Brisbane v. St. Paul, etc., R. Co.*, 23 Minn. 114.

3. *Vanwickle v. Camden, etc., R., etc., Co.*, 14 N. J. L. 162, qualified in *Coster v. New Jersey R., etc., Co.*, 24 N. J. L. 730, which affirms 23 N. J. L. 227.

4. *Readington Tp. v. Dilley*, 24 N. J. L. 209 (holding that it is discretionary with them what statements they will hear and what documents they will examine); *Pennsylvania R. Co. v. Keiffer*, 22 Pa. St. 356; *Lyman v. Burlington*, 22 Vt. 131.

But a later case in *New Jersey* holds that they may acquire information affecting their action from others, and they may receive it in their discretion under oath. *Lehigh Valley R. Co. v. Dover, etc., R. Co.*, 43 N. J. L. 528,

evidence or not;¹ and still others hold that they must proceed according to the ordinary rules of evidence and receive none save legal testimony.² Inasmuch as they may, if they choose, proceed without the aid of counsel, the practice is simple, and a large discretion is allowed them in admitting or rejecting testimony.³ But it is their duty to hear all the legal and relevant testimony offered by either party bearing on the question of compensation, and their refusal to do so, when offered in due time, is ground for the vacation of their report,⁴ as is also the receiving by them of incompetent evidence on a material point.⁵

Jury.—The amount of compensation is to be determined by the jury from an actual survey of the premises, when practicable, their own knowledge of values, and the opinions of witnesses familiar with such matters; but they are not bound by the opinions and estimates of the witnesses as to value or damages.⁶ The jury are left free to determine for themselves, not only what information they need, but how and from what source they will obtain it.⁷

i. BURDEN OF PROOF AS TO TITLE.—Where the landowner is

14 Am. & Eng. R. Cas. 87, *qualifying* Vanwickle v. Camden, etc., R., etc., Co., 14 N. J. L. 162.

1. Rondout, etc., R. Co. v. Deyo, 5 Lans. (N. Y.) 298; Saint Paul, etc., R. Co. v. Covell, 2 Dakota 483.

2. Central Pac. R. Co. v. Pearson, 35 Cal. 247; Rochester, etc., R. Co. v. Budlong, 6 How. Pr. (N. Y. Supreme Ct.) 467.

3. Port Huron, etc., R. Co. v. Voorheis, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227, *quoted in* Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350.

4. Jones v. Goffstown, 39 N. H. 254; Washington, etc., R. Co. v. Switzer, 26 Gratt. (Va.) 661.

Waiver of Witnesses by Mistake.—A landowner who waives his right to produce witnesses before the commissioners and consents to a view, under a mistaken belief that he will be entitled to a rehearing before other commissioners, where he would have the privilege of examining witnesses, may have the award set aside without showing any fault on the part of the commissioners or any one representing the company. Matter of New York, etc., R. Co., 63 How. Pr. (N. Y. Supreme Ct.) 265.

5. Petition of Landaff, 34 N. H. 163.

But their report will not be set aside in such cases unless it manifestly appears that the complaining party has been prejudiced by their action. Saint Paul, etc., R. Co. v. Covell, 2 Dakota 483; Troy, etc., R. Co. v. Northern

Turnpike Co., 16 Barb. (N. Y.) 100, *criticised in* Matter of New York, etc., R. Co., 29 Hun (N. Y.) 1.

6. Green v. Chicago, 97 Ill. 370; McReynolds v. Burlington, etc., R. Co., 106 Ill. 152; Princeton v. Gieske, 93 Ind. 102; Kansas City v. Kansas City, etc., R. Co., 84 Mo. 410; Republican Valley R. Co. v. Arnold, 13 Neb. 485; Washburn v. Milwaukee, etc., R. Co., 59 Wis. 370.

Exception.—In *Tennessee*, however, it is held that where a charter authorizes the assessment of damages for injuries done to land in carrying out the purposes of the petitioner's charter, by a jury who are required to "go on the premises" and assess the damages thereto, such jury have no right to examine witnesses, but the jurors themselves are the witnesses respecting the facts in question, and their report must be based upon their own estimate of the damages after a personal inspection of the premises. Stevens v. Duck River Nav. Co., 1 Sneed (Tenn.) 237.

See further on this topic, *infra*, XI. *View of Premises.*

7. Columbia Delaware Bridge Co. v. Geisse, 36 N. J. L. 537.

Return of Evidence to Court.—The provision of the state statute requiring a sheriff's jury to reduce to writing and to return to the clerk of the court the testimony taken before them, does not apply to a trial before the court itself under the federal statute. Chapell v. U. S., 160 U. S. 499.

the petitioning party he must prove his title, unless it is admitted;¹ and he can only recover according to the title or estate so proved.² But when proceedings are instituted against one as the owner of land who is in possession thereof, such recognized owner will not be required to prove his title to the land at the time of the trial.³

j. **RIGHT TO OPEN AND CLOSE—In General.**—The party who asserts the affirmative of the issue, and upon whom, for that reason, is the burden of proof, and against whom the issue will be decided if no evidence be given, is entitled to open and close both the evidence and the argument to the jury.⁴

Discretion of Court.—Some decisions hold that it is discretionary with the judge presiding over the jury to direct which party may open and close,⁵ especially where, under the statutes, the burden of proof seems to be partly on one party and partly on the other.⁶

Landowner.—The weight of authority, in railroad condemnation proceedings, concedes to the landowner the right to open and close, no matter which party begins the proceeding. The amount of the damages is the object of inquiry, and the burden of proof is on the landowner.⁷ And the rule holds good where both

1. Chicago, etc., R. Co. v. Cook, 43 Kan. 83; Deidrich v. Northwestern Union R. Co., 42 Wis. 248, following Austin v. Rutland R. Co., 45 Vt. 215; Walton v. Green Bay, etc., R. Co., 70 Wis. 414, distinguished in Taylor v. Chicago, etc., R. Co., 81 Wis. 82.

In a proceeding to ascertain the value of betterments under N. Car. Code, §§ 473-480, the burden is upon the petitioner to show, not only that he believed, but that he had good reason to believe, his title to the premises to be good (at least until he made out a *prima facie* case, when the burden shifted), and of the reasonableness of this belief the jury must be the judge; and, it seems, the petitioner is competent to testify to his belief in the validity of his title. Carolina Cent. R. Co. v. McCaskill, 98 N. Car. 526.

2. Robbins v. Milwaukee, etc., R. Co., 6 Wis. 636.

3. Selma, etc., R. Co. v. Camp, 45 Ga. 180; Peoria, etc., R. Co. v. Bryant, 57 Ill. 473; Cummins v. Des Moines, etc., R. Co., 63 Iowa 397, 17 Am. & Eng. R. Cas. 86; Knauff v. St. Paul, etc., R. Co., 22 Minn. 173.

4. Greenl. Ev., § 74; 1 Whart. Ev., § 357; McReynolds v. Burlington, etc., R. Co., 106 Ill. 152, 14 Am. & Eng. R. Cas. 172.

When the issue was formed by a statement in the complaint that the

defendant's damages did not exceed the sum of two hundred dollars, and a statement in the answer that the land sought to be appropriated was of the value of \$234, and that the additional damages to the defendant resulting from such an appropriation would amount to \$2,516, the defendant was permitted to open and close the case. Oregon, etc., R. Co. v. Barlow, 3 Oregon 311.

5. Charleston, etc., R. Co. v. Blake, 12 Rich. (S. Car.) 634.

6. Warner v. Gunnison, 2 Colo. App. 430.

Discretion of Commissioners.—Commissioners of appraisal, under N. Y. General Railroad Act, § 15, have the right to hear the proofs and allegations in such order as they may deem most conducive to justice between the parties, and to decide which counsel shall open and close the argument. Albany Northern R. Co. v. Lansing, 16 Barb. (N. Y.) 68, criticised in Matter of New York, etc., R. Co., 29 Hun (N. Y.) 1.

7. Arkansas.—Springfield, etc., R. Co. v. Rhea, 44 Ark. 258.

Indiana.—Grand Rapids, etc., R. Co. v. Horn, 41 Ind. 479.

Massachusetts.—Connecticut River R. Co. v. Clapp, 1 Cush. (Mass.) 559.

Minnesota.—Minnesota Valley R. Co. v. Doran, 17 Minn. 188, former

parties apply for a jury, each filing exceptions to the commissioners' award.¹ The same doctrine has been followed in condemnations for other than railroad purposes.²

Condemning Party.—In several jurisdictions, however, in an assessment before a jury, the condemning party is given the right to open and close, as the burden rests upon it to show not only the necessity for the taking, but the value of the land.³

XI. VIEW OF PREMISES—1. **In General.**—In some states the statutes make it the duty of the jury to view the premises.⁴ In

appeal 15 Minn. 230; *St. Paul, etc., R. Co. v. Murphy*, 19 Minn. 500.

Missouri.—*St. Louis, etc., R. Co. v. North*, 31 Mo. App. 345, 351.

Nebraska.—*Omaha, etc., R. Co. v. Walker*, 17 Neb. 432, 20 Am. & Eng. R. Cas. 396; *Omaha, etc., R. Co. v. Umstead*, 17 Neb. 459.

New Jersey.—*Morris, etc., R. Co. v. Bonnell*, 34 N. J. L. 474.

South Carolina.—*Charleston, etc., R. Co. v. Blake*, 12 Rich. (S. Car.) 634.

Admission of Cause of Action.—Where, in a suit to condemn land, the defendant files an admission of plaintiff's cause of action, he is entitled to open and conclude the argument. *Dallas, etc., R. Co. v. Day*, 3 Tex. Civ. App. 353, *following* *Gainesville, etc., R. Co. v. Waples*, 3 Tex. App. Civ. Cas., § 409.

1. *Indiana, etc., R. Co. v. Cook*, 102 Ind. 133.

Waiver of Right.—The landowner does not waive this right, so far as the argument to the jury is concerned, by allowing the company to introduce its evidence first. *Dallas, etc., R. Co. v. Chenault*, 4 Tex. App. Civ. Cas., § 111.

In Assessments by Commissioners the landowner has been given the right to open and close, on the ground that the damages were unliquidated and constituted the only issue to be tried. *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 148, *affirmed* in 98 N. Y. 664, *approving* *Evansville, etc., R. Co. v. Miller*, 30 Ind. 209.

2. **Street Widening.**—*Hyde Park v. Dunham*, 85 Ill. 569.

Laying of Gas Pipes.—*Consumers' Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285.

Ferry Landing.—*Winnisimmet Co. v. Grueby*, 111 Mass. 543.

Post Office.—*Burt v. Wigglesworth*, 117 Mass. 302.

3. *Alabama.*—*Montgomery South-*

ern R. Co. v. Sayre, 72 Ala. 443, 20 Am. & Eng. R. Cas. 203.

Georgia.—*Harrison v. Young*, 9 Ga. 359; *Streyer v. Georgia Southern, etc., R. Co.*, 90 Ga. 56; *Wolff v. Georgia Southern, etc., R. Co.*, 94 Ga. 555; *Williams v. Macon, etc., R. Co.*, 94 Ga. 709.

Illinois.—*McReynolds v. Burlington, etc., R. Co.*, 106 Ill. 152, 14 Am. & Eng. R. Cas. 172; *South Park Com'rs v. School Trustees*, 107 Ill. 489.

Indiana.—*Neff v. Reed*, 98 Ind. 341, and cases cited.

Ohio.—*Neff v. Cincinnati*, 32 Ohio St. 215.

Tennessee.—*Alloway v. Nashville*, 88 Tenn. 510.

Texas.—*Gainesville, etc., R. Co. v. Waples*, 3 Tex. App. Civ. Cas., § 409; *Gulf, etc., R. Co. v. Abney*, 3 Tex. App. Civ. Cas., § 413; *Ft. Worth, etc., R. Co. v. Culver*, 4 Tex. App. Civ. Cas., § 5; *Gulf, etc., R. Co. v. Ross*, 4 Tex. App. Civ. Cas., § 87.

Washington.—*Bellingham Bay, etc., R. Co. v. Strand*, 4 Wash. 311, 51 Am. & Eng. R. Cas. 608; *Seattle, etc., R. Co. v. Murphine*, 4 Wash. 448; *Seattle, etc., R. Co. v. Gilchrist*, 4 Wash. 509.

West Virginia.—*Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

4. *Des Moines v. Layman*, 21 Iowa 153; *Wakefield v. Boston, etc., R. Co.*, 63 Me. 385; *Kansas City v. Kansas City, etc., R. Co.*, 84 Mo. 410; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263.

Exceptions.—The charter of the *Nashville & Chattanooga R. Co.* does not authorize, on the appeal of either party from the report of the five commissioners, another valuation to be made on a view of the premises by a jury of twelve persons. The jury can only make the valuation on proof heard by them under the direction of

New York the commissioners may do so if they consider it necessary for the purpose of the appraisalment.¹ But it is misconduct for some of the jurors, without the consent of the court, after the evidence is closed and before the argument, to visit the premises, in order to get a better understanding of the case.²

2. Power to Order—Discretion of Court—Power.—As a general rule the court has the power to order the jury to view the premises,³ after they are impaneled and sworn,⁴ although the trial may be after the completion of the improvement complained of.⁵

Discretion.—The propriety of directing a view usually rests in the discretion of the court, and its action will not be disturbed where no abuse appears.⁶

3. Time and Conduct of the View—Time.—A statutory right of either party to have the jury view the premises may be exercised at any stage of the case before the court gives its instructions, and it is error to deny the exercise of such right;⁷ but at what particular time in the progress of the trial they shall go is in the sound discretion of the court.⁸ It is proper, however, that the view

the court, as in other cases. *Hord v. Nashville, etc., R. Co., 2 Swan (Tenn.) 497.*

Photographic View.—Where on a trial an inspection of the premises in question is proper but is impracticable or impossible, a photographic view thereof is admissible. *Omaha Southern R. Co. v. Beeson, 36 Neb. 361.*

1. Matter of Riverside Ave., 83 Hun (N. Y.) 50.

View by Commissioners.—Commissioners of intelligence can gain more information in respect to the value of the property taken by the erection of a railroad from an inspection than from the evidence of any quantity of theorists, and their finding will not be disturbed unless it is clearly apparent that injustice has been done, or that they have overlooked some material feature of the case, or proceeded upon an erroneous principle, or been influenced by passion or prejudice. *Matter of New York El. R. Co., 58 Hun (N. Y.) 611, 35 N. Y. St. Rep. 944.*

2. Ortman v. Union Pac. R. Co., 32 Kan. 479.

3. Coyner v. Boyd, 55 Ind. 166; Lamb v. Lane, 4 Ohio St. 167.

Exception.—In a proceeding to condemn water rights for a public use, the court has no authority at common law to require a defendant to permit, for the purpose of acquiring evidence as to value on the assessment of damages, an inspection to be made of buildings and lands not covered by the petition

and not to be condemned in the proceeding. *Syracuse v. Glenside Woolen Mills, 73 Hun (N. Y.) 421.*

What Court.—The court of the county in which the land lies alone has jurisdiction to order a view, and the right will be lost by taking a change of venue. *Rockford, etc., R. Co. v. Coppinger, 66 Ill. 510.*

4. Traut v. New York, etc., R. Co. (Pa. 1888), 15 Atl. Rep. 678.

5. Springer v. Chicago, 135 Ill. 552; Dearborn v. Boston, etc., R. Co., 24 N. H. 179, followed in Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9.

A verdict founded upon a view so ordered will not be set aside, unless it is clear that the jury erred. *Omaha, etc., R. Co. v. Walker, 17 Neb. 432, 20 Am. & Eng. R. Cas. 396.*

6. King v. Iowa Midland R. Co., 34 Iowa 458; Clayton v. Chicago, etc., R. Co., 67 Iowa 238; Coughlen v. Chicago, etc., R. Co., 36 Kan. 422, 30 Am. & Eng. R. Cas. 330; Snow v. Boston, etc., R. Co., 65 Me. 230; Bellingham Bay, etc., R. Co. v. Strand, 4 Wash. 311, 51 Am. & Eng. R. Cas. 608; Pick v. Rubicon Hydraulic Co., 27 Wis. 433. Of course if a statute gives the right, it is imperative and the court has no discretion. *Kankakee, etc., R. Co. v. Straut, 102 Ill. 666.*

7. Kankakee, etc., R. Co. v. Straut, 102 Ill. 666, 10 Am. & Eng. R. Cas. 440.

8. Galena, etc., R. Co. v. Haslam, 73 Ill. 494.

should be had before hearing the evidence.¹

Conduct of the View.—The jury should be attended by a proper officer in viewing the premises.² The view should be from all standpoints which will fairly inform the jury of the extent of the injury inflicted and the damages sustained.³

4. Effect of the View—*a. KNOWLEDGE OBTAINED TO BE USED IN CONNECTION WITH OTHER EVIDENCE.*—The jury are judges of law and facts, and need not base their conclusions entirely on testimony. They can use their own judgment and knowledge derived from the view, in connection with the testimony of the witnesses,⁴ even if, in so doing, they arrive at a conclusion not in accord with the weight of testimony.⁵ The true rule is that the

1. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

Fixing Time in Warrant.—In an early case it was held that a certain day must be fixed, in the warrant, for the meeting of the jury on the land, and that the want thereof is fatal to the inquisition. *Chesapeake, etc., Canal Co. v. Key*, 3 Cranch (C. C.) 599.

2. *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377, affirmed in 8 Wend. (N. Y.) 47; *Canal Bank v. Albany*, 9 Wend. (N. Y.) 244.

But the proceedings will not be quashed for a violation of this rule unless the view was formally ordered by the court in which the proceedings were had. *Owners of Ground, etc. v. Albany*, 15 Wend. (N. Y.) 374.

And if the petitioner makes no request that the jury be accompanied by an officer, the objection that they were not so accompanied is waived. *Fort-Street Union Depot Co. v. Backus*, 92 Mich. 33.

3. But it is too late after verdict for one who attended the view to raise the objection that the jury did not have a full view of the premises. *Oregon Cascades R. Co. v. Oregon Steam Nav. Co.*, 3 Oregon 178.

The landowner's premises both within and without the condemning party's location are to be viewed, and from both standpoints. It is error to limit the jury to a view taken from within the location. *Wakefield v. Boston, etc.*, R. Co., 63 Me. 385.

Going upon Other Tracts.—But it is also error for the jury to go upon and view other tracts of land in the same locality, and a failure to object to such action is not a waiver of the error. *Tedens v. Sanitary Dist.*, 149 Ill. 87.

One Commissioner Separated from Others.—The fact that one of the commissioners was separated from the others at the view is not fatal, if each viewed the premises so as to enable him to judge of the amount of damages, and the result arrived at was upon their joint deliberation. *Matter of New York, etc., R. Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 265.

Where One Juror Falls to Attend the view, the irregularity is waived by going on with the trial, although knowing the fact, without bringing the matter to the attention of the court. *Gurney v. Minneapolis, etc., R. Co.*, 41 Minn. 223.

4. *Illinois.*—*Mitchell v. Illinois, etc., R., etc., Co.*, 85 Ill. 566; *Culbertson, etc., Packing, etc., Co. v. Chicago*, 111 Ill. 651; *Sanitary Dist. v. Cullerton*, 147 Ill. 385.

Iowa.—*Thompson v. Keokuk*, 61 Iowa 187.

Kansas.—*Chicago, etc., R. Co. v. Willits*, 45 Kan. 110, 47 Am. & Eng. R. Cas. 317.

Michigan.—*Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378; *Fort-Street Union Depot Co. v. Jones*, 83 Mich. 415.

Missouri.—*Kansas City v. Street*, 36 Mo. App. 666.

New York.—*Matter of Metropolitan El. R. Co.*, 76 Hun (N. Y.) 375.

Ohio.—*Williams v. Lockman*, 46 Ohio St. 416.

Pennsylvania.—*In re Barbadoes St.*, 8 Phila. (Pa.) 498.

Federal Courts.—*Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415.

5. View Itself Evidence.—The result of a jury's personal view of the land is evidence proper to be acted upon by them; and if they believe, from the

jury, in estimating the damages, shall consider the testimony of the witnesses in connection with the facts as they appeared upon the view, and shall ascertain the damages upon the whole case, as thus presented.¹ The view may enable the jury to decide questions which the testimony of witnesses alone, although duly considered, would not.² But the fact that they acted on their own judgment, aided to some extent by ocular evidence, does not deprive the court of the right to review their award upon the question of damages.³

whole evidence, that they have, from such view, arrived at a more accurate judgment as to the value of the premises sought to be taken, and of the damages, than that shown by the evidence in open court, they may, upon the evidence, rightfully fix the value of the land taken and the damages at the amount so approved by their judgment formed from the personal examination, even though it differs from the amount testified to and the weight of testimony given by witnesses in open court. *Kiernan v. Chicago*, etc., R. Co., 123 Ill. 188; *Peoria*, etc., R. Co. v. *Sawyer*, 71 Ill. 361.

It was error to instruct the jury that the sworn testimony given upon the stand, bearing upon the subject in controversy, and such reasonable deductions as were legitimately to be drawn from it, in connection with such facts as presented themselves in viewing the premises, constituted the only proper basis on which to rest their verdict, and afforded the only test and criterion by which they were to fashion and fix it. *Pittsburgh*, etc., R. Co. v. *Swinney*, 59 Ind. 100.

1. *Illinois*.—*Green v. Chicago*, 97 Ill. 370.

Kansas.—*Topeka v. Martineau*, 42 Kan. 387.

Nevada.—*Virginia*, etc., R. Co. v. *Henry*, 8 Nev. 165.

New York.—*Rochester*, etc., R. Co. v. *Budlong*, 6 How. Pr. (N. Y. Supreme Ct.) 467; *Rondout*, etc., R. Co. v. *Deyo*, 5 Lans. (N. Y.) 298; *Matter of Norwood*, etc., R. Co., 47 Hun (N. Y.) 489; *Matter of New York El. R. Co.*, 55 Hun (N. Y.) 608, 29 N. Y. St. Rep. 190.

Pennsylvania.—*Gorgas v. Philadelphia*, etc., R. Co., 144 Pa. St. 1, 51 Am. & Eng. R. Cas. 593; *Hartman v. Reading*, etc., R. Co. (Pa. 1888), 13 Atl. Rep. 774.

Contrary Doctrine.—In an early *Tennessee* case it is held that the jury who

view the premises cannot examine witnesses, but the jurors themselves are the witnesses, and their report must be based solely upon their own estimate of the damages. *Stevens v. Duck River Nav. Co.*, 1 Sneed (Tenn.) 237. See also *Clarksville*, etc., Turnpike Co. v. *Atkinson*, 1 Sneed (Tenn.) 426. In a few of the states the rule is that where a view of the premises is allowed to the jury, such view is not for the purpose of furnishing evidence upon which a verdict is found, but to enable the jury better to understand and apply the evidence given in court. It is, therefore, deemed error to instruct the jury that they may use their own examination and judgment, as well as the judgment of the witnesses, in estimating the damages. *Brakken v. Minneapolis*, etc., R. Co., 29 Minn. 41, 7 Am. & Eng. R. Cas. 593; *Heady v. Vevay*, etc., Turnpike Co., 52 Ind. 117; *Close v. Samm*, 27 Iowa 503.

Purpose and Object of the View.—The jury in condemnation proceedings, as in all cases where no certain measure of damages exists, must trust somewhat to their own judgment, that being one of the purposes for which juries of inquest are provided. They are expected to view the premises and use their own senses, both to obtain such information as an eye-witness can gain, and to interpret and comprehend the testimony of others, the purpose throughout being to give all the damages which they reasonably discover, past or present and to result, but no more. *Grand Rapids*, etc., R. Co. v. *Chesebro*, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159.

2. *Neff v. Reed*, 98 Ind. 341.

Juror as Witness.—It seems that if a juror has knowledge of any fact bearing upon the case, he must disclose and testify to it in court. *Parks v. Boston*, 15 Pick. (Mass.) 198.

3. *Matter of Metropolitan El. R. Co.*, 76 Hun (N. Y.) 375.

b. TO DETERMINE WEIGHT OF CONFLICTING EVIDENCE.—A personal view of the premises is in the nature of evidence, and may be taken into consideration by the jury in passing upon the testimony; when the evidence is conflicting it may be resorted to by the jury as bearing upon the weight to be given to variant and conflicting estimates,¹ and in all cases of conflicting evidence where a view is had, the verdict will not be set aside as excessive unless it clearly is so.²

c. EVIDENCE OF WITNESSES NOT TO BE DISREGARDED.—The evidence which the jury may acquire in taking the view is not to be elevated to the character of exclusive or predominating evidence,³ in such a sense as to permit them altogether to disregard the sworn testimony in making their award.⁴ They must act upon all the evidence, and not solely upon that furnished by their personal view.⁵

Exception.—But where, after the view, the case was submitted to the jury without evidence, the court, on appeal, declined to review the verdict, as there was no evidence in the record and the court could not know what the jury saw. *Peoria, etc., R. Co. v. Barnum*, 107 Ill. 160.

1. *Peoria Gas Light, etc., Co. v. Peoria Terminal R. Co.*, 146 Ill. 372; *Grand Rapids v. Perkins*, 78 Mich. 93; *Lafin v. Chicago, etc., R. Co.*, 33 Fed. Rep. 415.

They are not, like juries in ordinary civil and criminal cases, bound by the weight of evidence, but may be governed greatly by the view itself. *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

When there is a wide conflict of testimony they will be justified in acting on their own judgment entirely. *Western Pac. R. Co. v. Reed*, 35 Cal. 621; *In re Antoinette St.*, 8 Phila. (Pa.) 461.

2. *Chicago, etc., R. Co. v. Jacobs*, 110 Ill. 414; *Chicago, etc., R. Co. v. Hopkins*, 90 Ill. 316.

3. *Chicago, etc., R. Co. v. Parsons*, 51 Kan. 408; *Chaffee's Appeal*, 56 Mich. 244; *Hoffman v. Bloomsburg, etc., R. Co.*, 143 Pa. St. 503.

4. *California*.—*Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

Illinois.—*Atchison, etc., R. Co. v. Schneider*, 127 Ill. 144.

Michigan.—*Grand Rapids v. Perkins*, 78 Mich. 93.

Missouri.—*Kansas City v. Baird*, 98 Mo. 215.

Pennsylvania.—*Flower v. Baltimore, etc., R. Co.*, 132 Pa. St. 524.

Wisconsin.—*Munkwitz v. Chicago, etc., R. Co.*, 64 Wis. 403.

United States.—*Lafin v. Chicago, etc., R. Co.*, 33 Fed. Rep. 415.

5. *Peoria Gas Light, etc., Co. v. Peoria Terminal R. Co.*, 146 Ill. 372.

The jury having been sent to view the land, the court charged: "What you observed on the view, then, you must remember as a part of the evidence of the case. The statements of the witnesses who have testified must be considered by you, yet you are not bound to be controlled thereby if your own examination of the premises leads you to a different conclusion." This instruction, when followed by the statement that the verdict must be based upon the testimony of the witnesses and what the jury saw upon the ground, was unobjectionable. All that could fairly be implied from it was that the jury need not ignore the evidence of their senses and give weight to testimony which their view showed to be erroneous. *Gorgas v. Philadelphia, etc., R. Co.*, 144 Pa. St. 1, 51 Am. & Eng. R. Cas. 593. To the same effect is *Kansas City v. Butterfield*, 89 Mo. 646.

A *Wisconsin* case thus clearly states the reasons of the rule: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, and they may disregard his testi-

XII. VERDICT—REPORT—AWARD—1. Verdict of Jury—*a.* MODE OF ARRIVAL AT VERDICT.—The rules governing the mode by which the jurors in a condemnation case should arrive at their verdict do not differ materially from the rules prevailing in other cases, and the reader is therefore referred to the article VERDICT.

b. DESCRIPTION OF PROPERTY TAKEN OR DAMAGED.—The verdict ought to describe the land valued or taken and ascertain its boundaries with certainty.¹ But the land need not be described by metes and bounds, if the description is such as to enable a true location to be made, and matters *in pais* may be resorted to, in order to arrive at the true location.² The land may be described

mony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of testimony given in court. But if the fact of which the jury may thus take cognizance is only one of many elements which must be considered to determine some other fact which can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different. * * * A jury is not bound to give, and cannot give, any weight to testimony which, although undisputed by witnesses, is contrary to what every person of ordinary intelligence knows to be true. To illustrate, should a witness testify that at Boston on a certain day the sun arose at midnight, or that the Mississippi river empties into Lake Michigan, or that white is black, the testimony would be rejected at once. So, in matters of mere opinion, in cases where the testimony of experts is not required, if the jury know all the facts, they are not necessarily controlled by the opinions of witnesses, if such opinions have been received. In such cases the jury are as competent as the witnesses to form an opinion, and the opinions of witnesses, if objected to, are inadmissible. *Veerhusen v. Chicago, etc., R. Co., 53 Wis. 689.* Beyond this the jury cannot properly go. To allow jurors to make up their verdict on their individual knowledge of disputed

facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge, or of the grounds of such opinions, could not be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all of the evidence is before it and there is none whatever to support the judgment. The court would be obliged to presume that the jury or some juror had, or at least thought he had, some personal knowledge of facts outside the testimony, or contrary to it, which would sustain the judgment. Such a ruling in a case, the procedure in which was governed by common-law rules of evidence, we presume was never heard of." *Washburn v. Milwaukee, etc., R. Co., 59 Wis. 364, 20 Am. & Eng. R. Cas. 225, distinguishing Neilson v. Chicago, etc., R. Co., 58 Wis. 516, quoting Snyder v. Western Union R. Co., 25 Wis. 60, and quoted in Seefeld v. Chicago, etc., R. Co., 67 Wis. 96; Sasse v. State, 68 Wis. 530.*

1. *Chesapeake, etc., Canal Co. v. Union Bank, 4 Cranch (C. C.) 75; Chesapeake, etc., Canal Co. v. Mason, 4 Cranch (C. C.) 123.* See also *infra*, XII. 2. *c. Description of Land Taken, Quantity, etc.*

2. *Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Duck River Valley Narrow Gauge R. Co. v. Cochrane, 3 Lea (Tenn.) 478.*

Sufficiency.—A description in an award allowed a strip thirty feet wide

by reference to the description of it in the warrant,¹ or in the petition;² and if the quantity taken is correctly stated in the award of the commissioners, or the location is on file, it need not be stated again in the verdict.³

c. FINDING AS TO NECESSITY OF THE TAKING.—Where the jury is required to find upon the question of the necessity of the taking,⁴ an omission to do so will vitiate their award.⁵ As to the sufficiency of the form of a finding upon this subject, the decisions are various.⁶ A finding of the jury that the taking of the land in question is not necessary cannot be disregarded and

on each side of a given line across the entire premises, except that in crossing a specified parcel a strip only twenty-five feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former, and by giving the courses and distances. The description was held sufficient. *Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222.

Where property is described in a petition for condemnation as "the east seven-eighths of lot 8," and in the verdict and judgment as "the east seven-eighths feet of lot 8," the word "feet" will be rejected as surplusage, and the judgment will stand as if the description was the same as in the petition. *Newman v. Chicago*, 153 Ill. 469.

A petition is jurisdictionally defective if it only describes the land as a strip 100 feet wide, commencing on the east line of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 22, running N. 59°, 10' W., across certain designated governmental subdivisions, and lying 50 feet on each side of the centre line of a specified railroad, as located by a certain survey and indicated by stakes. And a report by the jury, which describes the land in this way and gives no map, and does not name, as far as possible, the owners of the land to be condemned, will not sustain an award. *Toledo, etc., R. Co. v. Munson*, 57 Mich. 42, 20 Am. & Eng. R. Cas. 410.

1. *Chesapeake, etc., Canal Co. v. Binney*, 4 Cranch (C. C.) 68.

2. *Ohio River R. Co. v. Harness*, 24 W. Va. 516.

3. *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Philadelphia, etc., R. Co. v. Trimble*, 4 Whart. (Pa.) 47.

Correcting Description.—The court in a proceeding of this kind has no jurisdiction to correct the description, ex-

cept by consent of parties. Nor would the tender of a deed by the land proprietor, correcting the description, but refused by the other party, vary the case; and it seems that either party may take advantage of the defect. *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

4. *Peck v. Whitney*, 6 B. Mon. (Ky.) 117; *Wood v. Campbell*, 14 B. Mon. (Ky.) 339; *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519; *Grand Rapids, etc., R. Co. v. Van Driele*, 24 Mich. 409; *McClary v. Hartwell*, 25 Mich. 139; *Arnold v. Decatur*, 29 Mich. 77.

See *supra*, III. 3. *Determining Questions of Necessity and Propriety*; and *infra*, XII. 2. d. *Finding as to Necessity of the Taking*.

5. *Grimes v. Doyle, Sneed* (Ky.) 58.

6. A finding that "public convenience requires" the laying out of a highway is sufficient. *Hunter v. Newport*, 5 R. I. 325.

And so is a finding that a certain part of the road was not required by common convenience and necessity, but that a certain other part "ought to be laid." *Pierce v. Southbury*, 29 Conn. 490.

Likewise a finding that "it is necessary for said * * * company to take said real estate for public use, to wit * * * for right of way," is sufficient. *East Saginaw, etc., R. Co. v. Benham*, 28 Mich. 459.

But a finding that the taking would be "for public use," without more, will not answer. *McClary v. Hartwell*, 25 Mich. 139.

Nor is a finding sufficient which states that the taking is necessary "for the purpose of operating and constructing" a railroad. *Grand Rapids, etc., R. Co. v. Van Driele*, 24 Mich. 409; *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519.

a contrary finding be made by the court.¹

d. FINDING ON QUESTION OF DAMAGES—(1) In General.—A verdict is sufficient in form which finds, in effect, that the landowner is entitled to damages in a sum named.² It should indicate upon what basis the damages are assessed in order that the record may thereafter show the rights of the parties.³ Where both damages and benefits are required to be found, it is enough if it can be clearly ascertained from the verdict how much are the damages and how much the benefits, if any.⁴

The verdict must be reasonably certain as to the amount of damages and what they are awarded for,⁵ and it must be within

1. Cal. Code, § 1241; *Wilmington Canal, etc., Co. v. Dominguez*, 50 Cal. 505.

2. *Oregon R. Co. v. Bridwell*, 11 Oregon 282, 17 Am. & Eng. R. Cas. 130. See also *infra*, XII. 2. *e. Finding on Question of Damages*, as to the commissioner's finding on this question.

A landowner agreed to accept stock for land damages. At the trial he agreed that the action should "be tried without objection to form or substance of plaintiff's statement or defendant's plea, that all matters of legal demand and all matters of defense lawfully admissible under any form of pleading shall be admissible as if formally set forth by declaration or plea." The jury returned the following verdict: "We find damages for plaintiff in the sum of five thousand and two hundred dollars, with interest included, payable in capital stock of defendant company at par value." It was held that the verdict was in proper form and should be sustained. *Hoffman v. Bloomsburg, etc., R. Co.*, 157 Pa. St. 174.

3. *St. Louis, etc., R. Co. v. Mitchell*, 47 Ill. 165, holding that where the statute contemplates that the cost of fencing may be included as part of the damages for land taken, but the evidence shows that a company has already contracted for the building of the fence, these facts should appear; and if only damages for thereafter maintaining the fence are assessed, and the company fails to build, the landowner may construct the fence himself and recover the cost from the company.

4. *Portland v. Lee Sam*, 7 Oregon 397.

But separate findings are unnecessary in the absence of evidence of

effects in any sum. *Gallatin Canal Co. v. Lay*, 10 Mont. 528.

5. *Peoria, etc., R. Co. v. Bryant*, 57 Ill. 473.

Requisite Certainty.—Where a landowner commences an action after the company has entered upon the land, it should be made to appear whether the action is to recover damages for a trespass or for the permanent appropriation of the land; and the verdict should show whether the damages are for the permanent appropriation or not, and also what interest the owner has parted with, and what the company has acquired. *Wichita, etc., R. Co. v. Fechheimer*, 36 Kan. 45.

A verdict in a proceeding to condemn land for right of way which finds that the landowner "is entitled as compensation the sum of \$420, and as damages the sum of \$411.25, a total sum of \$831.25," is sufficiently certain. *Illinois Western Extension R. Co. v. Mayrand*, 93 Ill. 591.

Effect of Uncertainty.—An award of a jury which discloses that the jury assessed the damages which they thought the respondent entitled to on account of his "claiming" to own certain land used and occupied as a street, and from which it does not appear whether the damages awarded were the estimated value of the land or only that of some doubtful claim they supposed him to be setting up, cannot be sustained. *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519.

Where a jury, summoned to reassess damages for land taken for a railroad, rendered a verdict in which they assessed the damages at a certain sum, "with interest thereon from the time when the said railroad company took possession of the land," it was held that the verdict was void for uncertainty, and that the Court of Common

the issues and based upon the evidence submitted to the jury.¹

(2) *Itemizing the Damages.*—Ordinarily a verdict in a gross sum, without itemizing the damages, is sufficient,² unless otherwise required by statute.³ The value of the land taken and the damages may be blended in one aggregate sum.⁴ But where a right of way is over several distinct parcels of land, the finding should indicate the damages assessed to each parcel.⁵

Pleas had no authority to alter the same, nor to supply any defect therein. *Connecticut River R. Co. v. Clapp*, 1 Cush. (Mass.) 559.

Correcting Uncertainty.—A verdict returned by the jury in condemnation proceedings, finding "the amount of consequential damages, if any, to be — dollars," may, under the direction of the court, before the discharge of the jury, be put in terms expressing a finding that there were no consequential damages. *Allmon v. Chicago*, etc., R. Co., 155 Ill. 17.

1. **Finding Outside of Issues.**—In an action for the condemnation of land for a street, the complaint and the answer alleged that the defendant was owner of the land, and the jury, upon special issues submitted to them, assessed the defendant's damages at three hundred dollars, but also found that the land had been dedicated to the public use by the defendant as a street. It was held that the finding concerning dedication was not within the issues, and that the defendant was entitled to the damages assessed by the jury; and held, further, that had the plaintiff alleged in his complaint the fact of dedication as found by the jury, it would have alleged itself out of court. *San José v. Freyschlag*, 56 Cal. 8.

Unsupported by Evidence.—The jury found the value of the land taken at three thousand dollars, and the damages, aside from the value of the land taken, to the landowner, over and above the benefits, at two thousand five hundred dollars, making in all five thousand five hundred dollars. It was objected that the verdict was defective in making no reference to the fencing and keeping the same in repair. It was held that as there was no proof as to the fencing, the jury could not find as to its cost. *Peoria*, etc., R. Co. v. *Birkett*, 62 Ill. 332.

2. *Illinois.*—*Wabash*, etc., R. Co. v. *McDougall*, 126 Ill. 111, 36 Am. & Eng. R. Cas. 597.

Maine.—*Ford v. Lincoln County*, 64 Me. 408.

Michigan.—*Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222; *Grand Rapids v. Bennett* (Mich. 1895), 64 N. W. Rep. 585.

Pennsylvania.—*Philadelphia*, etc., R. Co. v. *Trimble*, 4 Whart. (Pa.) 53; *Lodge v. Frankford*, etc., R. Co., 9 Phila. (Pa.) 543.

The jury may, however, if they think proper, state separately the items of damage and their amounts in their verdict, in which case the court may remit or deduct objectionable items, without setting aside the whole verdict. *Fitchburg R. Co. v. Boston*, etc., R. Co., 3 Cush. (Mass.) 58.

3. *Robinson v. Robinson*, 1 Duv. (Ky.) 162.

On the trial of an appeal from the award of commissioners appointed to condemn a small triangular piece of ground for the use of a railroad company, the jury made special findings as to elements of damage, estimating inconvenience, disfigurement, and damage, and stating the amount of each. They were not required to make the special finding as to damage more definite, or to recite and estimate other elements than those two mentioned, but a motion was made to strike them all out. It was held that in this particular case there were other elements of damage than inconvenience and disfigurement, and that it was not error to overrule the motion. *Missouri Pac. R. Co. v. Dulaney*, 38 Kan. 246.

4. *Packard v. Bergen Neck R. Co.*, 54 N. J. L. 553.

5. *Sanford v. Chicago*, etc., R. Co., 2 Mich. N. P. [Supp.] 132.

Contrary View.—Where a strip is taken through a tract containing several lots, it is proper for a jury to make an assessment in one gross sum, although the commissioners have made separate assessments in respect to each lot. *Sherwood v. St. Paul*, etc., R. Co., 21 Minn. 127.

Silence as to a particular landowner is, in some jurisdictions, equivalent to an award of no damages as to him,¹ in other jurisdictions, however, there must be an express finding of no damages, or of nominal damages.²

(3) *Joint and Several Awards.*—Where the land taken belongs to several owners there must be a separate finding as to the compensation of each owner;³ unless they are tenants in common,⁴ which they will be presumed to be in the absence of proof to the contrary.⁵ Separate assessments should be made to the holders of distinct or separate estates in the same land, such as lessees, life tenants, mortgagees, etc.⁶

Where one person owns several parcels a gross sum may be awarded unless he demands a separate appraisal of each lot,⁷ which latter course is the better practice.⁸

In some jurisdictions where a gross award is made the several owners may have their shares apportioned to them by the court of chancery.⁹

(4) *Conditional and Alternative Awards.*—The jury must assess the value of the property and the damages in money; they cannot by their verdict require the condemning party to do certain work for the landowner;¹⁰ nor can they impose upon the latter any legal obligations, such as the removal of buildings and the like, by specifying what portion of the damages are awarded to him to

1. Point-No-Point Road Case, 2 S. & R. (Pa.) 277.

2. State v. Cooper, 23 N. J. L. 381; Washington v. Fisher, 43 N. J. L. 377; Kearsley v. Gibbs, 44 N. J. L. 169.

Illustration.—A verdict that “we find and allow damages to each of them [complainants] respectively as follows, viz: to A nothing,” is a sufficient finding that A has sustained no damages. Chace v. Fall River, 2 Allen (Mass.) 533; Cambridge v. Middlesex County, 117 Mass. 79. As to itemizing damages in the commissioner’s report, see *infra*, XII. 2. c. (2) *Itemizing the Damages*.

3. Smith v. Rogers, Litt. Sel. Cas. (Ky.) 117; Chicago, etc., R. Co. v. Sanford, 23 Mich. 418; State v. Fischer, 26 N. J. L. 129, *following* State v. Oliver, 24 N. J. L. 129; Rusch v. Milwaukee, etc., R. Co., 54 Wis. 136.

Gross Sum with Proportionate Amount to Each Owner.—An award of damages for land condemned for railroad uses was sustained where it expressed the gross sum allowed to all joint claimants and specified how much of it was for each of those interested as mort-

gagees. Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

4. East Saginaw, etc., R. Co. v. Benham, 28 Mich. 459, *followed* in Michigan Air Line R. Co. v. Barnes, 44 Mich. 226; State v. Fischer, 26 N. J. L. 129; Pittsburgh, etc., R. Co. v. Hall, 25 Pa. St. 336; Thornton v. North Providence, 6 R. I. 433.

5. Suver v. Chicago, etc., R. Co., 123 Ill. 293.

6. Harris v. Howes, 75 Me. 436, and cases cited.

7. Kankakee, etc., R. Co. v. Chester, 62 Ill. 235; Sherwood v. St. Paul, etc., R. Co., 21 Minn. 122, *followed* in Sherwood v. St. Paul, etc., R. Co., 21 Minn. 127.

8. Rentz v. Detroit, 48 Mich. 544.

9. Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Baltimore, etc., R. Co. v. Thompson, 10 Md. 87; Ross v. Elizabethtown, etc., R. Co., 20 N. J. L. 235.

10. New Orleans Pac. R. Co. v. Murrell, 34 La. Ann. 536.

As to the reservation of easements to the landowner, see *infra*, XII. 2. g. *Reservation of Easements to Owner—Conditional Awards*.

defray the expense of so doing.¹

e. **INTERPRETATION—CONCLUSIVENESS—***Interpretation.*—Where the statute requires the damages to be assessed as of the date of issuing the summons, a verdict fixing “the present value” of the land will be deemed to refer to the date of issuing the summons.²

Conclusiveness.—As a general rule, the award and findings are conclusive, even as between the parties, unless the jury have misconceived the law in making them or have not fully considered all the essential elements of the injury done.³ Such a verdict, especially where the jury viewed the premises, will not be set aside unless clearly wrong.⁴

1. *Jefferis v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 447; *Wilson v. Whitsell*, 24 Ind. 306.

Thus a note given as a condition to the laying out of a highway is without consideration and void. *Dudley v. Butler*, 10 N. H. 281. The contrary doctrine obtains in *Kentucky*, where orders for the alterations of roads, on condition that the work be done by the applicant (*M'Ilvoy v. Speed*, 4 Bibb (Ky.) 85), or that the applicant should answer in damages to a person injured (*Thurman v. Emmerson*, 4 Bibb (Ky.) 279), were held valid.

The Damages must Not Be Conditional or contingent, but for a definite sum for which an execution would lie. *Winchester, etc., R. Co. v. Washington*, 1 Rob. (Va.) 72.

Nor can the verdict find facts and submit to the court questions of law arising upon them, the damages to be dependent upon the decision of such questions. *Germantown, etc., Turnpike Road Co.'s Case*, 4 Rawle (Pa.) 191; *Point-No-Point Road Case*, 2 S. & R. (Pa.) 277.

2. *Pacific Coast R. Co. v. Porter*, 74 Cal. 261, 33 Am. & Eng. R. Cas. 167.

So where, on appeal from an award, the jury render a verdict for a lesser sum, with interest from the date of the award appealed from, this will be deemed a special verdict that the damages were such lesser sum at the time the land was taken. *Noble v. Des Moines, etc., R. Co.*, 61 Iowa 637, 14 Am. & Eng. R. Cas. 208.

3. *Port Huron, etc., R. Co. v. Voorheis*, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227; *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309. See also, *infra*, XII. 2. *h. Conclusiveness and Effect.*

Exceptions.—The award of road

viewers for damages sustained by a person for laying out a road across his land is not conclusive. The applicant may, after the award and tender of the money awarded, commence suit in the District Court against the county for his damages. *Grigsby v. Burtnett*, 31 Cal. 406.

The jury of freeholders have, to some extent, the character and authority of experts. Although their finding is not conclusive, it must be given due weight. *New Orleans, etc., R. Co. v. Rabasse*, 44 La. Ann. 178.

Finding as to Necessity.—So the finding that the taking is necessary is conclusive if there is evidence to support it. *Port Huron, etc., R. Co. v. Voorheis*, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227.

4. *Fremont, etc., R. Co. v. Meeker*, 28 Neb. 94, 44 Am. & Eng. R. Cas. 115, *following* *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707; *Clarke v. Chicago, etc., R. Co.*, 23 Neb. 616.

Verdict without Judgment.—A verdict upon which no judgment is entered, assessing the damages which a party will sustain by reason of the laying out of a lateral railroad across his land, under the Pennsylvania statute of 1832, will not justify an entry and the making of the road, but the record of the proceedings is admissible in evidence to mitigate the damages. *Harvey v. Thomas*, 10 Watts (Pa.) 63.

Estoppel to Attack Verdict.—If a railroad company prevail upon a party to suppress a verdict of condemnation which has been intrusted to it for delivery to the proper custodian, it cannot afterwards take advantage of its own wrong by insisting that an actual return was necessary to give it validity as a final and complete adjudication. *West v. West, etc., R. Co.*, 61 Miss. 536.

f. SPECIAL FINDINGS.—See article SPECIAL FINDINGS OF JURIES.

g. OBJECTIONS—MOTION TO SET ASIDE—Objections and How Cured.—Before the discharge of the jury, merely formal defects in the verdict may be corrected under the direction and discretion of the court;¹ but after their discharge and separation, the general rule is that they cannot be reassembled and their verdict corrected by them.²

Power to Set Aside.—The state has power through its proper tribunals to set aside the inquest for fraud or legal error, at any stage prior to the actual taking of the property and payment of the compensation.³ Ordinarily, however, the court in which the proceeding is pending has not the power to set aside the verdict on objections not raising questions of jurisdiction,⁴ such as inadequacy or excessiveness of damages. The remedy in such cases is by appeal.⁵

Practice on Motion to Set Aside.—The motion should be addressed to and determined by the court to which the verdict is returned.⁶

1. *Allmon v. Chicago, etc., R. Co.*, 155 Ill. 17.

2. *Ayer v. Chicago*, 149 Ill. 262, holding, also, that the verdict cannot be changed, in the absence of the jury, after their discharge, and after the expiration of the term at which it was rendered.

Jury Functus Officio after Separation.—A jury summoned to assess the damages for land sought to be condemned by a railroad, having signed their verdict and dispersed, become then *functus officio*, and any subsequent act done by them is of no more effect than an act by any unauthorized individuals. *West v. West, etc., R. Co.*, 61 Miss. 536, 20 Am. & Eng. R. Cas. 402.

3. In *Garrison v. New York*, 21 Wall. (U. S.) 196, the U. S. Supreme Court said: "The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state and is necessarily under her control. * * * She can * * * vacate or authorize the vacation of any inquest taken by her direction, * * * where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in

the property. * * * Until the property is actually taken, and the compensation is made or provided, the power of the state over the matter is not ended."

Effect of Accepting Payment.—An owner of land taken by a railroad company in condemnation proceedings, by accepting payment of the award, waived his right to a trial of objections to the award previously filed by him, though the company entered the land before payment, without having deposited the amount of the award in court. The fact that the receipt for the award stated that the payment was "upon the claim" of the owner for damages did not establish an agreement that the payment should not affect the owner's right to a trial of his objections to the award. *Ft. Worth Ice Co. v. Chicago, etc., R. Co.* (Tex. Civ. App. 1895), 33 S. W. Rep. 159.

As to setting aside the report of commissioners, see *infra*, XII. 2. *j.* *Application to Set Aside.*

4. *Backus v. Gartner*, 89 Mich. 209.
5. *Willing v. Baltimore R. Co.*, 5 Whart. (Pa.) 460.

But see *infra*, XII. 1. *i.* *Damages Excessive or Inadequate*; XII. 2. *j.* (5) *Excessive Damages*, and XII. 2. *j.* (6) *Inadequate Damages*, where it is shown that cases so holding really go upon the ground of the impropriety of so doing rather than the want of power.

6. *Burr v. Bucksport, etc., R. Co.*, 64 Me. 130.

Where the motion to set aside the verdict as contrary to law is made upon a case settled, the case may be referred to in order to ascertain the issues.¹ The objecting party has a right to produce evidence, and a denial of this right is error.²

h. **GROUND FOR SETTING ASIDE—GENERALLY.**—Good cause must be shown to set aside the verdict, the presumption being that the jury discharged their duty.³

Improper Argument to Jury by counsel is, in aggravated cases, and

1. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

2. Orange Belt R. Co. *v.* Craver, 32 Fla. 28.

Contrary Doctrine.—The judge at nisi prius, upon a motion to set aside the verdict of a jury drawn to estimate the damages sustained by the location of a railroad, refused to hear any evidence to show that the award was excessive, or that the jury disregarded the instructions of the person appointed to preside at the hearing. It was held that exceptions would not lie on account of such refusal. *Lennox v. Knox, etc., R. Co.*, 62 Me. 322. In such a case an affidavit made after the rendition of the verdict that some members of the jury were not freeholders, is not good ground for setting aside the verdict. *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648.

Jurors' Affidavits are admissible to impeach the verdict, the contrary rule being inapplicable to these proceedings, in which the jurors partake more of the character of commissioners than of a common-law jury. *Canal Bank v. Albany*, 9 Wend. (N. Y.) 244. *Contra*, see *Oregon Cascades R. Co. v. Oregon Steam Nav. Co.*, 3 Oregon 178. See generally, upon this subject, article VERDICTS.

3. Orange Belt R. Co. *v.* Craver, 32 Fla. 28. See also article VERDICTS.

Summary of Grounds.—The court before which proceedings are had upon the question of confirming or setting aside the findings and award of a jury in condemnation proceedings may set aside the award, and order a new trial before a new jury, upon the following grounds: (1) For fraud or misconduct of the jury affecting the rights of the parties; (2) for gross errors or mistakes of the jury; (3) for the erroneous rejection or admission of testimony affecting the rights of the parties; (4) for errors of such an extraordinary character or grossness as furnish a just

inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duty imposed; (5) when it is apparent that the damages awarded are either inadequate or excessive. *Fort-Street Union Depot Co. v. Backus*, 92 Mich. 33. To the same effect, see *Clarksville, etc., Turnpike Co. v. Atkinson*, 1 Sneed (Tenn.) 426.

The Admission of Evidence not admissible under strict legal rules is not enough, unless it appears to have caused substantial injustice. *Detroit Western Transit, etc., R. Co. v. Crane*, 50 Mich. 182, 10 Am. & Eng. R. Cas. 502.

The Finding must Be Clearly Responsive to all the matters which the statute requires the jury to investigate, or it will be set aside on motion of any party to the record. *McAllilley v. Horton*, 75 Ala. 491; *Philadelphia, etc., R. Co. v. Cake*, 95 Pa. St. 139.

Irregularities in Impanelling the Jury.—That the sheriff who summoned the jury may have been partial to, or prejudiced in favor of, one of the parties to the controversy is not *per se* sufficient to set aside the inquisition, if it appears that no injustice has thereby been done to any one. *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

Juror having Acted on Former Panel.—But where a juror, upon his examination as to his qualifications, denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the contesting party was ignorant of his having acted as a member of the former panel, and of the submission of the question of such necessity to him as a member thereof, until after the second proceedings were ended, he is entitled to have the verdict set aside and to a new trial. *Hester v. Chambers*, 84 Mich. 562. And see *Walker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 1.

where prejudice is shown ground for setting aside the verdict.¹

Misconduct of Jurors is good cause for setting aside the verdict, the same as in ordinary actions.² Thus misconduct of jurors as respects the view of the premises will warrant the setting aside of the verdict.³

Mistake.—When it appears that injustice has been done through some mistake or inadvertence of the jury, the verdict will be set aside.⁴

Verdict against Weight of Evidence.—The courts have power to set aside verdicts on this ground, and may determine whether the evidence which was before the jury shall be presented to them, and, if so, in what mode.⁵

1. Counsel's Address to the Jury.—It is improper for counsel for plaintiff, in stating the case to the jury, to refer to the amount of the award appealed from; but such impropriety is no ground for discharging the jury on defendant's motion. It is sufficient for the court at the time, and in the final instructions, to advise the jury that their verdict should in no way be influenced by the amount of such award. *Ball v. Keokuk, etc., R. Co., 74 Iowa 132.*

To authorize the setting aside of a verdict on the ground of improper remarks of counsel as to the value of the property, outside of the evidence, the remarks must be of such a character as may reasonably be supposed to have influenced the jury. So a remark by defendant's counsel that if he had been allowed he would have shown that plaintiff's house, for which the company was forced to pay three thousand two hundred dollars, was sold to plaintiff for five hundred dollars, is not ground for reversal where the jury seemed to have understood that the price paid by plaintiff was immaterial in assessing his damages. *Festner v. Omaha, etc., R. Co., 17 Neb. 280, 20 Am. & Eng. R. Cas. 238.*

See in general, upon this subject, article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

2. But the names of such jurors and the nature of their misconduct must be stated in the motion. *Lennox v. Knox, etc., R. Co., 62 Me. 322.*

3. Irregularities Connected with View of Premises.—It is misconduct for two of the jurors, without the direction or consent of the court, after the evidence has been submitted and before the argument of counsel in the case, to go together to the real estate in contro-

versy and examine it in order that they might have a better understanding of the case they are trying and be the better enabled to fix a value thereon. *Ortman v. Union Pac. R. Co., 32 Kan. 419, 17 Am. & Eng. R. Cas. 136.*

Where a jury is called upon to assess damages for the taking of a right of way over the lands of several distinct owners, the verdict will not be set aside because the sheriff in charge of the jury directed them to view all of the premises before hearing the evidence as to any one, instead of hearing the evidence in each case and then making a personal view. The method pursued by the sheriff is more convenient, tends to a more speedy trial, and is unobjectionable. *Jameson v. Androscoggin R. Co., 52 Me. 412.* See also *supra*, XI. *View of Premises.*

Use of Liquors by Jurors.—Some of the jurors, after they had finished viewing the premises, drank intoxicating liquor, but it did not appear that any of them became intoxicated, or that the persons furnishing the liquor were in any wise interested in the case, nor was it shown that the jury were thereby influenced to the prejudice of the petitioner. The court held that, while the jurors and the officer in charge should have been punished for the impropriety, it was not sufficient to warrant the setting aside of the verdict. *Sanitary Dist. v. Cullerton, 147 Ill. 385.*

4. *Cadmus v. Central R. Co., 31 N. J. L. 179.* See also article VERDICTS.

The Mere Fact that the Finding may Be Unjust will not affect the conclusiveness of the verdict if it can be sustained in any aspect of the evidence. *Colusa County v. Hudson, 85 Cal. 633.*

5. *Fitchburg R. Co. v. Eastern R.*

i. DAMAGES EXCESSIVE OR INADEQUATE—*In General.*—While it is within the power of the court to set aside a verdict for excess or inadequacy of the damages,¹ it will not encroach upon the province of the jury in this matter save in strong cases of injustice. The amount must be so large as to evince passion, prejudice, partiality, or corruption.² This is especially so where the jury have viewed the premises and the verdict is not clearly extravagant.³ It is a well settled rule that where there is evidence to sustain the verdict and the testimony is in conflict, the court will not interfere.⁴

Co., 6 Allen (Mass.) 98, settling the question which was left undecided in Walker v. Boston, etc., R. Co., 3 Cush. (Mass.) 1.

But it must appear clearly that the verdict is wholly inconsistent with and contrary to all the proofs to warrant disturbing it on this ground. Illinois, etc., R., etc., Co. v. McClintock, 63 Ill. 514; Atchison, etc., R. Co. v. Schneider, 127 Ill. 144; Sanitary Dist. v. Cullerton, 147 Ill. 385. And see Brown v. Ipswich Mfg. Co., 5 Gray (Mass.) 460; New Orleans, etc., R. Co. v. Frank, 39 La. Ann. 707, 30 Am. & Eng. R. Cas. 275.

Preponderance of Evidence.—It is not ground to set aside the verdict that the judge differs from the jury as to the preponderance of the evidence. Oregon Cascades R. Co. v. Oregon Steam Nav. Co., 3 Oregon 178.

Illustration.—A railroad ran diagonally across a tract of thirteen acres of land so as to cut off two portions of it in triangular form, separating them from the main tract and from each other. In eminent domain proceedings a verdict was returned for fifty dollars for the land taken and six hundred and thirty six dollars for damages. A former jury had given six hundred dollars damages in all. It was held that the verdict was not so palpably against the evidence as to be disturbed. Ohio Valley R., etc., Co. v. Kuhn (Ky. 1887), 5 S. W. Rep. 419.

1. Chapman v. Groves, 8 Blackf. (Ind.) 308; Harding v. Medway, 10 Met. (Mass.) 465; Philadelphia, etc., R. Co. v. Cake, 95 Pa. St. 139. *Contra*, see Willing v. Baltimore R. Co., 5 Whart. (Pa.) 460. And see *infra*, XII. 2. *j.* (5) *Excessive Damages*; XV. 7. *i.* (2) *Reducing Excessive Damages*. See also in general, upon this subject, article VERDICTS.

2. *Arkansas.*—Texas, etc., R. Co. v.

Eddy, 42 Ark. 527; Springfield, etc., R. Co. v. Rhea, 44 Ark. 258.

Iowa.—Ball v. Keokuk, etc., R. Co., 74 Iowa 132.

Kentucky.—Louisville, etc., R. Co. v. Ingram (Ky. 1890), 14 S. W. Rep. 534.

Missouri.—Sedalia v. Missouri, etc., R. Co., 17 Mo. App. 105.

New Jersey.—Somerville, etc., R. Co. v. Doughty, 22 N. J. L. 495.

New York.—Owners of Ground, etc. v. Albany, 15 Wend. (N. Y.) 374.

Pennsylvania.—Philadelphia, etc., R. Co. v. Gesner, 20 Pa. St. 240.

Virginia.—Alexandria, etc., R. Co. v. Faunce, 31 Gratt. (Va.) 761.

West Virginia.—Battrell v. Ohio River R. Co., 34 W. Va. 232.

3. *McReynolds v. Burlington, etc., R. Co.*, 106 Ill. 152; *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163; *Sioux City, etc., R. Co. v. Weimer*, 16 Neb. 272, 20 Am. & Eng. R. Cas. 184; *Omaha, etc., R. Co. v. Walker*, 17 Neb. 432.

More than Claimed.—But a verdict for more damages than are claimed in the petition is erroneous and the court will remit the excess. *Houston Tap, etc., R. Co. v. Milburn*, 34 Tex. 224.

4. *Arkansas.*—Springfield, etc., R. Co. v. Rhea, 44 Ark. 258.

Illinois.—Illinois, etc., R. Co. v. Von Horn, 18 Ill. 257; *Chicago, etc., R. Co. v. Jacobs*, 110 Ill. 414.

Indiana.—Kyle v. Miller, 108 Ind. 90.

Minnesota.—Colvill v. St. Paul, etc., R. Co., 19 Minn. 283.

Illustrations.—Where the land sought to be taken for right of way, situate in the limits of a city, was over ten acres, and twenty-five witnesses sworn estimated the damages at various sums from one thousand eight hundred dollars to eighteen thousand dollars, and the jury assessed the damages at five thousand five hundred dollars, it was held that the damages were not exces-

Inadequate Damages.—The same rules apply where the verdict is objected to as inadequate,¹ but where it is evident that the jury ignored or omitted to investigate some of the proper elements of damage, their verdict should be set aside.²

2. Report of Commissioners—*a*. IN GENERAL—FORMAL REQUISITES.—Primarily, the report of the commissioners should show an observance of all the requirements of the statute.³ The omission

sive. Peoria, etc., R. Co. *v*. Birkett, 62 Ill. 332.

A verdict for one thousand seven hundred dollars cannot be considered excessive where several witnesses testify that, in their opinion, the farm, consisting of three hundred and thirteen acres, is depreciated ten dollars per acre. Dudley *v*. Minnesota, etc., R. Co., 77 Iowa 408, 36 Am. & Eng. R. Cas. 593.

Where three witnesses put the value of land taken at one thousand dollars, two at one thousand and fifty dollars, one at one thousand one hundred dollars, one at one thousand two hundred dollars, and one at nine hundred dollars, a verdict for nine hundred and fifty dollars will be sustained. Grannis *v*. St. Paul, etc., R. Co., 18 Minn. 194, followed in Scott *v*. St. Paul, etc., R. Co., 21 Minn. 322.

A railroad was located over a three-acre tract of land on which was a mill, so as to cause the smoke-stack and part of the boiler house to be removed, and also to destroy the road to the mill. The evidence as to the value of the property was conflicting, ranging from nothing up to six thousand dollars. The jury gave two thousand five hundred dollars damages. This was held not excessive. State Line R. Co. *v*. Playford (Pa. 1888), 14 Atl. Rep. 355.

An award by a jury of three thousand dollars for a strip of land one hundred feet wide across an eighteen-acre tract on which there is a house worth one thousand dollars and a barn worth four hundred dollars, with some out-buildings and a young orchard not in bearing, the road running thirty-three feet from the house, where many witnesses fix the value of the entire tract with its improvements at less than the amount of the award, will be set aside as excessive. Louisville, etc., R. Co. *v*. Asher (Ky. 1891), 15 S. W. Rep. 517.

1. Green *v*. Chicago, 97 Ill. 374.

In a proceeding to condemn a lot upon which there was a building occupied by a tenant for a saloon and

restaurant, under an unexpired lease, a real estate dealer testified that the value of the leasehold interest was between two thousand five hundred dollars and three thousand dollars, over and above the rent, which was sixty dollars a month. The tenant testified that he had occupied the premises for eight or nine years, and that the leasehold interest was worth to him the amount of the rent only. The jury gave the tenant one hundred and fifty dollars as compensation for his interest and one hundred dollars for the costs and expenses of removal. It was held, on appeal by the tenant, that the verdict was not too low, under the evidence. Becker *v*. Chicago, etc., R. Co., 126 Ill. 436.

2. Walters *v*. Houck, 7 Iowa 72.

A railroad company condemned a right of way through a forty-acre tract, appropriating about four acres and cutting off fourteen acres from the residue of the tract. The jury returned a verdict assessing the compensation at about one-tenth of the value of the entire tract. It was held that as it was apparent that the jury had not taken into consideration the damages arising from cutting off the fourteen acres from the residue of the tract, the award must be set aside. Grand Rapids, etc., R. Co. *v*. Chesebro, 74 Mich. 466, 39 Am. & Eng. R. Cas. 159. See also *infra*, XV. 7. i. (3) *Inadequacy of Damages*.

3. Otero Canal Co. *v*. Fosdick, 20 Colo. 522; Rice *v*. Danville, etc., Turnpike Road Co., 7 Dana (Ky.) 81; State *v*. Van Geison, 15 N. J. L. 339; State *v*. Lord, 26 N. J. L. 140. *Contra*, see Road in Middle Creek, etc., Tp., 9 Pa. St. 69.

Requisites and Sufficiency of the Report—Generally.—The report should show that the commissioners met at the time and place designated in the order of the court; that they were sworn before entering upon the discharge of their duties; that they viewed in person the land sought to

of something which the statute explicitly requires to be stated is fatal to the report,¹ as is also the omission of a finding upon any of the questions submitted to the commissioners pursuant to the statute.² The jurisdictional facts must be clearly set out.³ The

be condemned; that, at times and places of which the several parties in interest had notice, they heard the allegations and proofs of the parties, and to that end issued subpoenas for all witnesses which the parties or any of them desired to call. The report should also contain minutes of the testimony and the rulings of the commissioners upon all points made by counsel or parties as to the admission or rejection of testimony, and, generally, all matters which are necessary to show the rules or principles by which the commissioners were governed in making their appraisal. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

As to Notice.—The commissioners may properly embody in the report which they file with the county clerk a statement of their doings with reference to giving notice of the time when they will proceed to lay off the route of the railroad, and such recitals are *prima facie* evidence of the facts therein stated. *Clement v. Wichita*, etc., R. Co., 53 Kan. 682.

As to Adjournments.—A report filed by commissioners which recites that they met at the time and place named in the notice, and proceeded to lay off a route, that a legal adjournment was had, and further states that they met at a later time and another place, in pursuance of adjournment, when they proceeded with the completion of their work, does not show that the adjournment was without notice or illegal, nor does it show an abandonment of the proceedings under the original notice, nor a loss of jurisdiction; and such report is not void upon its face. *Leavenworth*, etc., R. Co. *v. Meyer*, 50 Kan. 25.

Conditional Report.—Whether the commissioners may, without special legislative authority, make a conditional award, or one contingent upon the happening of future events or the subsequent performance of certain acts by the parties, *quære*. *McCord v. Sylvester*, 32 Wis. 451. See *supra*, XII. 1. d. (4) *Conditional and Alternative Awards*.

Lost Report.—A certificate of the commissioners that they had formerly

made a report, which is lost, stating its contents, and that such was and is their report, is insufficient. If a report is lost before it is returned to the judge, it can only be supplied by a new one in due form, or by a proceeding *de novo*. *Rice v. Danville*, etc., Turnpike Road Co., 7 Dana (Ky.) 81.

1. *State v. Jersey City*, 25 N. J. L. 309; *U. S. v. Dumplin Island*, 1 Barb. (N. Y.) 24; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

Illustration.—Where commissioners appointed to compute the damage to land show by their report that they understood that the fee of the land to be taken was not in the defendant, it will be assumed that the award of damages was not for a greater interest than that actually held by defendant, though their report gives "the value of the land or property actually taken;" this statement being required by statute. *Otero Canal Co. v. Fosdick*, 20 Colo. 522.

2. *California*.—*Damrell v. San Joaquin County*, 40 Cal. 154.

Colorado.—*Pueblo*, etc., R. Co. *v. Rudd*, 5 Colo. 270.

Kentucky.—*Bibb v. Montjoy*, 2 Bibb (Ky.) 1; *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 302; *Robinson v. Robinson*, 1 Duv. (Ky.) 162.

Maine.—*Pierce v. Franklin County*, 63 Me. 252.

New York.—*Matter of New York*, etc., R. Co., 35 Hun (N. Y.) 232.

Pennsylvania.—*Philadelphia*, etc., R. Co. *v. Cake*, 95 Pa. St. 139.

Surplusage.—But the report need not pass upon questions which the statute does not require them to decide, and if it does so, such finding may be disregarded as surplusage. *Aken v. Parfrey*, 35 Wis. 249.

3. *State v. Scott*, 9 N. J. L. 17; *Semon v. Trenton*, 47 N. J. L. 489; *Thompson v. Multnomah County*, 2 Oregon 34.

Appointment of Commissioners.—Recitals in the award that the commissioners were duly appointed by the judge and legally summoned by the sheriff are not facts required to be stated in the award, and do not prove that the commissioners who purport

proposed road must be described not only by metes and bounds but also by courses and distances.¹ If the statute so require, the minutes of the testimony should be included in,² or annexed to, the report.³ And if a map or draft is required in addition to the courses and distances, it must be made and reported.⁴

Sealing and Filing.—The statutory requirements as to sealing and filing the commissioners' report should, of course, be strictly followed.⁵

b. RIGHT OF A MAJORITY TO ACT OR DECIDE.—The general rule of law that where authority is conferred upon three or more persons to do a public act, the concurrence of a majority is a valid execution of the power, when all attend and take part in the transaction,⁶ is applicable, in most jurisdictions, to the deliberation and report of commissioners to assess damages.⁷ All having acted, a report concurred in and signed by a majority is good.⁸ A number of the states have statutes declaratory of and adopting the common-law rule above mentioned.⁹ Various applications and qualifications of these rules will be found indicated below.¹⁰

to sign the award were duly and legally appointed. *Lewis v. St. Paul, etc., R. Co.*, 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612.

Effort to Agree with Landowner.—Where an inquisition omitted to state a disagreement between the owner of the lands mentioned and the company, and that the judge who appointed the commissioners was not interested, etc., it was held defective, and quashed. *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107.

1. *Woods v. Campbell*, 14 B. Mon. (Ky.) 339.

If a railroad, the quantity, quality, and value of the lands taken or materials required should be stated. *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

2. *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 293.

3. *Rondout, etc., R. Co. v. Deyo*, 5 Lans. (N. Y.) 298.

4. *State v. English*, 22 N. J. L. 291; *Road from Warrior Run*, 3 Binn. (Pa.) 3.

5. **Sealing.**—*Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300; *Hanes v. North Carolina R. Co.*, 109 N. Car. 490.

Filing.—*Higbee v. Peed*, 98 Ind. 420.

6. *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Paradise Road*, 29 Pa. St. 20. As to the right of a majority of the jurors to decide, see *supra*, XII. 1. *a. Mode of Arrival at Verdict*; of the commissioners, see next note

The majority may decide, though the minority dissent and refuse to be further considered members of the board. *Ex p. Rogers*, 7 Cow. (N. Y.) 526.

7. *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5; *Matter of New York*, 34 Hun (N. Y.) 441; *Young v. Buckingham*, 5 Ohio 485; *Union Pac. R. Co. v. Burlington, etc., R. Co.*, 1 McCrary (U. S.) 452.

8. *Indiana.*—*Piper v. Connersville, etc., Turnpike Road Co.*, 12 Ind. 400; *American Cannel Coal Co. v. Huntington, etc., R. Co.*, 130 Ind. 98, 51 Am. & Eng. R. Cas. 653.

Massachusetts.—*Plymouth v. Plymouth County*, 16 Gray (Mass.) 341.

New York.—*Cruger v. Hudson River R. Co.*, 12 N. Y. 190; *Astor v. New York*, 62 N. Y. 580.

9. *Hays v. Parrish*, 52 Ind. 132; *Quayle v. Missouri, etc., R. Co.*, 63 Mo. 465; *Matter of Broadway*, 63 Barb. (N. Y.) 572.

Some of the statutes authorize a majority to act as well as to decide, but in such cases it must appear that all were notified and qualified. *Ohio, etc., R. Co. v. Barker*, 134 Ill. 470; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5; *Astor v. New York*, 62 N. Y. 580.

10. *Illinois.*—Under the Act of 1852 the three commissioners appointed to assess the damages were all required to qualify, and must endeavor to agree.

c. DESCRIPTION OF LAND TAKEN, QUANTITY, ETC.—Necessity.—If a statute requires the report to describe the property, an omission to do so is fatal.¹

And unless all the commissioners were sworn, and acted together, their report will not authorize a judgment of condemnation. If they all qualify and meet and attempt to agree, the decision or report of two of them will doubtless be binding; but when only two qualify or act together their award or assessment will not be binding, unless the owner ratifies the act by accepting the damages. Ohio, etc., *R. Co. v. Barker*, 134 Ill. 470.

Maine.—A committee, agreed on and appointed, instead of a jury, to assess the damages occasioned by the location of a county road, cannot act by a majority, but their proceedings will be void unless they all concur in the result arrived at. *McLellan v. Kennebec County*, 21 Me. 390.

Missouri.—Under a proper construction of the statutes requiring three commissioners, their report is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment upon it vesting the title to the land in the company. *Quayle v. Missouri*, etc., R. Co., 63 Mo. 465.

New Hampshire.—Whether a majority of a board of road commissioners may execute the joint authority which the statutes purport to confer upon the entire board, in case all are not notified, and do not meet and consult, *quære*. *Palmer v. Conway*, 22 N. H. 144.

New York.—The decision of two commissioners (to open streets, etc.), where all are present and acting, is the decision of all; but two cannot do any valid act in the absence of the third, such as signing a report, etc. Matter of Summit St., 3 How. Pr. (N. Y.) 26.

The General Railroad Act, § 16, requires a report in condemnation proceedings to be signed by a majority of the commissioners, but it does not require them all to be together at the signing; nor is there any rule of law or principle of public policy requiring it. *Rochester*, etc., R. Co. v. Beckwith, 10 How. Pr. (N. Y. Supreme Ct.) 168.

The purpose of section 3370 of the Code of Civil Procedure is that a landowner should have the benefit of the

exchange of views and the comparison of ideas which would come from a consultation together of all the commissioners of appraisal appointed to take his real estate against his will, and although it might be that the result would not have been different if such consultation had taken place, the failure to comply with such provisions of the statute is an objection of sufficient weight to justify the setting aside of the report of the commissioners of appraisal and the directing of a new appraisal. Matter of Brooklyn El. R. Co., 80 Hun (N. Y.) 355.

1. *Anderson v. Pemberton*, 89 Mo. 61; *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249. See also *supra*, XII. 1. b. *Description of Property Taken or Damaged*.

In *North Carolina* a report of commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right of way. *Hanes v. North Carolina R. Co.*, 109 N. Car. 490.

In *Kansas* the nature and extent of the rights and easements acquired by a railroad company by the condemnation of lands for the purposes of its road must be definitely shown in the written report of their proceedings filed by the commissioners who made the condemnation. The report must show what is taken, and what the landowner parts with. Nothing is taken by implication or intendment, and parol evidence to show that the commissioners intended to condemn other land not included in their report is inadmissible. *C. G. Larned Mercantile*, etc., Co. v. Omaha, etc., R. Co., 56 Kan. 174.

In the Absence of a Statutory Requirement the report should contain such description in order to identify the property for which damages are given, *Smith v. Connelly*, 1 T. B. Mon. (Ky.) 58; Matter of New York, etc., R. Co., 21 How. Pr. (N. Y. Supreme Ct.) 434; *Franklin Tp. Road*, 4 Pa. Dist. Rep. 417; and so that the jury, in going upon the ground, can readily discover where the laying out is, *Northern R. Co. v. Concord*, etc., R. Co., 27 N. H. 183.

Sufficiency.—It is sufficient, in railroad cases, to describe the land taken as a strip of a given width through a certain particularly described quarter section, since the map and profile filed by the company will render the description definite and certain.¹ The description may refer to a previous description in the warrant or petition,² or to a plan or survey attached, or filed, or recorded, or in any other way identified.³ Where, however, the condemnation proceeding is to operate as a deed, the description should be equally specific as in a deed. The precise limits of the land transferred should be shown.⁴

1. *Hunt v. Smith*, 9 Kan. 137.

Illustration.—The land appropriated is sufficiently identified in a report which describes it as "a strip, belt, or piece of land one hundred feet in width, extending from the east side to the west side, over and across said land, through the centre of which said strip, belt, or piece of land the centre line of the railroad of the Chicago, Milwaukee and St. Paul railway is now surveyed and located, so as to have one-half in width on each side of the centre line." *Chicago, etc., R. Co. v. Randolph Town-Site Co.*, 103 Mo. 451, 47 Am. & Eng. R. Cas. 118, *applied* in *St. Louis, etc., R. Co. v. Fowler*, 113 Mo. 458.

2. *Ruston v. Grimwood*, 30 Ind. 364, where, although the petition was not *eo nomine* referred to, yet, as a part of the record, the court allowed it to be consulted to bear out the report.

3. *Iowa*.—*State v. Schilb*, 47 Iowa 611.

Massachusetts.—*Stone v. Cambridge*, 6 Cush. (Mass.) 270; *Gilkey v. Watertown*, 141 Mass. 317; *Andover v. Essex County*, 5 Gray (Mass.) 393.

Missouri.—*Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334; *Kansas City, etc., R. Co. v. Story*, 96 Mo. 611, 36 Am. & Eng. R. Cas. 584.

New Hampshire.—*Hall v. Manchester*, 39 N. H. 295.

Diagram.—Where land is condemned for a right of way after the road is built and in operation, a report of the commissioners which contains a diagram showing the shape of the land and the course of the road across it, and upon what subdivision of a section the road is located, is sufficient as to the description of the land, though no survey by courses and distances be made. *Strang v. Beloit, etc., R. Co.*, 16 Wis. 635.

Lost or Variant Plans.—Where the plan referred to could not be found on the files at the proper time of filing,

the laying out of the road was held void. *Jeffries v. Swampscott*, 105 Mass. 535. But where it varied from the description given in the report, though not so much that the way could not be made out with reasonable certainty, the laying out was sustained. *Gilkey v. Watertown*, 141 Mass. 317.

4. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189.

Invalid Descriptions.—Where commissioners are appointed to determine the damages for land taken by a railroad corporation in New Jersey, an award by them assessing damages for running, making, and maintaining fences, without showing that the lands of the party through which the road is run are improved lands, is illegal and void, the charter authorizing such damages in case only of improved lands. *New Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25.

A report of commissioners which describes the land as beginning "at the east line of C's land, and runs eastwardly by a curved line as the stakes now stand to T's land, embracing a space of two rods in width on each side of said line of stakes, and containing four acres of land," is not a sufficient compliance with a statute which requires the commissioners to transmit their award, together with a description of the land and the quantity taken, by whom owned and how situated, bounded, and described, to the judge. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189.

Setting Forth the Quantity of Land Taken.—Where commissioners appointed to assess damages assessed them in view of the tract taken altogether, but understated the quantity of the land by a fraction of an acre, it did not invalidate their action. *Morgan v. Chicago, etc., R. Co.*, 39 Mich. 675.

d. FINDING AS TO NECESSITY OF THE TAKING.—Where required, the report must find distinctly that the taking is necessary for the public use and benefit; and to make such a report the commissioners must be satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance.¹ So, also, in drainage cases, a failure to find as to public utility is fatal to the report,² and a finding that the proposed road is one “of convenience and necessity” is sufficient, although the statutory words are “common convenience and necessity.”³

e. FINDING ON QUESTION OF DAMAGES—(1) *In General.*—The report of the commissioners must assess the damages to the landowners through whose land the improvement passes,⁴ and to each one of them according to his estate or interest in the land.⁵ Some cases hold that where the report is silent as respects damages to any particular owner, this is equivalent to an award of no damages as regards him,⁶ and affords no ground of complaint on

In a proceeding to assess damages, under the Pa. Act of March 29, 1848, for land taken by the Pennsylvania R. Co., a report setting out the adjoiners and boundaries, with a draft showing the length, breadth, course, and distances of the ground taken, without a calculation of the contents, sufficiently sets forth the quantity of land taken. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.

1. *Mansfield, etc., R. Co. v. Clark*, 23 Mich. 519. See also *supra*, III. 3. *Determining Questions of Necessity and Propriety*; and *supra*, XII. 1. *c. Finding as to Necessity of the Taking.*

Exception.—It is not necessary, where only a strip of land one hundred feet wide is taken, that the report should show expressly that the commissioners deemed such strip necessary. *Hunt v. Smith*, 9 Kan. 137.

2. *Bass v. Elliott*, 105 Ind. 517.

Sufficient Findings.—A finding “that the taking of said strip or parcel of land * * * was required and necessary for the constructing and operating of said railroad, and a necessary public use thereof,” is sufficient. *Morgan v. Chicago, etc., R. Co.*, 39 Mich. 675.

3. *Cushing v. Gay*, 23 Me. 9.

4. *New-Washington Road*, 23 Pa. St. 485; *Parker v. Fort Worth, etc., R. Co.*, 84 Tex. 333, 51 Am. & Eng. R. Cas. 643. See also *supra*, XII. 1. *d. Finding on Question of Damages.*

Requisites of the Award.—An award should embrace, first, what the com-

missioners consider is a just compensation to the landowner as the fair value of the land taken; and second, a just compensation for the effect which the taking would have in depreciating the market value of the remainder; and where it seems both of these things were considered, as where the actual value of the land taken was not more than sixty dollars and the commissioners allowed five hundred dollars, the report will not be set aside on an objection that the commissioners did not consider and allow for “inconveniences” to the property. *Albany, etc., R. Co. v. Dayton*, 10 Abb. Pr. N. S. (N. Y. Supreme Ct.) 182.

5. *Fitzpatrick v. Pennsylvania R. Co.*, 10 Phila. (Pa.) 107; *Dolphin v. Pedley*, 27 Wis. 469. But error in not apportioning their damages separately to each of several parties claiming distinct interests in the same land, according to their respective interests, is a mere irregularity, subject to correction by recommitment, which will not affect the jurisdiction of the commissioners. *In re Washington Street (R. I. 1895)*, 33 Atl. Rep. 516.

6. *Hildreth v. Lowell*, 11 Gray (Mass.) 345; *Howland v. Penobscot County*, 49 Me. 143; *Childs v. Franklin County*, 128 Mass. 97; *Point-No-Point Road Case*, 2 S. & R. (Pa.) 277.

Illustrations.—A report stating “and we * * * did appraise the damages to the owners of said land as follows,” without reciting any appraisal, was upheld where it appeared, as a fact,

the part of another owner to whom damages were assessed.¹ Other decisions require an express finding of the absence of the right to damages,² and hold that a report stating that one or more of the owners made no claim for damages is insufficient.³ The report is not void because it does not show whether a deduction for benefits was made.⁴

The commissioners are sworn officers and may rely upon their own judgments as to the amount. The precise value is not essential, an approximation being sufficient.⁵

(2) *Itemizing the Damages*.—Ordinarily the commissioners are not required to state separately the various items that make up the aggregate of their award.⁶ The award of a gross sum is sufficient, leaving it to the court to apportion it among the several claimants.⁷ In some jurisdictions, however, the statutes require

that the commissioners did appraise the damages and tendered them to the owner, who refused to receive them. *Reed v. Acton*, 117 Mass. 392. The dismissal of a petition for damages is an adjudication of no damages. *Smith v. Boston*, 1 Gray (Mass.) 72.

1. *Clifford v. Eagle*, 35 Ill. 444.

2. *Highway Com'rs v. Durham*, 43 Ill. 86, *modifying* *Taylor v. Marcy*, 25 Ill. 518; *Washington v. Fisher*, 43 N. J. L. 377, and cases cited; *Kearsley v. Gibbs*, 44 N. J. L. 169.

3. *State v. Runyon*, 24 N. J. L. 256, *following* *State v. Garretson*, 23 N. J. L. 388.

4. *Hunt v. Smith*, 9 Kan. 137.

5. *People v. Williams*, 51 Ill. 63.

By the Mass. Act of 1859, c. 122, plaintiff company was authorized to drive its cars over the Essex bridge, belonging to the commonwealth, at a fixed sum for each trip. By an Act of 1863, c. 97, the company was authorized to extend its road over the bridge, and the county commissioners were authorized to determine the manner of the construction, and fix the compensation to be paid. It was held that the commissioners were not restricted in fixing the compensation to the amount established by the Act of 1859, which was the same as tolls for coaches, and that the commissioners might include a sum to be paid to the agent of the commonwealth for services in superintending the bridge, rendered necessary by the construction of the road. *Salem, etc., R. Co. v. Essex County*, 9 Allen (Mass.) 563.

But an award for land in a city, giving its value for farming purposes

merely, is erroneous. *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56.

6. *Matter of Campbell*, 1 N. Y. St. Rep. 768; *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350; *Ford v. Lincoln County*, 64 Me. 408; *Wilmington, etc., R. Co. v. Smith*, 99 N. Car. 131; *Philadelphia, etc., R. Co. v. Trimble*, 4 Whart. (Pa.) 47; *Lodge v. Frankford, etc., R. Co.*, 9 Phila. (Pa.) 543. As to itemizing the damages by the jury, see *supra*, XII. 1. d. (2) *Itemizing the Damages*.

7. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *California Pac. R. Co. v. Frisbie*, 41 Cal. 356; *Cincinnati, etc., R. Co. v. Bay City, etc., R. Co.* (Mich. 1895), 64 N. W. Rep. 471; *Spaulding v. Milwaukee, etc., R. Co.*, 57 Wis. 304, 10 Am. & Eng. R. Cas. 401; *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332, 10 Am. & Eng. R. Cas. 168.

Illustrations.—A report of commissioners awarding damages to the owners of, and persons interested in, lands to be acquired for the construction of the new Croton aqueduct, under the provisions of chapter 490, Laws of 1883, was claimed to be defective in that it failed to state separately the sum awarded for the land actually taken, and the sum awarded for the damages to the contiguous lands injuriously affected thereby. It was held that the statute contemplated the award of but one amount. *Matter of Thompson*, 45 Hun (N. Y.) 261.

Where a report of commissioners, appointed to appraise land condemned for railroad purposes, allowed a round

the damages to be itemized,¹ and the court may, in a proper case, order the jury to specify the items or subjects for which they allow damages.² Where the interests of the different owners are separable, their damages should be assessed separately.³

f. NAMING THE OWNERS OF PROPERTY TAKEN.—Where there are several owners the report should state the name of each, if known, and the amount allowed him;⁴ failure to do this, if such statement is required by statute, is fatal to the report.⁵ If there are unknown owners that fact should be stated.⁶ The appropriate, individual names of the owners should be stated, not their initials, or partnership names, or the names of estates, or collective designations, such as “heirs” or “devisees.”⁷

sum for “the value of said ground appropriated by them and the damages to the remainder of the premises of defendants by reason of the severance of the part taken,” etc., it was held that though “damages to the remainder” were not a matter of distinct allowance, yet as they were an element of estimate in arriving at a “just compensation” for the land actually taken, the error of the report, being one of form rather than of substance—of expression rather than of real meaning—would not vitiate it. *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

1. *Robinson v. Robinson*, 1 Duv. (Ky.) 162; *Ohio, etc., R. Co. v. Wallace*, 14 Pa. St. 245; *Greenville, etc., R. Co. v. Nunnemaker*, 4 Rich. (S. Car.) 107, where it is held that a failure to comply with the statute in this respect may be cured by amendment.

Canal Appropriation.—The inquisition taken under the 15th section of the Va. act incorporating the Chesapeake and Ohio canal company should state specifically and separately the value of the land condemned in perpetuity, and the quantity and quality of the estate in the land condemned for temporary purposes; and should also state separately the damages estimated on each separate source of damage; so that the inquisition will ascertain the damages which have been estimated, and will protect the company from any future demand for these damages. *Chesapeake, etc., Canal Co. v. Hoyer*, 2 Gratt. (Va.) 514.

Failure to Itemize, How Objected to.—Where commissioners are appointed to assess compensation for the taking of private property for public uses, and it is claimed that the commissioners

have not assessed “compensation for each piece of land taken, and for each source of damage separately,” an objection to the action of the commissioners on that ground must be taken before the commissioners themselves, to afford them an opportunity to obviate the objection, and if they refuse, an exception must be noted. If the party fails to make the objection before the commissioners, he cannot move to set aside the report on that ground in the court to which the report of the commissioners is made. *In re Clear Lake Water Co.*, 48 Cal. 586.

2. *Harvey v. Lackawanna, etc., R. Co.*, 47 Pa. St. 428.

3. *Ruppert v. Chicago, etc., R. Co.*, 43 Iowa 490.

4. *Honenstine v. Vaughan*, 7 Blackf. (Ind.) 520; *Com. v. Coombs*, 2 Mass. 489; *Com. v. Great Barrington*, 6 Mass. 492.

5. *Roberts v. Williams*, 15 Ark. 43.

6. *Com. v. Great Barrington*, 6 Mass. 492. *Contra*, see *Cushing v. Gay*, 23 Me. 9, where the failure to name all the owners was held not to deprive those not named of the right to appeal.

Award to “Unknown Owners,” When Improper.—Although it is the duty of the commissioners to award damages directly to the owner, in case his title is sufficiently established, and not to “unknown owners,” yet, where the amount of the award is small, and the owner can have adequate relief by proceedings to obtain the fund, the court will not send back the report for correction in this respect alone. *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56.

7. **Invalid Designations of Owners.**—The following were held to be invalid naming of owners: An award to sev-

g. RESERVATION OF EASEMENTS TO OWNER—CONDITIONAL AWARDS—Easements.—The value of the property taken and the damages to the remainder must be assessed in money.¹ It is erroneous to reserve to the landowner certain easements or privileges, making deductions therefor from the amount of damages which would otherwise have been awarded,² such as a "wagon-way and stop for cattle,"³ or the privilege of constructing a street across the railway,⁴ or of leaving portions of a building projecting thereon.⁵

Things to be Done by Condemning Party.—It is equally erroneous to provide in the report that the condemning party shall do certain things for the landowner, as a part of his damages,⁶ such as the building of fences,⁷ maintaining of crossings,⁸ bridges, and cattle

eral partners by their firm name, or to several owners by their initials only (*Vawter v. Gilliland*, 55 Ind. 278; *State v. Woodruff*, 36 N. J. L. 204); or to "Mrs. Porter" and "Mrs. Kearsley" (*Kearsley v. Gibbs*, 44 N. J. L. 169); or to "A B and others" (*State v. Oliver*, 24 N. J. L. 129); or to "the estate of A," or the "devisees of A" (*Washington v. Fisher*, 43 N. J. L. 377; *State v. Blauvelt*, 33 N. J. L. 36; *Matter of William, etc., Streets*, 19 Wend. (N. Y.) 678, where it is held that where land is assessed as benefited, and there is doubt as to the owners, an award to the estate of the person last in possession would be good, but not so where damages are assessed); or to "the heirs of Jacob Kemp" (*State v. Woodruff*, 36 N. J. L. 204; *Oxford Tp. v. Brands*, 45 N. J. L. 337, and cases cited; *Adams v. Rulon*, 50 N. J. L. 526).

Valid Naming of Owners.—An award to "Adam Sture, Appellant," where the owner's real name was Andrew Sture, was held good, the word "Appellant" affording a sufficient means of identification by reference to the record (*Red River, etc., R. Co. v. Sture*, 32 Minn. 95); and an award to "C as guardian of F" was held to be substantially an award to the minor himself, and therefore valid. *Peavey v. Wolfborough*, 37 N. H. 286.

1. *Maryland.*—*Hamilton v. Annapolis, etc., R. Co.*, 1 Md. Ch. 107, affirmed in 1 Md. 553.

Michigan.—*Toledo, etc., R. Co. v. Munson*, 57 Mich. 42.

Missouri.—*Sedalia v. Missouri, etc., R. Co.*, 17 Mo. App. 105.

New York.—*New York, etc., R. Co. v. Bell*, 28 Hun (N. Y.) 426.

West Virginia.—*Chesapeake, etc. R. Co. v. Patton*, 6 W. Va. 147.

2. *Hill v. Mohawk, etc., R. Co.*, 5 Den. (N. Y.) 206, affirmed in 7 N. Y. 152, where the inquisition stated that the award of damages was "based on the supposition, and made on the condition and with the understanding" that the owners of the land might open a street across the railroad. To the same effect, see *Chesapeake, etc., R. Co. v. Halstead*, 7 W. Va. 301.

3. *Central Ohio R. Co. v. Holler*, 7 Ohio St. 220.

4. *Hill v. Mohawk, etc., R. Co.*, 5 Den. (N. Y.) 206, affirmed in 7 N. Y. 152.

5. *Hyde v. Middlesex County*, 2 Gray (Mass.) 267; *Colburn v. Kittridge*, 131 Mass. 470. But see *Com. v. Noxon*, 121 Mass. 42; *Schuchardt v. New York*, 59 Barb. (N. Y.) 295.

Privilege to Move House.—An award of damages for the location of right of way for a railroad, although not contemplated by the Neb. Gen. Stat. 191, § 97, contained a provision that the party owning the premises, part of which were taken for right of way, might move back his house therefrom. The award was held valid. *Omaha, etc., R. Co. v. Menk*, 4 Neb. 21.

6. *McCord v. Sylvester*, 32 Wis. 451, where the company was required to keep up a certain flow of water in a creek for farm purposes. *White v. Boston, etc., R. Corp.*, 6 Cush. (Mass.) 420.

7. *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287; *Chesapeake, etc., R. Co. v. Patton*, 6 W. Va. 147.

8. *Chicago, etc., R. Co. v. Melville*, 66 Ill. 329.

guards, etc.,¹ or the constructing of culverts and wasteways.²

Ratification of such awards by the parties will render them binding and enforceable as contracts.³

Conditional or Alternative Awards are invalid; the award must be positive and for a fixed and definite amount.⁴

h. CONCLUSIVENESS AND EFFECT.—Where the parties are regularly before the commissioners, and an award is regularly made by them as to each claimant, the rights of the respective parties become definitely fixed, and such award, until modified or changed on appeal, is conclusive and binding, not only upon the parties of record, but upon their privies and grantees.⁵ The report has the same weight as the verdict of a jury and is equally conclusive as to the facts ascertained in it.⁶ The commissioners

1. Toledo, etc., R. Co. v. Munson, 57 Mich. 42.

2. Morse's Petitioner, 18 Pick. (Mass.) 443.

Compensation for Removing Building.—So also it is error to include in the award compensation to the landowner for removing a building, under a contract with the condemning party by which the latter agreed to pay for such removal. The landowner should be left to his action on the contract. *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 122.

3. Chicago, etc., R. Co. v. Joliet, etc., R. Co., 105 Ill. 394, where such agreements are said to run with the land; but in *Piper v. Union Pac. R. Co.*, 14 Kan. 568, and *Morss v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 536, it is denied that they run with the land.

Illustration.—A company sought to condemn lands used by a coal dealer, on which was a trestle used in connection with the business. The report of inquisition required the company to pay a certain sum of money, and to build another trestle and connect it with its own road and another road; and upon a noncompliance with this condition, to pay an additional sum in money. The trestle was not built, and the landowner brought suit. It was held that the jury could only award a money compensation, unless consented to by the parties; but such consent being given, and the award as to the building of the trestle being ratified by the parties, it was binding, and the company could not defend on the ground that part of the trestle to be erected was not on the lands condemned. In such case the landowner had a right to insist on the kind of

trestle awarded, or on damages, and was not required to accept another trestle in the place of the one described in the inquisition. Neither could the company defend, after agreeing to the terms of the inquisition, on the ground that the other company would not permit it to connect the trestle with its road. *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, 10 Am. & Eng. R. Cas. 429.

4. *Reg. v. London, etc., R. Co.*, 3 El. & Bl. 443, 77 E. C. L. 443; *Dudley v. Butler*, 10 N. H. 281. See cases cited *supra*, XII. 1. d. (4) *Conditional and Alternative Awards*.

5. *Trogden v. Winona, etc., R. Co.*, 22 Minn. 198. But see *People v. McRoberts*, 62 Ill. 38; *Waterbury v. Hartford, etc., R. Co.*, 27 Conn. 146. See *supra*, XII. 1. e. *Interpretation—Conclusiveness*.

Illustrations.—Where a railroad was located so as to divide plaintiff's land, and, in awarding damages, the county commissioners took into consideration the fact that no right of crossing had been reserved for plaintiff, plaintiff cannot afterwards assert a legal right to a crossing. *New York, etc., R. Co. v. Miller*, 165 Mass. 514.

Under Pa. Act April 28, 1870, appointing commissioners for construction of a bridge, and authorizing them to condemn any property "which they may deem necessary for the site of the bridge," the decision of the commission as to how much and what land was necessary was conclusive, where no abuse of their power was shown. *Philadelphia v. Ward*, 174 Pa. St. 45.

6. *State v. Graves*, 19 Md. 351; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Matter of One Hundred and Thirty-Eighth St., etc.*, 60 How. Pr.

being duly appointed and having jurisdiction, their report is conclusive in all collateral proceedings.¹

i. CONFIRMATION—(1) *In General*.—The court in which the report is filed may accept or reject it, according to its compliance or noncompliance with the statute; and this although the statute does not expressly provide for the return of the doings of the commissioners into court.² Either party may move to confirm the report.³ Where it appears that the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course to confirm the report,⁴ unless it be erroneous or defective on its face.⁵

(N. Y. Supreme Ct.) 290; Norfolk Southern R. Co. v. Ely, 101 N. Car. 8. As to the conclusiveness of the jury's verdict, see *supra*, XII. 1. *e. Interpretation—Conclusiveness*.

While it remains unreversed no common-law action will lie for an increase of damages, on the ground that the commissioners acted upon a mistaken basis in assessing the damages. Butman v. Vermont Cent. R. Co., 27 Vt. 500.

1. Townsend v. Chicago, etc., R. Co., 91 Ill. 545; Breitweiser v. Fuhrman, 88 Ind. 28.

Presumptions to Sustain Report.—In a collateral proceeding the report of the commissioners becomes final and conclusive upon the parties without its appearing that notice had been given of the filing of the report with the clerk; it will be presumed that such notice was given. Chicago, etc., R. Co. v. Chamberlain, 84 Ill. 333.

2. Pueblo, etc., R. Co. v. Rudd, 5 Colo. 270; Hingham, etc., Corp. v. Norfolk County, 6 Allen (Mass.) 356; Mississippi River Bridge Co. v. Ring, 58 Mo. 491, *approved* in Missouri Pac. R. Co. v. Wernwag, 35 Mo. App. 449.

3. Bloomfield, etc., Natural Gas-light Co. v. Calkins, 62 N. Y. 386, *affirming* 1 Thomp. & C. (N. Y.) 549; Matter of Metropolitan El. R. Co., 67 Hun (N. Y.) 652, 51 N. Y. St. Rep. 827.

Or to Reject It.—When the report is returned to the court either party may show cause against its confirmation, upon the ground of excessive or inadequate compensation, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be confirmed. Washington, etc., R. Co. v. Switzer, 26 Gratt. (Va.) 661.

4. N. Y. Gen. Railroad Act 1850, § 17; New York, etc., R. Co. v. Corey, 5 How. Pr. (N. Y. Supreme Ct.) 177.

5. Chesapeake, etc., R. Co. v. Pack, 6 W. Va. 397.

Conclusiveness on Motion to Confirm.—No affidavits or other proof to contradict or impeach the truth of the matters contained in the report should be heard on such application; and a commissioner should not be permitted to stultify himself in any case, by alleging that he signed the report without reading or hearing it read, where the same is properly signed. Rochester, etc., R. Co. v. Beckwith, 10 How. Pr. (N. Y. Supreme Ct.) 168.

The court cannot consider any objections or exceptions, except such as state that neither the report nor any of the proceedings which precede it properly designate the lands proposed to be taken. All other objections and exceptions must be considered on appeal from the report after confirmation, as provided by the General Railroad Act, § 18. Matter of New York, etc., R. Co., 21 How. Pr. (N. Y. Supreme Ct.) 434.

The court cannot consider objections as to the amount at which the property is appraised, nor as to the amount awarded as damages, unless some erroneous rule or valuation has been adopted, other than a mere mistake of judgment, or unless some great wrong or obvious mistake has been committed in making the estimate. Parties will be heard in regard to the principles of a report, and if the commissioners have adopted an erroneous principle or made an erroneous application of a correct principle, the court will interfere to correct the error. Matter of Buffalo, 1 Sheld. (N. Y.) 408.

In Illinois the landowner may oppose

(2) *Order of Confirmation—Validity and Effect.*—An order confirming the report of commissioners must be made on notice to the adverse party and in term time,¹ and be certain and unconditional.²

Setting Aside Order.—The court has power to vacate an order of confirmation and thereupon to set aside the report and appoint new commissioners; the owner is not confined to the remedy by appeal.³

(3) *Recommittal of Report—Amendment—In General.*—The court or judge cannot alter the report; he must accept or reject it as a whole;⁴ but he can, in the exercise of his discretion, recommit the matter to the same or other commissioners for further

confirmation by showing that the commissioners had prejudged his case, and that proof before them by him would have been useless. *Cole v. Peoria*, 18 Ill. 301.

In Michigan, however, confirmation is not a matter of strict right upon a regular record, but the court has power, for substantial reasons *aliunde*, to refuse confirmation. *Port Huron, etc., R. Co. v. Callanan*, 61 Mich. 12.

In North Carolina the report may be confirmed as to those of the defendants who do not object, and its validity tried upon the objections of the others. *Act of 1879, c. 149; Lock's Creek Canal Co. v. McKeithan*, 89 N. Car. 52.

1. *Michigan Cent. R. Co. v. Probate Judge*, 48 Mich. 638, 14 Am. & Eng. R. Cas. 351; *Pillsbury v. Springfield*, 16 N. H. 565.

Recording.—The order confirming the report of commissioners of appraisal need not be recorded in the book of conveyances. Recording in the office of the clerk of the county where the land is situated is a compliance with the statute. *Morgan v. New York, etc., R. Co.* (Supreme Ct.), 28 N. Y. St. Rep. 86, 7 N. Y. Supp. 731, 55 Hun (N. Y.) 606.

2. *Yeamans v. Hampden County*, 16 Gray (Mass.) 36; *In re Road in Lathrop Tp.*, 84 Pa. St. 126. But see *In re Opening of Wharton St.*, 48 Pa. St. 487, where the court permitted the landowner to remit a part of the damages and confirmed the report for the balance of the award.

When Regularly Made It Is Conclusive, until reversed, upon adverse claimants to the damages reported; their remedy is to appeal from the order of confirmation. *Farrington v. New York*, 83 Hun (N. Y.) 124.

An Unwarranted Provision requiring the execution of a deed will not ren-

der the order void if the giving of the deed was not made a condition of the payment of the award. *Morris v. New York*, 55 Hun (N. Y.) 476.

3. N. Y. Laws of 1850, c. 140, §§ 17, 18; *Matter of New York Cent., etc., R. Co.*, 64 N. Y. 60, holding that where cause is shown for thus setting aside the proceedings the court is the judge of the sufficiency thereof, and the granting such relief is within its jurisdiction, the exercise whereof may be reviewed by the general term, but not in the court of appeals.

When Set Aside.—The confirmation of a report authorizing a railroad company to enter upon the real estate of another party against his consent, and build a fence for its own purposes, is erroneous, as being without authority of law. *Chesaapeake, etc., R. Co. v. Patton*, 6 W. Va. 147, *reviewed in Chesaapeake, etc., R. Co. v. Halstead*, 7 W. Va. 301.

The failure of the clerk to notify a landowner of the filing of the report of the commissioners is such an irregularity as will justify setting aside the order confirming such report. *Swan v. Chicago, etc., R. Co.*, 38 Mo. App. 588.

Where the Landowner Is Guilty of Laches in failing to file his objections in time, and the proceedings have been pending for a number of years, and rights of the parties have become fixed under the order of confirmation, the court is justified in refusing to vacate the order for the purpose of a rehearing. *Matter of Lexington Ave. (Supreme Ct.)*, 45 N. Y. St. Rep. 884.

4. *Hannibal Bridge Co. v. Schaubacker*, 49 Mo. 555; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Rockester Water Works Co. v. Wood*, 60 Barb. (N. Y.) 137, 41 How. Pr. (N. Y.) 53.

deliberation or correction of the report,¹ and such discretionary action is not reviewable.²

Unless there is a plain and decided preponderance of evidence against the judgment of the commissioners, the court will not send back the report on the question of damages.³

Amendment.—While the court has not power to amend or alter

1. *Matter of Daly*, 88 Hun (N. Y.) 188; *Hanes v. North Carolina R. Co.*, 109 N. Car. 490; *In re Washington Street* (R. I. 1895), 33 Atl. Rep. 516.

Illustrations.—Where, upon a hearing before commissioners appointed to appraise damages, the owner makes default, the Supreme Court, on motion to confirm the report of the commissioners, has power, the default being excused, to open it, set aside the report, and order a new hearing. *Matter of New York, etc., R. Co.*, 93 N. Y. 385, 14 Am. & Eng. R. Cas. 402, *affirming* 29 Hun (N. Y.) 602, *following* *Matter of New York, etc., R. Co.*, 64 N. Y. 60.

A report of county commissioners had been made and filed in the clerk's office in the Circuit Court, to the effect that a bridge was necessary for the public safety and convenience over a certain railroad crossing. Afterwards, on petition of a landowner, a report of the same commissioners was made, and filed in the same court, laying out a substitute for the highway at that place and discontinuing the old highway. Both petitions and reports were pending in said court in the same term. It was held that a motion to accept the second report and recommit the first for inquiry as to change of circumstances ought to be granted. *Nashua, etc., R. Co. v. Lee*, 55 N. H. 568.

Commissioners were appointed to assess the damages of an abutting owner for building a railroad in the street. The report was in very general terms, and was referred back to them to make a further report, setting forth the easements for which they had allowed damages, and what damages they had allowed for the easements, respectively. In compliance with this order they made a further report stating, as far as they appeared to have regarded practicable, the subjects for which the owner was entitled to be compensated, but that they regarded these subjects as incapable of any more definite or accurate description. It was held that under such circumstances the report would not be

recommitted to them again for any more detailed description of the items intended to be included in their award, nor would new commissioners be appointed. *Matter of New York El. R. Co.*, 35 Hun (N. Y.) 414.

N. Y. Laws 1888, c. 583 (Brooklyn City Charter), tit. 12, § 12, as amended by Laws 1891, c. 245, provides that the report of commissioners appointed in condemnation proceedings shall be presented to the court for confirmation, that the court may either confirm the same or send it back to the commissioners for further consideration, and that, if the report is confirmed, such confirmation shall be final and conclusive, but that the report may be sent back for reconsideration as often as the court may deem necessary. It has been held that the statute does not prohibit sending the case to the commissioners to apportion the award between joint landowners after the report has been confirmed. *Matter of Chapin* (Supreme Ct.), 34 N. Y. Supp. 1058.

2. *Wilcox v. Meriden*, 57 Conn. 120.

3. *Matter of Pearl St.*, 19 Wend. (N. Y.) 651.

Inadequacy of Damages is not ground for recommitment unless it appears that there was an error in the principle upon which the commissioners proceeded in making the award. *Matter of Bushwick Ave.*, 48 Barb. (N. Y.) 9; *Matter of South Seventh St.*, 48 Barb. (N. Y.) 12.

Rehearing on Question of Damages.—

Where a report of commissioners is merely referred back to them to be corrected so as to conform to the state of facts which then existed, they cannot hear proofs offered by the landowners on the question of damages. When the commissioners have once viewed the premises and decided upon the amount of damages, their powers, under their appointment, are exhausted, so far as the amount of damages is concerned, until further orders by the court. *New York, etc., R. Co. v. Corey*, 5 How. Pr. (N. Y. Supreme Ct.) 177.

the report it may compel the commissioners to do so.¹ Informalities, omissions,² and clerical errors may be corrected in this way,³ and the commissioners should correct their report, when sent back to them, on the principles laid down by the court.⁴

j. APPLICATION TO SET ASIDE—(1) *In General*.—Only the tribunal to which the inquisition is required to be returned for ratification or rejection can set it aside. A court of equity has no jurisdiction in such matters.⁵

How Made.—In *California* the motion is properly founded upon the report itself, of which the testimony taken by the commis-

1. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

2. *Long v. Talley*, 91 Mo. 305; *Springbrook Road*, 64 Pa. St. 451.

Informalities.—The charter of a railroad company required the commissioners, in appraising damages, to take into consideration "the loss or damage," and also "the benefit or advantage," etc., and to "state particularly the nature and amount of each." The court held that if the commissioners proceed regularly and conformably to the directions of the charter, but omit in their return to state the particulars of damage, the informality may be cured by amendment, and is not a ground for setting aside the return. *Greenville, etc., R. Co. v. Nunnamaker*, 4 Rich. (S. Car.) 107.

3. *Clerical Errors*.—The report of commissioners appointed in proceedings to acquire private property for a public purpose can be reconsidered by the court after confirmation, and ordered to be amended in respect to clerical errors or evident or conceded mistakes which would have been corrected on the hearing of the report, and confirmed as amended, *nunc pro tunc*. The party aggrieved, or who desires the correction to be made, should proceed by petition and notice to all parties affected by the result. *Matter of Curtiss St.*, 1 Sheld. (N. Y.) 425.

When Report should be Sent Back.—If the report does not show fully what the proceedings before the commissioners were, it should be set aside or sent back to them for amendment. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

A report of a committee may be re-committed when its form and detail are not justified by the original petition, but may be easily corrected by stating what width common conven-

ience and necessity required the commissioners to give between the *termini*, leaving them to carry out the decision by locating the increased width upon the face of the earth. *Deering v. County Com'rs*, 87 Me. 151.

After an Appeal taken from the award of damages, the report of the commissioners in laying out a railroad cannot be amended so as to relate back to the time of filing the report. *Northern R. Co. v. Concord, etc., R. Co.*, 27 N. H. 183.

4. *Matter of Central Park*, 61 Barb. (N. Y.) 40, holding, however, that the fixing of the valuation of the land taken is within the peculiar province of the commissioners.

5. *New Central Coal Co. v. George's Creek Coal, etc., Co.*, 37 Md. 537. See also *supra*, XII. 1. *g. Objections—Motion to Set Aside*.

In New York it was held, in an early case under the general railroad law of 1850, that the report cannot be set aside on motion, but only on appeal from the order of confirmation—later cases sustain the power of the special term to set aside the report. *Albany Northern R. Co. v. Cramer*, 7 How. Pr. (N. Y. Supreme Ct.) 164; *Rochester, etc., R. Co. v. Beckwith*, 10 How. Pr. (N. Y. Supreme Ct.) 168; *Matter of New York Cent., etc., R. Co.*, 64 N. Y. 60.

Power Restored by the Code.—Code Civ. Pro., § 3371, expressly confers the power upon the special term of the Supreme Court to set aside the report of commissioners of appraisal in condemnation proceedings for irregularity, error of law, or upon the ground that the award is excessive or insufficient, and the award should be reviewed at special and general terms upon the facts as well as upon the law. *Matter of Brooklyn El. R. Co.*, 80 Hun (N. Y.) 355.

sioners is a part.¹ The provisions of the Practice Act relating to new trials in civil cases have no application to such a motion.² In *Michigan* affidavits of the commissioners may be used on the motion, to impeach their finding, or to show the rule of damages on which they proceeded.³ In *Virginia* all matters affecting the validity of the report are open for investigation without notice.⁴

Waiver—Laches.—The report will not be set aside for fraud, mistake, or irregularity, where the moving party has been guilty of laches in making the application, and the public have been allowed, for a considerable time, to act upon it as confirmed.⁵

(2) **Grounds—Generally.**—The report should be set aside where the landowner has given the company a deed of the land in question. He must procure his damages under the contract as found in the deed.⁶ But the report will not be set aside because of its silence as to the existence or nonexistence of crops, buildings, or improvements on the land;⁷ nor because it uses numerals to express the value and damages, and omits the dollar mark and the word "dollars," where the intent that the numerals should represent dollars is evident;⁸ nor because all the testimony is not submitted with the report;⁹ nor because, instead of a lump sum, an annual sum for the use of the property taken is allowed.¹⁰

1. *Western Pac. R. Co. v. Reed*, 35 Cal. 621.

2. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

Motion must Attack Entire Report.—In an application by a railroad company to condemn land, if damages are assessed for an undivided interest in a tract of land, the company cannot move to set aside the report of the commissioners as to such undivided interest, but the motion, if made, must be to set aside the report as to the whole tract in which the party owns an undivided interest. *Southern Pac. R. Co. v. Wilson*, 49 Cal. 396.

3. *Marquette, etc., R. Co. v. Probate Judge*, 53 Mich. 217, 14 Am. & Eng. R. Cas. 355.

New York Rule.—After commissioners have viewed the premises and the report has been signed and filed, a certificate or statement signed by one of the commissioners, setting forth the rule adopted in estimating the damages, cannot be received for the purpose of affecting the report. *Matter of New York, etc., R. Co.*, 29 Hun (N. Y.) 1, followed in *Matter of New York, etc., R. Co.*, 35 Hun (N. Y.) 260.

4. *Washington, etc., R. Co. v. Switzer*, 26 Gratt. (Va.) 661.

5. *Matter of Lexington Ave., 50 How. Pr. (N. Y. Supreme Ct.) 114.*

Failing to File Exceptions to the report and demanding a jury trial is a waiver of the right to move to set aside. *Minneapolis, etc., R. Co. v. Nester*, 3 N. Dak. 480.

6. *Western Pac. R. Co. v. Reed*, 35 Cal. 621.

7. *Hunt v. Smith*, 9 Kan. 137.

8. *Hunt v. Smith*, 9 Kan. 137.

9. *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165, where it is said to be the better practice, however, to submit all the testimony.

10. *Salem, etc., R. Co. v. Essex County*, 9 Allen (Mass.) 563. In this case the statute put no limitation whatever on the power of the commissioners in fixing the compensation a railroad should pay for the use of a bridge belonging to the state.

Objections Available on Certiorari Only.—The objections that the judge appointed the commissioners, not on the day mentioned in the notice that was served, but on a day subsequent thereto, without any written notice of the adjournment; that he received, in evidence of the service of notice, an affidavit made before a person who did not appear to be legally qualified to administer an oath; that the description of land taken from the landowner, as presented to the judge and laid before the commissioners, did not in-

“Good Cause.”—Some of the statutes provide that the report may be set aside for “good cause.” This means something clear and indubitable, pointing error in law or fact, intentional or unintentional, on the part of the commissioners.¹ It does not mean that the report should be set aside merely because it is unsatisfactory, but only on good cause shown.²

Rulings on Evidence.—The report will not be set aside for mere technical errors in the admission of evidence, where no wrong principle has been adopted and the damages are not excessive.³ Such rulings can only be reviewed on appeal.⁴

clude all the land taken from him, but left out a part that must become the subject of another valuation and assessment, and that the notice of the meeting of the commissioners which was served on him, specifying the time when they would meet at a place other than on his land for a valuation and assessment of his damages, cannot be inquired into upon an application to set aside the report of commissioners. Such objections can be inquired into in no other way than upon certiorari. The application to set aside the report must rest entirely upon evidence showing the inadequacy of the compensation. The regularity of all the proceedings would have to be admitted, in order to form such an issue as is contemplated under the act incorporating the company. *Bennet v. Camden, etc., R., etc., Co.*, 14 N. J. L. 145.

1. Nev. Stat. 1864-65, § 31; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

2. *Virginia, etc., R. Co. v. Elliott*, 5 Nev. 358.

New Jersey Doctrine.—Mistake, irregularity, or even fraud, in the proceedings, previous to or in the appointment of commissioners for the condemnation of lands, is not good cause for setting aside their report; but if they have not been duly sworn, if notice of the time and place of their meeting has not been given the party, or if the time and place of meeting have been changed without notice to him, both of which have been to his prejudice; if the commissioners did not “view and examine” the lands, or if any of them acted with partiality or corruption; if a mistake of law or fact intervened on the part of the commissioners as to their powers or duty, and such mistake is made manifest; or if upon the whole matter there should be reasonable grounds to apprehend that justice may not have been done, and

the landowner is willing to take the hazard of paying the costs, as he must do if the jury do not increase the damages, the report of the commissioners should be set aside on the application of the landowner. *Bennet v. Camden, etc., R., etc., Co.*, 14 N. J. L. 145.

A party dissatisfied with the conduct of the commissioners appointed under the act incorporating the Camden & Amboy R. & T. Co., or with their report, may either have a certiorari, or may proceed under the act by application to the Supreme Court to set aside the report. The remedies are cumulative, not inconsistent. The legislature contemplated no appeal to a jury but on the subject of damages, and that nothing is “good cause” for setting aside the report, on motion in the Supreme Court, but such matters as lead to a reasonable apprehension that injustice has been done in setting the amount of damages, or that there has been some improper conduct on the part of the commissioners, the company, or their agents, in regard to the assessment. *Vanwickle v. Camden, etc., R., etc., Co.*, 14 N. J. L. 162.

3. *Matter of New York El. R. Co.*, 61 Hun (N.Y.) 625, 40 N.Y. St. Rep. 647.

Thus the fact that commissioners allowed witnesses to state the damages to the land on the assumption that it might at some future time be platted into city lots and sold at a greatly advanced price is not such error as to justify setting aside their report, where the report shows that no erroneous principle was adopted, and where the objectionable evidence had no weight in fixing the damages. *Silver Creek, etc., R. Co. v. Baker* (Supreme Ct.), 18 N. Y. Supp. 331.

4. *N. Y. Gen. Railroad Act* 1850, § 18; *Rochester, etc., R. Co. v. Beckwith*, 10 How. Pr. (N.Y. Supreme Ct.) 168.

Insufficient Evidence—Verdict against Evidence.—The rule applicable to verdicts that they will not be set aside on the ground of insufficiency of evidence or as against the weight of evidence, where there is a conflict of testimony, is equally applicable to the reports of commissioners.¹

(3) *Irregularities—Mistake—Error of Judgment—Irregularities on the Part of the Commissioners.*—Failure by the commissioners to comply with the requirements of the statute is good ground for setting aside their report.² And it will be set aside if untrue, or if the proceedings of the commissioners have been irregular, and the report fails to state the facts constituting such irregularity.³

(4) *Fraud or Misconduct—Entertaining Commissioners.*—**Fraud or Misconduct** upon the part of the commissioners, by reason of which

Where a Party has been Deprived of Evidence that he was entitled to have considered, it will be presumed that it would, if received, have influenced the decision, and the report will not be allowed to stand. *Rochester, etc., R. Co. v. Budlong*, 6 How. Pr. (N. Y. Supreme Ct.) 467, 10 How. Pr. (N. Y.) 289, *applied* in *Black River, etc., R. Co. v. Barnard*, 9 Hun (N. Y.) 104; *Matter of New York, etc., R. Co.*, 27 Hun (N. Y.) 116.

Refusal to Hear Evidence.—It is not a sufficient reason for rejecting the report of commissioners who have viewed the premises, that they refused to hear the testimony of witnesses in reference to the value of the premises over which the road is laid out, and the amount of damages sustained by the landowner. *Lyman v. Burlington*, 22 Vt. 131.

1. *Piper's Appeal*, 32 Cal. 530; *Western Pac. R. Co. v. Reed*, 35 Cal. 621.

2. *Pueblo, etc., R. Co. v. Rudd*, 5 Colo. 270, 10 Am. & Eng. R. Cas. 404.

3. *Rochester, etc., R. Co. v. Beckwith*, 10 How. Pr. (N. Y. Supreme Ct.) 168.

Setting Aside Second Report.—To authorize a court to review on motion a second report, from which the statute has expressly inhibited an appeal, something more must be apparent than such errors of law or fact as are reviewable on appeal and are sufficient, where an appeal is allowable, to result in a reversal and new hearing. There must be such irregularity, fraud, or mistake in the proceedings of the commissioners, to warrant a proceeding by motion, as would authorize the court, under its established practice, to set

aside a judgment or verdict in an action on motion. *Matter of New York El. R. Co.*, 41 Hun (N. Y.) 502.

One Commissioner Interested.—But the mere fact that one of the commissioners was interested, unless it appears that the objecting party was ignorant of it, will not justify the vacation of the report; nor will it be set aside, although the party was ignorant of such interest, if the damages are clearly not excessive. *Roanoke City v. Berkowitz*, 80 Va. 616.

A Quotient or Average Award of damages will not warrant the setting aside of the report, if the commissioners did not agree beforehand on this mode of compromise, but resorted to it, as a proper method of arriving at a just result, after stating to each other the amounts which they had individually fixed. *Marquette, etc., R. Co. v. Probate Judge*, 53 Mich. 217, 14 Am. & Eng. R. Cas. 355.

Mistake or Error of Judgment.—Objections that there was a mistake in locating a part of the land in a wrong township, or that the engineer did not specify all the lands taken, cannot be considered on a motion to set aside the report of commissioners. *Vanwickie v. Camden, etc., R., etc., Co.*, 14 N. J. L. 162. Nor will it be set aside for error of judgment in valuing the property taken, or in the allowance of damages, unless the sum allowed is grossly inadequate or excessive, or some wrong principle was adopted, or glaring mistake made in making the estimate. *Matter of Central Park Extension*, 16 Abb. Pr. (N. Y. Supreme Ct.) 56; *Matter of Boston Road*, 27 Hun (N. Y.) 409; *Matter of Union El. R. Co.*, 55 Hun (N. Y.) 163.

a full, fair, and honest investigation has not been had, will furnish good cause for going outside of their report, upon motion to set it aside, and this may be shown by affidavits, competent evidence, or any other legal mode which the court shall prescribe.¹

Ex Parte Communications.—Where one party, in the absence of the other, discusses with the commissioners, or some of them, matters connected with the merits of the proceeding,² or sends them *ex parte* communications relative thereto, such conduct is good cause for setting aside a report in such party's favor.³

1. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

The report will be set aside on the same grounds as would a verdict, or report of a referee, or a default, inquest, or dismissal, where fraud, misconduct, palpable error, or accident are shown. *Matter of New York Cent., etc.*, R. Co., 64 N. Y. 60.

The Fact that the Statute Makes a Second Report Final and conclusive will not preclude the court from setting it aside for fraud or misconduct. *Matter of Buffalo, etc.*, R. Co., 32 Hun (N. Y.) 289, following *Matter of Prospect Park, etc.*, R. Co., 20 Hun (N. Y.) 184; *Matter of Prospect Park, etc.*, R. Co., 24 Hun (N. Y.) 199.

Illustrations of Fraud or Misconduct.—The report will be set aside where it appears that one of the commissioners, after entering upon his duties, was retained by one of the parties to the proceeding as attorney, to defend a suit against him, even though the attorney for the other party may have known the fact, and did not complain until the report was filed. *Douglass v. Byrnes*, 63 Fed. Rep. 16.

Going upon the land with a landowner and listening to explanations of a map, in the absence of any one representing the company, when it was known that such representatives were on their way to the land, and the act of other commissioners in riding in private carriages furnished by the landowner, and eating at his house, and accepting money for services and expenses in addition to the amount allowed by the statute, are misconduct such as to justify the setting aside of their report. *Matter of Buffalo, etc.*, R. Co., 32 Hun (N. Y.) 289.

A landowner moved to set aside a report of commissioners, and showed that the award made him was greatly inadequate; that notice of the confirmation was served upon his attor-

ney, and his failure to oppose the confirmation was due to the misbehavior of his attorney; that commissioners had talked privately with persons from whom they obtained information discrediting the evidence of the landowner. This was held to be good ground for setting aside the report. *Matter of New York Cent., etc.*, R. Co., 5 Hun (N. Y.) 105.

2. *Patten's Petition*, 16 N. H. 277; *Peavey v. Wolfborough*, 37 N. H. 286.

3. *Harris v. Woodstock*, 27 Conn. 567, following *Hickox v. Parmelee*, 21 Conn. 86.

At a hearing before commissioners, the counsel for the railroad company made certain oral computations as to the value of the land, and after the hearing was concluded the attorney sent a written statement of the same computations to the jury, without the knowledge of the opposite party. It was held that the sending of such a letter was an irregularity, but, under the circumstances, not ground for setting aside the report, in the absence of evidence that it influenced the decision. *New York, etc.*, R. Co. *v. Church*, 31 Hun (N. Y.) 440.

But where the commissioners take the advice of the petitioner's counsel merely as to the necessary legal steps required to be taken by them, such as the giving of notice, nothing being said as to any question of fact to be decided by them, the report should not, for this cause, be set aside. *Matter of Drainage*, 69 Hun (N. Y.) 601.

Attempt to Hasten Proceeding.—In *Blake v. Norfolk County* (114 Mass. 583) the court say: "The interviews of Mr. Aspinwall with one or more of the commissioners, which are alleged as one of the grounds for this petition and which took place subsequently to the hearing in reference to the proposed widening of Washington street, were of questionable propriety. It is impor-

Entertaining Commissioners.—While the commissioners should not accept entertainment, lodging, etc., from either of the parties, yet the mere fact that they did so, in the absence of proof of improper motive, or that their decision was influenced thereby, will not suffice to invalidate the report,¹ especially where such action is taken by agreement of the parties,² or is known to the adverse party and not objected to at the hearing.³

Agreements as to Compensation.—A report will not be set aside at the instance of the landowner because the commissioners received from the company a greater compensation than that fixed by statute, where the objecting party knew of such charge during the hearing, and where there is no complaint against the award, and no abuses of any kind are suggested.⁴

tant that contested matters upon which any tribunal is to pass should not in any way be made the subject of conversation, except in the presence of all parties to the controversy. If we were left in doubt as to whether the judgment of the commissioners was in any way affected by them we might feel it our duty to grant the petition. The existence of a cause which might improperly affect their judgment, although it is not known that it did so, is a sufficient ground for such action. If it was found that the members of such a tribunal had been addressed with any improper motive, or with intent to sway or bias their judgment, even if such attempt had not been shown to be effectual, it would also be a sufficient ground for such action. In the present case, however, the facts were distinctly found that Mr. Aspinwall addressed the commissioner or commissioners at their office in Boston, with no improper purpose to influence their action, his object being only to hasten it. It is also found that their action was not changed by reason of anything done by him. We do not think, therefore, that the proceedings should be quashed on account of these conversations, or that important public rights should be lost because of an irregularity found to have been unintentional and attended with no evil result."

1. *Connecticut*.—Greene v. East Haddam, 51 Conn. 547.

Massachusetts.—Tripp v. Bristol County, 2 Allen (Mass.) 556; Blake v. Norfolk County, 114 Mass. 583.

New Jersey.—State v. Bergen, 21 N. J. L. 342; State v. Justice, 24 N. J. L. 473; State v. Reckless, 38 N. J. L.

396; Lehigh Valley R. Co. v. Dover, etc., R. Co., 43 N. J. L. 536.

Pennsylvania Rule.—*In re Magnolia St.*, 8 Phila. (Pa.) 468, Allison, P. J., said: "If entertainments are to be interdicted, they must be interdicted absolutely. It is impossible to draw the line anywhere short of entire exclusion. If permitted to any extent, and under circumstances which plead in favor of indulgence in exceptional cases, they will become precedents for a return to former abuses, when expensive entertainments, consisting of an unlimited supply of delicacies and of intoxicating liquors, were in too many instances resorted to, for no other assignable reason except to influence the action of the jurors, and to procure from them reports more favorable than could be otherwise hoped for. * * * When it is brought to our attention that entertainment or refreshment of any kind, however inferior in quality, or trifling in quantity, has been supplied, either directly or indirectly, by a party in interest, to road jurors, it will be regarded by the court as a sufficient ground for setting aside the report." *Contra*, see *In re Road in Plymouth Tp.*, 5 Rawle (Pa.) 150.

2. Beardsley v. Washington, 39 Conn. 265.

3. Williams v. Stonington, 49 Conn. 229.

Where Intoxicants are Freely Furnished by the petitioner to the commissioners during the hearing, the report will be vacated without inquiring how far the commissioners were affected thereby. Petition for Newport Highway, 48 N. H. 433.

4. State v. Miller, 23 N. J. L. 387;

(5) *Excessive Damages*.—When the Report will be Set Aside.—Ordinarily, where opinions as to the value might well be variant, the reports of commissioners will not be closely scrutinized; but the court will interfere where the damages assessed are flagrantly excessive.¹

Excess must Be Palpable and Unsupported by Evidence.—The award will not be set aside as excessive unless the excess is plain and palpable upon the evidence.² If there is any substantial testimony to sustain the valuation it will not be disturbed,³ especially where the commissioners viewed the premises.⁴

(6) *Inadequate Damages*.—While the court has power to set aside the report for inadequacy even where a view was had, upon

Matter of Staten Island Rapid Transit R. Co., 41 Hun (N. Y.) 392, *appeal dismissed* 104 N. Y. 680.

The landowner has ground of complaint only when the amount agreed upon is exorbitant or so large as to create suspicion of corruption. *Lehigh Valley R. Co. v. Dover, etc., R. Co.*, 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87.

In *Matter of Buffalo, etc., R. Co.*, 32 Hun (N. Y.) 289, the report was set aside on the double ground that the landowner had gone on the lands with the commissioners, entertained one of them at supper, and paid gratuities to another, evidently with an improper design.

1. *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585; *Marquette, etc., R. Co. v. Probate Judge*, 53 Mich. 217, 14 Am. & Eng. R. Cas. 355; *St. Louis, etc., R. Co. v. Richardson*, 45 Mo. 466; *Matter of New York, etc., R. Co.*, 29 Hun (N. Y.) 646, *affirmed* in part in 94 N. Y. 287. See also *supra*, XII. 1. *i. Damages Excessive or Inadequate*; and *infra*, XV. 7. *i. (2) Reducing Excessive Damages*.

Unless there has been some illegality or irregularity in the proceedings the court cannot, ordinarily, set aside the report as excessive. *Matter of Carpenter*, 11 Misc. Rep. (Ulster County Ct.) 690.

More than Petitioned for.—Where the petitioners claimed two thousand dollars damages, and the report allowed them two thousand five hundred dollars, it was set aside as excessive. *Houston Tap, etc., R. Co. v. Milburn*, 34 Tex. 224.

The Report Is Prima Facie Correct unless error appears on its face, and the *onus* is upon the condemning party

to show that the damages are excessive. *Crawford v. Valley R. Co.*, 25 Gratt. (Va.) 467. See, for instances of reports sustained, *Golden Boulder, etc., R. Co. v. Haggart*, 9 Colo. 346, 27 Am. & Eng. R. Cas. 375; *Matter of New York, etc., R. Co.*, 21 Hun (N. Y.) 250.

Motives of Commissioners.—As a general rule the motives that may have influenced the official conduct of the commissioners cannot be gone into. *Webster v. Washington County*, 26 Minn. 220.

2. *Matter of New York, etc., R. Co.*, 27 Hun (N. Y.) 116.

3. *Virginia, etc., R. Co. v. Elliott*, 5 Nev. 358; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

4. *Western Pac. R. Co. v. Reed*, 35 Cal. 621; *Matter of One Hundred and Thirty-eight St., etc.*, 60 How. Pr. (N. Y. Supreme Ct.) 294.

Effect of View.—As the commissioners are composed of disinterested freeholders, carefully selected, with an opportunity to each of the parties to reject such as may be objectionable, and such commissioners not only hear the evidence but view the land, while the court does neither, it would require very strong evidence of inadequacy or excess in the appraised value of the land and damages to influence the court, for that cause alone, to set aside the report. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

The commissioners need not follow either set of conflicting witnesses, but may fix the damages upon information obtained through the view and other sources. *Matter of Kings County R. Co.*, 60 Hun (N. Y.) 586, 39 N. Y. St. Rep. 876. See also *supra*, XI. 4. *Effect of the View*.

which, in part, the award was based,¹ yet this power will not be exercised unless it appears that the inadequacy is so gross and palpable as to afford evidence of impartiality, fraud, or undue influence,² or unless the commissioners have fallen into some error of procedure, or have adopted an erroneous principle in estimating the damages.³

(7) *Time and Manner of Objecting to Report*.—Objections which the statute allows to be made before the commissioners must be so made, and, if overruled by them, an exception must be taken. The party cannot wait, as to such objections, until the report is filed, and then move to set it aside.⁴ Where the statute requires

1. Matter of Metropolitan El. R. Co., 76 Hun (N. Y.) 375.

Need Not Follow Opinions of Witnesses.

—A railroad was located across a mill site so as to take land that was intrinsically worth sixty dollars; but certain witnesses testified that the property for mill purposes was depreciated in value one thousand dollars to one thousand two hundred dollars. The commissioners allowed five hundred dollars. It was held that they were not obliged to follow the opinions of the witnesses, and that the report, therefore, should not be set aside. Albany, etc., R. Co. v. Dayton, 10 Abb. Pr. N. S. (N. Y. Supreme Ct.) 182.

2. Newton v. Armstrong (Supreme Ct.), 19 N. Y. Supp. 573; Matter of Gilroy, 78 Hun (N. Y.) 260; Matter of Brooklyn El. R. Co., 87 Hun (N. Y.) 88.

3. Rochester, etc., R. Co. v. Myers, 63 Hun (N. Y.) 625, 43 N. Y. St. Rep. 734.

It must appear affirmatively that they omitted to include in their award damages or compensation to which the owners were legally entitled. Coster v. New Jersey R., etc., Co., 23 N. J. L. 227, affirmed in 24 N. J. L. 730, reviewed in North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450.

Where the Valuation Exceeds the Highest Estimates of any witnesses for the public, the award will not be disturbed. Matter of Street Opening (Supreme Ct.), 1 N. Y. Supp. 145.

Second Award—Nominal Damages.—A legislative provision that a second report of commissioners shall be final and conclusive on all the parties interested does not deprive a party of the right of review for the correction of misconduct, mistake, or fraud on

the part of the commissioners; but the fact that one report has been made assessing only nominal damages, and the matter was referred to a second set of commissioners, who made a similar report, will not justify setting aside a report. Matter of Prospect Park, etc., R. Co., 24 Hun (N. Y.) 199, appeal dismissed 85 N. Y. 489.

4. *In re* Clear Lake Water Co., 48 Cal. 586; Green v. Elliott, 86 Ind. 53; Thayer v. Burger, 100 Ind. 262.

Aside from such statutory provision, after the report is returned to the court either party may show cause against its confirmation, upon the ground of excessive or inadequate compensation, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be confirmed. Washington, etc., R. Co. v. Switzer, 26 Gratt. (Va.) 661.

In Missouri the party must file his exceptions either before or within ten days after notice of the filing of the report. Chicago, etc., R. Co. v. Eubanks, 32 Mo. App. 184. And if he obtains leave to file them after that time, on one particular ground, he cannot raise any other ground of objection on the hearing. U. S. v. Reed, 56 Mo. 565.

Time to File Bill to Set Aside Report.—The lapse of less than five months after the signing of the award before the filing of a bill to set it aside is not such an unreasonable delay as to deprive the complainant of his right to relief, where in the interval no rights of the one party have been impaired, and no advantage has been gained by the other party, and where no other remedy can be invoked. Baltimore, etc., R. Co. v. Canton Co., 70 Md. 405.

the objections to be in writing, it must be strictly complied with.¹ Where a verification is necessary one of the objectors may verify for all.²

3. Report or Award of Appraisers, Viewers, Surveyors, etc.—a. IN GENERAL—CONCURRENCE, SIGNING, ETC.—The report of appraisers should recite the order for their appointment, or a copy of such order should be attached thereto.³ The report of viewers must set forth all the matters submitted to them,⁴ but it need not state affirmatively the presence of the parties at the time of the view, or that witnesses were regularly called and sworn. This will be presumed.⁵

Concurrence.—If all the appraisers or viewers are present and sworn,⁶ or the absence of one of them is accounted for,⁷ he having been duly notified,⁸ an award by the majority of them will be valid.⁹

Signing.—They need not all sign the report.¹⁰ When the report embraces awards to several owners one signing is sufficient; the different awards need not be separately signed.¹¹

b. DESCRIPTION—LOCATION.—The report should describe the character of the ground and its shape, and what part of it is necessary to be taken.¹² The location of a proposed highway should be given by metes and bounds,¹³ and its width

1. *Bryant v. Knox, etc.*, R. Co., 61 Me. 300.

2. *Munson v. Blake*, 101 Ind. 78.

3. *Low v. Galena, etc.*, R. Co., 18 Ill. 324.

4. *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

5. *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165.

6. *Water Com'rs v. Lansing*, 45 N. Y. 19; *Turnpike Road Case*, 5 Binn. (Pa.) 481.

7. *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5.

8. *State v. Burnet*, 14 N. J. L. 385.

9. *Louk v. Woods*, 15 Ill. 256; *Scraper v. Pipes*, 59 Ind. 158. See also *supra*, XII. 1. a. *Mode of Arrival at Verdict*; and XII. 2. b. *Right of a Majority to Act or Decide*.

10. *Moore v. Green, etc.*, Street's Pass. R. Co., 3 Phila. (Pa.) 417.

If Two out of Three Sign it will be presumed that the other was present and consulting until the contrary is shown. *Louk v. Woods*, 15 Ill. 256.

11. *Tucker v. Erie, etc.*, R. Co., 27 Pa. St. 281.

12. *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

Quality.—Where land taken by the railroad was described by the viewers

as in the town of Columbia, and used for a lumber yard, etc., the quality is sufficiently set forth. The description of quality must have respect to the location and circumstances. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.

In Canal Appropriations the report should state the courses, distances, and quantity, with such references as will designate the exact property converted to the use of the state. *Com. v. Fisher*, 1 P. & W. (Pa.) 462.

By the provisions of the Pa. Act of Assembly, it is not necessary that the viewers who assessed the damages done to lands by the construction of the canal should also report the whole quantity in the tract of the applicant, and the relevant position which that occupied by the canal had to the whole. Nor is it necessary that they should report whether the land through which the canal passes be improved or otherwise, what title the applicant had to the land, what duration of interest the state required for the purposes of the work, nor a draft of the land occupied by the canal. *Com. v. McAllister*, 2 Watts (Pa.) 190.

13. *Campbell v. Fogg*, 132 Ind. 1.

Entire Location to be Given.—The viewers must concur with the petition-

as laid out by the viewers or commissioners prescribed.¹

c. **ASSESSING THE DAMAGES**—In General.—The viewers may pass upon the title so far as is necessary to enable them to determine who are entitled to damages.² They should state that they made a just allowance for the advantage resulting to the owner, or that they made a fair and just comparison of the advantages and disadvantages.³

A quotient or average award is usually invalid.⁴ Where, through mistake, the award is grossly inadequate, equity will relieve, whether the appraisers were misled by fraudulent representations or by their own misapprehension.⁵

Itemizing the Damages.—The appraisers are not bound to itemize the damages,⁶ nor to draw the distinction between the value of the property taken and the damage resulting to the owner from the taking.⁷ Where there are several joint owners, the report need not apportion the damages among them according to their respective interests,⁸ nor need they be apportioned among several tracts of land belonging to the same owner.⁹ But the viewers may itemize the damages if they wish to;¹⁰ otherwise they need not state in detail how the damages accrued.¹¹

d. **REVIEW**.—In *Illinois* the court has power to modify the assessment on notice to the landowner, and may hear evidence;¹² and the fact that one of the viewers was elected a member of the

ers as to the location of the entire road petitioned for, or the board of supervisors has no jurisdiction to act. If the viewers report in favor of the location of a part only of the road petitioned for, the board of supervisors has no jurisdiction to open such part. *Brannan v. Mecklenburg*, 49 Cal. 672.

1. *De Long v. Schimmel*, 58 Ind. 64.

2. *Winebiddle v. Pennsylvania R. Co.*, 2 Grant's Cas. (Pa.) 32.

3. *Philadelphia, etc., R. Co. v. Cake*, 95 Pa. St. 139, 14 Am. & Eng. R. Cas. 211.

Advantages to Owner.—Where it is required that a report of viewers set forth the value of the property taken, or damages done to the property, the amount of benefit conferred, and the difference between the damages done to the property taken, an award stating that the viewers, taking into consideration the advantages and disadvantages, found a gross sum due to the owner, but without referring to the advantages to the owner, is not sufficient. *Ohio, etc., R. Co. v. Wallace*, 14 Pa. St. 245, followed in *Milwaukee, etc., R. Co. v. Eble*, 3 Pin. (Wis.) 334, 4 Chand. (Wis.) 72.

4. *In re Barbadoes St.*, 8 Phila. (Pa.) 498.

5. *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, where the damages were in fact five thousand dollars, but were inadvertently appraised at one dollar.

6. *American Cannel Coal Co. v. Huntington, etc., R. Co.*, 130 Ind. 98, 51 Am. & Eng. R. Cas. 653; *Lodge v. Frankford, etc., R. Co.*, 9 Phila. (Pa.) 543.

7. *Monterey County v. Cushing*, 83 Cal. 507.

8. *Pittsburgh, etc., R. Co. v. Hall*, 25 Pa. St. 336.

9. *American Cannel Coal Co. v. Huntington, etc., R. Co.*, 130 Ind. 98, 51 Am. & Eng. R. Cas. 653.

10. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318, where it is held proper to fix a sum for the value of the property taken and for the inconvenience and damage to the balance, and another sum for the value of the buildings, fences, etc., the amount of the two making up the aggregate.

11. *Tucker v. Erie, etc., R. Co.*, 27 Pa. St. 281.

12. *Skinner v. Lake View Ave. Co.*, 57 Ill. 151.

court, and joined the other judges in passing upon the report, will not invalidate the proceeding.¹

In *Pennsylvania* the remedy of a railroad company for an excessive award by viewers is by appeal and not by exception.²

e. SETTING ASIDE—REAPPRAISEMENT—Setting Aside.—The court has power to set aside an irregular report and appoint another jury of viewers, consisting of the same or other persons.³ Good grounds for setting aside are: acting in excess of the authority given by statute,⁴ or in the absence of the owner, and upon false information;⁵ gross errors and misconduct, or gross inadequacy or excessiveness in the damages;⁶ omission to state the quality and value of the land taken,⁷ or entertainment or refreshment, however trifling, supplied by a party in interest to any of the viewers.⁸

The report will not be set aside because of a mere clerical error in the name of one of the landowners if it is correct in other respects, and the road as laid is unmistakable;⁹ nor because the viewers conversed with the owners of property adjoining, in the absence of the parties interested;¹⁰ nor because the evidence might support conclusions somewhat different, and the court does not fully agree with the report in all of its findings.¹¹

Reappraisement.—In *Pennsylvania*, where viewers make an incomplete or informal report, it is discretionary with the court to refer it back to the same or different viewers;¹² but in *Missouri*, where the report is set aside and a review is ordered, a new set of viewers must be appointed.¹³

1. Galbraith v. Littleich, 73 Ill. 209.

2. Gen. Act. Feb. 19, 1849 (Bright. Dig. 839, § 13); Roberts v. Central Pass. R. Co., 1 Brews. (Pa.) 538; Lodge v. Frankford, etc., R. Co., 9 Phila. (Pa.) 543, following Harvey v. Lackawanna, etc., R. Co., 47 Pa. St. 428.

But under the charter of the Pennsylvania R. Co., the report may be reviewed and corrected in the common pleas. Pennsylvania R. Co. v. First German Lutheran Cong., 53 Pa. St. 445; Philadelphia, etc., R. Co. v. Cake, 95 Pa. St. 139, 14 Am. & Eng. R. Cas. 211.

3. Lowndes County v. Bowie, 34 Ala. 461. *Contra*, see Vawter v. Gilliland, 55 Ind. 278.

4. Smith v. Trenton Delaware Falls Co., 17 N. J. L. 5.

5. Wells v. Bridgeport Hydraulic Co., 30 Conn. 316.

6. Pennsylvania R. Co. v. First German Lutheran Cong., 53 Pa. St. 445, criticising Pennsylvania R. Co. v. Heister, 8 Pa. St. 445; Heise v. Pennsylvania R. Co., 62 Pa. St. 67; Phila-

delphia, etc., R. Co. v. Cake, 95 Pa. St. 139, 14 Am. & Eng. R. Cas. 211.

Excessive Damages.—When the approval of a court of quarter sessions is required by an act of assembly to an assessment of damages, that court will not readily set aside a report on the ground that the damages are excessive, yet it may become their duty so to do. It would be a much stronger case which would authorize the Supreme Court to set aside a report on that ground. Com. v. Fisher, 1 P. & W. (Pa.) 462.

7. Pa. Act March 27, 1848, § 4; Zack v. Pennsylvania R. Co., 25 Pa. St. 394.

8. *In re* Magnolia St., 8 Phila. (Pa.) 468. *Contra*, see *In re* Road in Plymouth Tp., 5 Rawle (Pa.) 150.

9. State v. Atkinson, 27 N. J. L. 420.

10. Spring Garden St. Case, 4 Rawle (Pa.) 192.

11. *In re* Opening of Berks St., 15 Phila. (Pa.) 381.

12. Charleston Road, 2 Grant's Cas. (Pa.) 467.

13. Hannibal, etc., R. Co. v. Row-

4. Award of Arbitrators—In General.—As in other cases, the award of arbitrators in condemnation proceedings must be co-extensive with the terms of the submission. The arbitrators must consider and decide all matters submitted in order to make a final settlement of the subject-matter.¹

Confirming and Setting Aside.—The rules as to confirmation or setting aside of an award in condemnation proceedings do not differ materially from the rules applicable in other cases. The decided cases are gathered in the notes.²

land, 29 Mo. 337. In this case the court held that where the court sets the report of the viewers aside, on the ground that the damages have not been estimated according to law, the damages awarded being conditional, and sends the same viewers back to make a further report in accordance with the law, this is not a review within the meaning of the charter, and new viewers need not be appointed; neither does it come within a provision of the charter that "not more than one review shall be granted to the same person."

1. Determination as to Fences and Crossings.—Under a submission of all matters in controversy as to a right of way, the arbitrators may determine as to fences and crossings, as well as make an award for money. *Kankakee, etc., R. Co. v. Alfred*, 3 Ill. App. 511.

Uncertain Award.—An award which requires a railroad to pay four hundred dollars for right of way, and to build fences, the money to be paid at any time fixed upon by the company, by giving the landowner three days' notice of the time and place of payment, and requires the landowner at the same time to deliver a deed for the right of way, is void for uncertainty as to the time for payment of the money and delivery of deed. *Alfred v. Kankakee, etc., R. Co.*, 92 Ill. 609.

An Award for Damages Actually Sustained is within the terms of a submission "for the purpose of ascertaining the amount of damage or compensation to be paid by the [defendants] for any injury or loss [the plaintiff] may sustain." *Maryland, etc., R. Co. v. Porter*, 19 Md. 458.

Separate Specifications.—Under a submission to find the value of the land taken and the damage to the owner by reason of the taking, the award need not specify separately the sum fixed for the value of the land and that fixed

for the damages. *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160.

Effect of Submission and Award.—All previous verbal agreements as to cattle gaps, bridges, etc., are merged in a subsequent written submission of the question of damages for the land taken. *Cook v. North, etc., R. Co.*, 50 Ga. 211.

Where such a submission is accompanied by a stipulation to pay a specified sum as liquidated damages for nonperformance of the award by either party, the landowner is entitled to a reasonable time to examine a deed tendered to him to sign, and is not in default if he refuses to sign a deed conveying more than the award authorizes. *Odum v. Rutledge, etc., R. Co.*, 94 Ala. 488.

2. Time to Apply for Confirmation.—Where the submission provides that either party may appeal within ten days after the entry of judgment, and that judgment shall not be entered until ten days after the cars are running, the aggrieved party may apply for confirmation within the ten days, in order to expedite the appeal. *Bennett v. Union El. R. Co.*, 5 Silv. Sup. Ct. (N. Y.) 464.

Equity will Grant Relief against awards where the arbitrators have not acted within the lines of the duty laid upon them, and have not, through fraud, misconduct, or mistake, carried out the agreement under which they obtained their authority. *Port Huron, etc., R. v. Callanan*, 61 Mich. 22.

Exceptions to the Award may be taken for errors of fact as well as of law. *McMahon v. Cincinnati, etc., R. Co.*, 5 Ind. 413, in which case an exception, among others, to the award of the arbitrators was that they took into consideration the benefits which would result to the owner's land by the construction of the railroad. The answer filed contained no answer to this ex-

XIII. JUDGMENT—1. Duty of Court to Enter.—Where there has been an appeal to a jury from the award of commissioners, it is the duty of the court to render judgment on the verdict of the jury.¹ Until the entry of such judgment the company is not entitled, by a deposit of the amount of the verdict, to take possession of the property condemned.²

2. Form and Requisites—Generally.—The judgment entered on a verdict should be for a gross sum, and should embody an order authorizing the petitioner to enter upon and use the land on payment thereof.³ The court can only enter the particular kind of judgment authorized by the statute.⁴

ception. A demurrer to the answer was overruled, but the court held that it should have been sustained.

Excessive Award.—Where the evidence as to the amount of damages is conflicting, corruption must be shown to set aside the award as excessive. *Bridgeport v. Eisenman*, 47 Conn. 34.

Action to Set Aside Award.—The plaintiff and the defendant railroad agreed to and did submit in writing to two arbitrators "to appraise the damages" which should be caused by the defendant's taking of the plaintiff's land for railroad purposes. The arbitrators awarded that the plaintiff should deed the land; that defendant should pay one hundred dollars; that it should build and maintain a certain cattle pass; that it should keep up the fences while the road was being built; and that it should not injure a spring of water near the railroad line. The declaration averred that the plaintiff had performed his part of the award by deeding, etc.; that defendant had occupied his land since the award was made, and had only paid the one hundred dollars; that it neglected to build the cattle pass and keep up the fence; that it had injured the spring by filling around it; and set forth the injuries. It was held, on demurrer to the declaration, that the defendant had waived the right to claim that the arbitrators did not follow the submission, as it had gained all it sought by the submission, and held it by virtue of the award; that if the arbitrators exceeded their authority, the defendant ratified their action by accepting the deed, etc. *Taylor v. St. Johnsbury, etc., R. Co.*, 57 Vt. 106.

1. *Dietrichs v. Lincoln, etc., R. Co.*, 12 Neb. 225; *Drath v. Burlington, etc., R. Co.*, 15 Neb. 367, 20 Am. & Eng. R. Cas. 385.

Verdict for Less than Award.—Where the jury return a verdict for a less sum than had been awarded by the commissioners, judgment should be entered on the verdict, not on the award. *Ennis v. Wood River Branch R. Co.*, 12 R. I. 73.

Second Assessment.—Where a second assessment of damages is made, the court must render judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment which has since been set aside at the instance of the landowner, it cannot be treated as a payment or allowed as a credit on the judgment. *Provolt v. Chicago, etc., R. Co.*, 69 Mo. 633.

2. *Wagner v. New York, etc., R. Co.*, 38 Ohio St. 32, 10 Am. & Eng. R. Cas. 380, quoted in *State v. Lubke*, 15 Mo. App. 152, reviewed in *Ex p. Reynolds*, 52 Ark. 330, 44 Am. & Eng. R. Cas. 60.

3. *Peoria, etc., R. Co. v. Peoria, etc., R. Co.*, 66 Ill. 174; *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 127.

Costs.—Where the statute vests the interest condemned on payment of the damages assessed, it is error to enter a judgment making the payment of costs also a condition precedent to such vesting. *Evansville, etc., R. Co. v. Fitzpatrick*, 10 Ind. 120.

4. *Oregonian R. Co. v. Hill*, 9 Oregon 377, and cases cited; *Fore v. Hoke*, 48 Mo. App. 254.

Final Order—Not Judgment.—In *New York* a proceeding for the condemnation of real property for a public use is a special proceeding and should terminate in a final order and not in a judgment. *Matter of Board of Education*, 19 Civ. Pro. Rep. (Brooklyn City Ct.) 420.

Personal Judgment.—In some jurisdictions a personal judgment, enforceable by execution, is permitted; this is proper where the property has been taken by consent or otherwise before compensation made.¹ In other cases, where the effect of the award and judgment is merely to fix the compensation, and no entry on the land has been made, it is error to enter an ordinary personal judgment against the condemning party, to be collected by execution; it should be in the nature of an award of damages merely.²

3. What Provisions Are Proper.—The judgment should state separately the value of the land sought to be taken with the improvements thereon, the damages to the residue, and the benefits that will accrue thereto by reason of the taking.³ The judgment should either direct the sum awarded by the verdict to be paid to the landowner, or that it be deposited with some public functionary for his use and benefit.⁴ If the petitioner has not entered upon the land, the judgment should order such entry upon payment of the amount awarded.⁵ It is not necessary to provide in the judgment that a deed be executed by the landowner, as the condemning party gets title under the statute.⁶

1. *Robbins v. Saint Paul, etc., R. Co.*, 24 Minn. 191; *Dietrichs v. Lincoln, etc., R. Co.*, 12 Neb. 225; *Drath v. Burlington, etc., R. Co.*, 15 Neb. 367.

2. *Illinois*.—*Peoria, etc., R. Co. v. Peoria, etc., R. Co.*, 66 Ill. 174.

Kansas.—*St. Louis, etc., R. Co. v. Wilder*, 17 Kan. 239; *Lawrence, etc., R. Co. v. Moore*, 24 Kan. 323; *Kansas City, etc., R. Co. v. Kennedy*, 49 Kan. 19; *Florence, etc., R. Co. v. Lilley* (Kan. App. 1896), 43 Pac. Rep. 857.

Oregon.—*Oregon R. Co. v. Bridwell*, 11 Oregon 282, 17 Am. & Eng. R. Cas. 130.

West Virginia.—*Chesapeake, etc., R. Co. v. Bradford*, 6 W. Va. 220.

3. *Butte County v. Boydston*, 64 Cal. 110.

Payment in Gold.—In *California*, if the court finds the value of the land taken generally, in dollars and cents, without saying that the estimated value is in gold coin, it cannot render a judgment in gold coin. *North Pac. R. Co. v. Reynolds*, 50 Cal. 280.

4. *Convers v. Atchison, etc., R. Co.*, 142 U. S. 671.

Settles Rights of Both Parties.—In proceedings under Minn. Gen. Stat., c. 34, tit. 1, a bond having been given on appeal taken, pursuant to section 23 of said title, the judgment authorized to be entered on a verdict found therein is one not only settling and declaring the right of the company seeking to

appropriate the property to the use thereof, upon payment made, but also one in favor of the landowner for the amount of compensation, as found by such verdict, and adjudging and declaring his absolute right thereto. *Curtis v. St. Paul, etc., R. Co.*, 21 Minn. 497.

Separate Use of Married Woman.—Where the property sought to be condemned had been conveyed to the separate use of a married woman, and was subject to a lien of the vendor, the judgment should have been for payment to her separate use, whenever the vendor should waive his lien. *Arnold v. Covington, etc., Bridge Co.*, 1 Duv. (Ky.) 372.

5. *Rockford, etc., R. Co. v. Copinger*, 66 Ill. 510.

Unconditional Judgment Improper in Street Cases.—In a proceeding by a city to condemn land for a street, it is irregular and erroneous to render an unconditional judgment for the payment of the compensation and damages found by the jury. The order should simply fix the sum to be paid before taking the property sought to be condemned, leaving the city free to abandon the improvement if it so chooses. If the amount so adjudged is to cover damages to other parts of the property not taken, all this should be distinctly stated in the order. *Bloomington v. Miller*, 84 Ill. 621.

6. *Indianapolis, etc., R. Co. v.*

4. Certainty as to Description, Ownership, etc.—Description.—The ordinary rule is that the judgment must be so far certain that the parties, and any ministerial officer who may be called upon to enforce the judgment, may know what land is taken.¹ The property should not only be described in the petition with reasonable certainty, but that description should be followed in the subsequent orders, verdict, and judgment.² Condemnation proceedings are legal proceedings, and equity will not proceed to condemn land omitted by mistake from the judgment, but will remit the parties to a legal forum.³

Ownership.—Ordinarily the names of the owners should be recited, but where their names are mentioned in the report of the commissioners which the judgment affirms, a reference to such report will suffice, without a new recital of such names.⁴ The damages allowed each owner should be stated.⁵ Where the full ownership is claimed and not denied, the only dispute being as to the amount

Smythe, 45 Ind. 322, *distinguishing* Evansville, etc., R. Co. v. Miller, 30 Ind. 209, which held to the contrary under a special charter.

Deed Deposited in Escrow.—Where a conveyance of land to his son had been signed by a father and deposited with a third person as an escrow, to be delivered on conditions which had not been fulfilled, judgment should have been for payment of the value to the father. Arnold v. Covington, etc., Bridge Co., 1 Duv. (Ky.) 372.

1. California Cent. R. Co. v. Hooper, 76 Cal. 404.

2. Chicago, etc., R. Co. v. Chicago, 132 Ill. 372; Galena, etc., R. Co. v. Pound, 22 Ill. 399.

Uncertainty.—A judgment that the corporation recover of the owner of the land "a railroad right of way over the following described lands," describing by number the quarter section, "of fifty feet in width on each side of the centre of the roadbed of a railroad to be located over said land, upon the payment of forty-nine dollars," the damages assessed by the jury (Ala. Code, § 3212), is irregular, unauthorized, and void for uncertainty. London v. Sample Lumber Co., 91 Ala. 606.

Uncertain in Law—Certain in Fact.—A location of lands taken for public use cannot stand if it is uncertain in law; but that it is uncertain in fact, so as to require a resort to the courts for settlement of its boundaries, does not render it uncertain in law, for in law that is certain which can be made certain. Coe v. Aiken, 61 Fed. Rep. 24.

Judgment Referring to Verdict.—But where the land is properly described in the verdict, the judgment may refer to the verdict for the description. Peoria, etc., R. Co. v. Mitchell, 74 Ill. 394.

3. Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57, holding that where, in a proceeding to condemn an entire property, the description of a part was omitted in the verdict and judgment, though the judgment is in due form and valid as to the remaining part, and the record fails to show that the compensation allowed was for any other land than that described in the judgment, and the party who sought the condemnation pays the compensation awarded to the county treasurer, the landowner, by accepting the same, will not admit that the part omitted in the judgment is also condemned.

4. Thompson v. Chicago, etc., R. Co., 110 Mo. 147.

5. Union Depot Co. v. Frederick, 117 Mo. 138, 57 Am. & Eng. R. Cas. 656, holding, however, that a judgment of a competent tribunal, based upon the award of commissioners, assessing a round sum as damages to two several tracts of land belonging to different owners, is not void so as to allow the defendant to recover possession, but merely irregular or erroneous, and not subject to collateral attack, although the statute declares that should more than one owner be included in the petition the damages allowed each shall be stated separately.

of land claimed, the judgment may properly recognize the fee title so claimed and not disputed.¹

5. Finality and Conclusiveness—Finality.—A judgment of condemnation is final as to the amount of compensation, unless appealed from, but it is not a final step in the condemnation until the compensation is paid, for the condemning party may abandon the condemnation even after an affirmance of the judgment appealed from. In such a case the order for possession, made after payment of the damages awarded, is the final step in the proceeding.²

Conclusiveness.—The judgment affirming an assessment of damages is conclusive upon the parties, as to the questions involved, until reversed or otherwise impeached.³ It concludes a party in a collateral proceeding, even though no damages were awarded him,⁴ and even though it be erroneous on the merits or irregular in form.⁵

1. *New Orleans Pac. R. Co. v. Gay*, 31 La. Ann. 430.

Provision for Mortgagee's Interest.—Commissioners having apportioned the amount of their award between the owner of the land taken and a mortgagee thereof, on an appeal by the owner the railroad company failed to make any proof of the mortgagee's interest in the land. It was held that a judgment in favor of the owner, making no provision for the payment to the mortgagee of any part of the sum awarded by the verdict, was not erroneous. In such case the railroad company might pay the amount of the judgment into court and apply for an order that the sum awarded to the mortgagee by the commissioners be paid to him from such deposit. *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311, 10 Am. & Eng. R. Cas. 499, distinguished in *Taylor v. Chicago*, etc., R. Co., 81 Wis. 82.

2. *Chicago, etc., R. Co. v. Chicago*, 148 Ill. 141; *Ayer v. Chicago*, 149 Ill. 262.

Minnesota Rule.—In proceedings for the condemnation of land, the company appealed from the award made to the District Court, gave the security required by statute, and took possession of the land. Afterward it entered a dismissal of the appeal, and a judgment of dismissal was entered. It was held that the judgment of dismissal was a "final judgment" within the meaning of Minn. Act of 1881, c. 57, and the company was therefore required to pay the award within sixty days thereafter. In such case, if the

company fail to pay the amount of the award within the sixty days, the landowner, on motion, is entitled to judgment declaring the condemnation proceedings abandoned, and awarding him damages computed upon the amount of the award at the rate of ten per cent. per annum, as provided by the statute. *Minneapolis, etc., R. Co., v. Woodworth*, 32 Minn. 452.

3. *Illinois*.—*Beveridge v. West Chicago Park Com'rs*, 100 Ill. 75.

Nebraska.—*Atchison, etc., R. Co., v. Boerner*, 34 Neb. 240.

Pennsylvania.—*Pennsylvania R. Co. v. Gorsuch*, 84 Pa. St. 411.

Texas.—*Muhle v. New York, etc., R. Co.*, 86 Tex. 459, 57 Am. & Eng. Cas. 591.

West Virginia.—*Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

4. *Burke v. Kansas City*, 118 Mo. 309.

Illustration.—The report of the commissioners, or, if that should be set aside, the verdict of the jury, when followed by the judgment of the court, is final and conclusive; and the owner of the land cannot maintain an action for damages which should have been, but were not, considered and assessed by the commissioners or jury. *Van Schoick v. Delaware, etc., Canal Co.*, 20 N. J. L. 249.

5. *Burke v. Kansas City*, 118 Mo. 309.

Recitals, how Far Conclusive.—In absence of proof otherwise, recitals in the judgment of condemnation of land under the Texas statute that due notices

6. Effect to Pass Title, or Warrant Taking Possession.—The judgment does not pass title to the condemning party, nor even the right to take possession of the land, until the compensation awarded is paid or secured.¹ It is a conditional judgment, simply giving a right to take the property upon paying the damages awarded, until which time both title and possession remain in the landowner.²

7. Amendment—Relief in Equity.—The amendment of judgments in condemnation proceedings and relief against such judgments by a court of equity follow the general rules as to amendment and relief in other cases.³

had been given, are conclusive, although the mode of service be not shown nor appear in the record. *Ackerman v. Huff*, 71 Tex. 317, 36 Am. & Eng. R. Cas. 589.

As to What Matters Conclusive.—It is not only conclusive as to all matters actually litigated, but also as to all matters necessarily within the issues joined, and which might have been but were not formally litigated. *Atchison, etc., R. Co. v. Forney*, 35 Neb. 607.

1. *Alabama Midland R. Co. v. Newton*, 94 Ala. 443; *Chicago v. Barbican*, 80 Ill. 482; *Levering v. Philadelphia, etc., R. Co.*, 8 W. & S. (Pa.) 459.

Payment of Costs.—Where judgment is entered for petitioner, and he obtains possession of the property without payment of the costs awarded respondent, such possession is to that extent illegal. *Dolores No. 2 Land, etc., Co. v. Hartman*, 17 Colo. 138.

Assignability of Company's Interest.—A judgment condemning lands for a right of way, under *ad quod damnum* proceedings at the suit of a railroad company, vests in the company an estate and interest commensurate with its corporate existence; and this estate passes to purchasers at a sale under a mortgage executed by the company, who are afterwards incorporated as a railroad company, or to another company corporation, its assignee, so long as the contemplated use of the right of way is continued. *Davis v. Memphis, etc., R. Co.*, 87 Ala. 633, 39 Am. & Eng. R. Cas. 65.

2. *Rice v. Chicago*, 57 Ill. App. 558; *Gear v. Dubuque, etc., R. Co.*, 20 Iowa 523; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

Payment Passes Title.—Where a railroad has condemned lands under Pa. Act of April 23, 1829, § 15, and dam-

ages have been awarded to the owner, the company becomes the owner of the land after the damages awarded have been paid, though the proceeding has been removed to the Supreme Court upon a certiorari. *Schuler v. Northern Liberties, etc., R. Co.*, 3 Whart. (Pa.) 555.

Abandonment of Proceeding.—The latter cannot compel the condemning party to take the land at the value assessed; it is optional with it whether to do so or to abandon the condemnation. *Price v. Engelking*, 58 Ill. App. 547; *Gear v. Dubuque, etc., R. Co.*, 20 Iowa 523. But as to abandonment, see *infra*, XVII. *Abandonment—Discontinuance.*

Failure to Pay—Subsequent Proceeding.—If the amount named in the judgment is not paid within the time limited by the statute, the judgment is not a bar to a subsequent proceeding to condemn the same land. *Alabama Midland R. Co. v. Newton*, 94 Ala. 443.

3. Payment of Money into Court.—Where the judgment requires the payment of a sum of money to the landowner within a given time, and the company cannot find him so as to make a tender, the judgment will be amended so as to permit the money to be paid into court. *Rauth v. New York El. R. Co.*, 23 Civ. Pro. Rep. (N. Y. Super. Ct.) 95.

Where an Improper Judgment has been Entered by the Clerk, the court may order a proper one to be entered, *nunc pro tunc*, at a subsequent term. *Lexington, etc., R. Co. v. Mockbee*, 63 Mo. 348, *overruling Jones v. Hart*, 60 Mo. 351.

Relief in Equity.—Equity has power to determine whether the amount of land taken is needed for public use, but in this respect the courts are liberal towards the party exercising the right,

XIV. ENFORCEMENT OF AWARDS AND JUDGMENTS—1. Necessity of Payment or Its Equivalent to Passing of Title.—See, for a full treatment of this subject, Am. and Eng. Encyc. of Law (2d ed.), title Eminent Domain.

2. Enforcement—Generally.—Where the charter of the condemning party, or some other statute, provides the remedy to recover compensation, such remedy is generally exclusive and must be closely followed;¹ but where no such remedy is provided a common-law action, founded on an express or implied promise to pay, will lie in many jurisdictions.² The remedies available will now be considered *seriatim*.³

3. Execution—Precept—Distress—Execution.—In some jurisdictions the award or judgment is enforceable by execution;⁴ in others it

as the owner is protected by the requirement for compensation; and every reasonable intendment will be made in favor of the adjudication of the tribunal awarding the lands. *Coe v. Aiken*, 61 Fed. Rep. 24, holding that a court of equity cannot set aside an adjudication of a proper tribunal determining and locating the quantity of lands required for a public use merely because the parties who brought about the adjudication had a fraudulent or illegal intent; but it must appear that the tribunal itself proceeded fraudulently, or in excess of its powers, or that it committed a gross mistake, or was imposed upon by fraudulent methods.

As to amendment of judgments in appellate court, see *infra*, XV. 7. *j. Allowing Amendments.*

1. See *supra*, II. 3., *Strict Compliance with Statute Essential*; II. 4., *Exclusiveness of Statutory Remedy*, and *infra*, XVIII. 1. *b. Statutory Remedy—When Exclusive*, where these rules are more fully treated. See also *Frelinghuysen v. Central R. Co.*, 28 N. J. Eq. 388; *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526; *Fisher v. Warwick R. Co.*, 12 R. I. 287.

2. *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467; *Wichita, etc., R. Co. v. Fechheimer*, 36 Kan. 45; *Jamison v. Springfield*, 53 Mo. 224; *Plott v. Western North Carolina R. Co.*, 65 N. Car. 74; *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496. But in *Dimmick v. Council Bluffs, etc., R. Co.*, 58 Iowa 637, 10 Am. & Eng. R. Cas. 105, it was held that allowing an award to be recorded by mistake is not a tort, and no title passes by reason

thereof, so as to raise an implied contract to pay the amount of the award; nor would such contract be implied by failure of the company to correct the mistake, until the fact of the mistake had become known to the company, and until a reasonable time thereafter for correcting it.

3. As to the landowner's remedies where the land is taken or injured wrongfully or without resort to condemnation proceedings, see *infra*, XVIII. *Remedies of the Landowner.*

Injunction and Mandamus.—As to the right of the landowner to a writ of injunction or mandamus where the compensation awarded has not been paid or secured, see Am. and Eng. Encyc. of Law (2d ed.), title Eminent Domain.

4. *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Provolt v. Chicago, etc., R. Co.*, 69 Mo. 633; *Neal v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 19; *North Branch Canal Co. v. Hireen*, 44 Pa. St. 418; *Harrisburg, etc., R. Co. v. Pepper*, 84 Pa. St. 295; *Davis v. North Pennsylvania R. Co.*, 2 Phila. (Pa.) 146.

Award of Commissioners is so Enforceable.—The provisions of Mo. Rev. Stat., § 894, as to enforcement of payment of damages assessed in eminent domain by execution, refer alone to the enforcement of an award made by commissioners, and not to that made by a jury. *Missouri Pac. R. Co. v. Wernwag*, 35 Mo. App. 449.

Enforcing Judgment on Second Trial.—Pending an appeal by a union depot company from an award of damages in condemnation proceedings instituted in the Circuit Court, the respondents were paid the amount of the award.

is not,¹ unless the condemning party has taken possession of the land,² the rule being that no personal judgment can be awarded upon which an execution can issue.³

Precept.—In *New York*, where, after confirmation of the commissioners' award, the company refuse to file the papers or pay the award, the court may issue a precept to compel them to do so.⁴

Distress.—Unavailing attempts have been made to use a warrant of distress for the collection of the damages assessed.⁵

4. Actions on Awards and Judgments—*a. GENERALLY*—**Right of Action.**—Where the statute provides no special mode of enforcing payment, the landowner may maintain an action for the amount awarded.⁶ To maintain such action plaintiff must have a right to the possession of the money, or to the performance of the thing required to be done,⁷ and must demand it before the condemning

Upon a second trial a less sum was awarded, and judgment entered for the petitioner for the difference between the two awards. It was held that *How. Mich. Stat.*, § 3468, expressly provides for the entry of such a judgment, and the issuance of an execution thereon is authorized by *How. Stat.*, § 7664. *Fort-Street Union Depot Co. v. Backus*, 103 *Mich.* 556.

1. *Cook v. South Park Com'rs*, 61 *Ill.* 115; *St. Louis, etc., R. Co. v. Lux*, 63 *Ill.* 523; *Springfield, etc., R. Co. v. Turner*, 68 *Ill.* 187; *Chicago, etc., R. Co. v. Chicago*, 148 *Ill.* 141; *Columbus, etc., R. Co. v. Richardson*, 7 *Ind.* 543; *Derby v. Gage*, 60 *Mich.* 1, 25 *Am. & Eng. R. Cas.* 233.

2. *St. Louis, etc., R. Co. v. Teters*, 68 *Ill.* 144; *Peoria, etc., R. Co. v. Mitchell*, 74 *Ill.* 394; *Chicago v. Barbican*, 80 *Ill.* 482; *Corwith v. Hyde Park*, 14 *Ill. App.* 635.

3. As to this rule, see *supra*, XIII. 2. *Form and Requisites*—*Generally*.

4. *Gen. Railroad Act* 1854, c. 282, § 5; *Matter of Rhinebeck, etc., R. Co.*, 67 *N. Y.* 242, *affirming* 8 *Hun* (N. Y.) 34.

5. *Com. v. Blue-Hill Turnpike Corp.*, 5 *Mass.* 420; *Russell Mills v. Plymouth County*, 16 *Gray* (Mass.) 347.

6. *Jersey City v. Gardner*, 33 *N. J. Eq.* 622; *Ganson v. Buffalo*, 1 *Keyes* (N. Y.) 454.

Election of Remedies.—In *Nebraska*, one who has been damaged by the location of a railroad through his premises, where the damages awarded have not been deposited with the probate judge, as provided by *Gen. Stat.* 191, § 97, may bring his action for the

amount of the award, to enjoin the operating of the road across his premises until payment is made; or he may sue in trespass for the unauthorized entry thereon. *Omaha, etc., R. Co. v. Menk*, 4 *Neb.* 21, *followed in Ray v. Atchison, etc., R. Co.*, 4 *Neb.* 439. In *Pennsylvania*, where damages have been assessed, and exceptions to the amount are withdrawn or not filed at all, and the money is not paid, the lessee's or owner's remedy is by suit for the compensation ascertained, and not by suit for nuisance. *Kensington v. Wood*, 10 *Pa. St.* 93.

Money Failing to Reach Owner.—Where private property was taken for public use, and money appropriated to pay for it failed to reach the owner by a misdirection on the part of the government for which the owner was not responsible, the facts constitute an implied contract, whereof the court has jurisdiction. *Dunnington v. U. S.*, 24 *Ct. of Cl.* 440.

7. **Money.**—A naked power to sell real estate does not authorize the executor, to whom it is given, to maintain an action for an award made for lands taken by right of eminent domain. He must, in addition to the power, show that he had some right to the possession of the money, either for the purposes of administration or as trustee under the will. *Cashman v. Wood*, 6 *Hun* (N. Y.) 520.

Performance.—If, on a hearing before a jury for the assessment of damages, it is agreed between the parties that the proprietors of the road shall make and maintain fences against the owner of the land taken, along the line of the road, such agreement, if valid, can only

party can be considered in default.¹ Ordinarily, an action will not lie on the award unless the land has been entered upon and appropriated, inasmuch as before that is done the condemning party may abandon the taking.² In *New York* the order confirming the award must be recorded before the action will lie.³

Who Liable.—Where, subsequent to the judgment, the property of the condemning party is sold under foreclosure, the landowner may recover the award from the purchasers at the sale,⁴ or from a new company organized by them.⁵

Pleading.—The complaint in such action must allege the failure

be enforced against the proprietors of the road in an action by the party with whom it is made, and not by any subsequent purchaser of the estate to which it relates. *Morss v. Boston, etc., R. Co., 2 Cush. (Mass.) 536.*

1. *New York, etc., R. Co. v. Townsend, 36 Hun (N. Y.) 630.*

2. *Dimmick v. Council Bluffs, etc., R. Co., 58 Iowa 637, 10 Am. & Eng. R. Cas. 105, following Gear v. Dubuque, etc., R. Co., 20 Iowa 523; Stacey v. Vermont Cent. R. Co., 27 Vt. 39. See also infra, XVII. Abandonment—Discontinuance.*

3. Laws 1850, c. 140, § 18, as amended by Laws 1876, c. 198; *Lent v. New York, etc., R. Co., 130 N. Y. 504, reversing 55 Hun (N. Y.) 180.*

Illustration.—In an action under the N. Y. General Railroad Act, Laws of 1850, c. 140, § 18, as amended by Laws of 1890, c. 95, to recover the amount of an award for land taken for railroad purposes, it appeared that the defendant was the successor of the P. & E. R. Co., that the original order confirming the commissioners' report was delivered by the counsel for that company to the county clerk, and was copied at full length in a book indorsed "P. & E. R. Co., orders," with the words "entered and recorded" at the end thereof. Defendant claimed that the order should have been recorded in the book of deeds, and that the recording of the original order, instead of a certified copy thereof, was not in compliance with the law. This was held untenable; that there was a substantial compliance with the statute, and defendant having caused the order to be recorded as it was, would not be permitted to object. *Morgan v. New York, etc., R. Co., 130 N. Y. 692, 42 N. Y. St. Rep. 597, 3 Silv. App. (N. Y.) 669, affirming 55 Hun (N. Y.) 606, 28 N. Y. St. Rep. 86.*

4. *Buffalo, etc., R. Co. v. Harvey, 107 Pa. St. 319.*

Illustration.—The charter of C, a railroad corporation, authorized it to acquire lands by statutory proceedings for the valuation thereof, the lands to "vest in the said company in fee simple as soon as the valuation thereof may be paid, or tendered and refused." In 1860 C commenced proceedings to acquire title to a parcel of A's land. It was valued, and C appealed from the valuation, but did not prosecute the appeal. C took possession of the land, and, having become insolvent, in 1866 all its property was sold and purchased by S, another and a distinct railroad corporation, which thereupon took possession of the land. In 1872 A commenced his action against S to have the valuation paid or the land restored to him. It was held that he was entitled to the relief demanded. *Gillison v. Savannah, etc., R. Co., 7 S. Car. 173.*

5. *Pfeifer v. Sheboygan, etc., R. Co., 18 Wis. 155*, holding that the new company was not rendered liable for the amount of the judgment by virtue of the purchase, but by reason of claiming the right of way and taking and using it.

Government Officers.—The doctrine that, except where Congress has provided, the United States cannot be sued, has no application to officers and agents of the United States who, when holding possession of property as such for public uses, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of inquiry and be adjudged accordingly. *U. S. v. Lee, 106 U. S. 196.*

of the defendant to pay the award,¹ and that the order of confirmation was duly recorded.² If the plaintiff relies upon any special undertaking on the part of the company for the breach of which damages were awarded, the declaration or complaint should show what the company was to do, and his readiness to permit them to do it.³ But the complaint need not negative any defense the company may have.⁴

b. DEBT.—Where the damages are reduced to a sum certain, pursuant to the provisions of the statute, the common-law action of debt will lie to recover them, if no other specific remedy is provided.⁵

c. ACTION ON BOND.—Where the filing of a bond is required

1. *Lent v. New York, etc., R. Co.*, 130 N. Y. 504, reversing 55 Hun (N. Y.) 180. In this case the complaint alleged the incorporation of defendant, the presentation by it of a petition for the appointment of commissioners, their appointment and report of amount to be paid plaintiff, the confirmation thereof on defendant's motion, and that defendant subsequently appealed from said order to the general term, where it was affirmed. Then followed a prayer for judgment for the amount of the award and costs. There was no allegation that defendant had failed or omitted to pay the award or was indebted to plaintiff. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was overruled. This was held to be error.

2. *Lent v. New York, etc., R. Co.*, 130 N. Y. 504, 55 Hun (N. Y.) 180, where the complaint did not expressly allege that the order confirming the report of the commissions had been recorded as required by said act to create a debt against defendant. It did allege, however, that the order had been "entered," and the paragraph closed with this clause: "To which order or its record plaintiffs beg leave to refer." It was decided that the word "entered" was properly used as synonymous with "recorded," and so that the complaint in this respect was sufficient.

3. Plaintiff was a coal dealer and had a trestle constructed on his lot used in handling coal. Defendant company constructed its road across the lot, and plaintiff was awarded certain damages in money, with a further provision that the company should construct a new trestle, and should not charge above a

certain price for hauling coal to the trestle, and upon a breach of this provision he was awarded an additional one thousand five hundred dollars. Plaintiff sued for a breach of this provision. It was held that his declaration was sufficient as to the description of where the trestle was to be built, by referring to a plat in the condemnation proceedings, which were set out at length; neither was his declaration defective in failing to aver a readiness to permit the company to enter upon the lot to do the work, where the declaration contained a general averment of readiness on his part to do everything required. *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, 10 Am. & Eng. R. Cas. 429.

4. *McKeoin v. Northern Pac. R. Co.*, 45 Fed. Rep. 464.

5. *Bigelow v. Cambridge, etc., Turnpike Corp.*, 7 Mass. 202; *Jeffrey v. Blue-Hill Turnpike Corp.*, 10 Mass. 368. See also articles AWARDS, vol. 3, p. 130; DEBT, vol. 5, p. 906.

And where the company enters under a statute allowing them to do so after securing or tendering the compensation, debt lies. *Smart v. Portsmouth, etc., R. Co.*, 20 N. H. 233.

The owner need not first exhaust the security before bringing the action. *Fisher v. Warwick R. Co.*, 12 R. I. 287.

Conditional Finding.—But debt will not lie to enforce a conditional finding. *Winchester, etc., R. Co. v. Washington, 1 Rob. (Va.) 72.*

Abandonment of Route.—Nor will debt lie where, before paying or depositing the award, the company changes its location, thereby abandoning the route across plaintiff's land. *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39.

to secure the landowner for any loss he may sustain, if the damages assessed are not paid the owner may proceed upon the bond.¹ But the owner must exhaust the remedy given him in the condemnation proceeding, for the recovery of his damages, before resorting to the bond.²

d. SPECIFIC PERFORMANCE.—In *England* this remedy is often resorted to for the enforcement of awards, but no such practice has been adopted in this country, except where some agreement has been made between the condemning party and the landowner as to the time and manner of payment of the amount awarded. In such cases the agreement, though not the award, may be specifically enforced.³

e. SUIT TO ENFORCE VENDOR'S LIEN.—See, for a full treatment of this topic, *Am. and Eng. Encyc. of Law* (2d ed.), title *Eminent Domain*.

XV. APPEALS—1. Right of Appeal—*a.* IN GENERAL.—Errors of law in condemnation proceedings are properly corrected in the court which made them, or on appeal from its decision. Such errors furnish no ground for equitable interference;⁴ hence such errors will not avail the landowner as ground for an injunction to prevent the occupation of his land.⁵ Thus appeal, and not *certiorari*, injunction, or *mandamus*, is the proper remedy where the damages are assessed under a mistake as to the amount of land taken,⁶ or under a mistake as to the person entitled to damages,⁷ or to review the action of city authorities in determin-

1. *Woodward v. Webb*, 65 Pa. St. 254; *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367; *Hoffman's Appeal*, 118 Pa. St. 512. Compare *Smith v. Boston, etc., R. Co.*, 6 Allen (Mass.) 262.

Right of Way Bond.—An action of *assumpsit* cannot be sustained upon a right of way bond where it appears from the statement filed in the case that judgment had been obtained against the railroad company for damages, although the statement avers that such judgment was improperly and fraudulently procured under an alleged agreement of the parties, without trial or submission of evidence. *Harris v. Schuylkill River East Side R. Co.*, 159 Pa. St. 468.

2. *Pittsburgh v. Irwin*, 85 Pa. St. 420.
3. *Baker v. Chicago, etc., R. Co.*, 57 Mo. 265; *Viele v. Troy, etc., R. Co.*, 20 N. Y. 184, *affirming* 21 Barb. (N. Y.) 381, in which case, shortly before an award was made for the damages for a right of way, the company entered under an agreement with the landowner that the amount of damages fixed should be paid when a valid deed

should be made, and ten days' notice given that the award was completed. The deed was tendered according to contract, but an incumbrance upon the land was not removed until after the expiration of the ten days. The company continued in possession and commenced operations for the construction of the road. In an action by the landowner for specific performance, it was held that the company could not avail itself, as a defense, of the fact that a deed conveying an unincumbered title was not tendered within the ten days; taking possession was a waiver of such objection.

4. *Cooper v. Anniston, etc., R. Co.*, 85 Ala. 106, 36 Am. & Eng. R. Cas. 581; *State v. Hanna*, 97 Ind. 469; *Brown v. Beatty*, 34 Miss. 243.

5. *Phifer v. Carolina Cent. R. Co.*, 72 N. Car. 433.

6. *State v. Longstreet*, 38 N. J. L. 312.

7. *McCrary v. Griswold*, 7 Iowa 248.

Right of Real Owner to Appeal.—A failure of condemnation commissioners to ascertain and designate the owners of the lots or parcels of land taken, or

ing the necessity and propriety of extending a street across a railroad track.¹ The landowner may appeal, notwithstanding the deposit of the damages, if he has not used the money nor interfered with it.²

b. POWER OF LEGISLATURE TO RESTRICT OR TAKE AWAY THE RIGHT.—In the absence of a constitutional provision guaranteeing the right of appeal, the power of the legislature is unlimited. It may grant or withhold an appeal,³ or impose such conditions upon the exercise of the right as it sees fit,⁴ or substitute another remedy in place of an appeal.⁵

c. CONSTRUCTION OF STATUTES—In General.—The provisions of the statutes regulating the right of appeal in condemnation proceedings, and the modes of procedure provided, are so dissimilar and local that no rules of general application can be deduced from many of the adjudications expounding them. These decisions are given in the note, arranged in the alphabetic order of the states.⁶

the fact that they name the wrong person as the probable owner in their report, whether it occurs from ignorance or mistake, will not prevent the real owner of any lot or parcel of real estate or interest therein from availing himself of the remedy of appeal. *Chicago, etc., R. Co. v. Grovier*, 41 Kan. 685, 39 Am. & Eng. R. Cas. 146.

1. *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141, 24 Am. & Eng. R. Cas. 309.

2. *Matter of New York, etc., R. Co.*, 98 N. Y. 12, where a city whose land had been taken was allowed to appeal after the damages awarded had been deposited with the city chamberlain, but remained untouched in his hands.

3. *Kundinger v. Saginaw*, 59 Mich. 355; *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77, *following* *Skinner v. Nixon*, 7 Jones (N. Car.) 342.

Postponing Right of Appeal.—The constitutional provision that the Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference is not impaired by an act of the legislature postponing the right of appeal until the final determination of the cause; and the general law allowing appeals from interlocutory judgments must yield to the provisions of a special act. *Norfolk, etc., R. Co. v. Warren*, 92 N. Car. 620.

4. *Central Branch Union Pac. R. Co. v. Atchison, etc., R. Co.*, 28 Kan. 453, 10 Am. & Eng. R. Cas. 528;

Oliver v. Union Point, etc., R. Co., 83 Ga. 257, 39 Am. & Eng. R. Cas. 107.

The charter of a railroad company, which was irrevocable, gave the company the power to take lands by condemnation, and provided for an appeal by the landowner, from the award of damages, to a certain court. It was held that a general statute which took away the right to appeal to that court, and gave an appeal to another court on the same terms and conditions, and with the same mode of trial, was not unconstitutional. *United R., etc., Companies v. Weldon*, 47 N. J. L. 59, 23 Am. & Eng. R. Cas. 134.

5. *State v. Oshkosh*, 84 Wis. 548.

But where a statute provides how an appeal shall be taken, the parties cannot substitute a different procedure so as to dispense with the requirements of the statute. *Klein v. St. Paul, etc., R. Co.*, 30 Minn. 451.

6. **Alabama.**—Under statutory provisions regulating proceedings for condemnation (Code, §§ 3207–20; Sess. Acts 1888–89, p. 112), and the judicial construction which has been placed upon them (72 Ala. 443, 87 Ala. 328), the assessment of damages by a jury of six men is preliminary only, and either party has a right of appeal to the Circuit Court under the general statute (Code, § 3640); but this necessarily destroys the right of appeal from the probate court to the Supreme Court, given by the special statute (§ 3215). *Postal Tel. Cable Co. v. Alabama*

Statutes Making Decision of Tribunal to Assess Damages Final and Conclusive are valid unless the local constitution expressly confers a right to

Great Southern R. Co., 92 Ala. 331, 47 Am. & Eng. R. Cas. 252.

Arkansas.—The provision in the road law of 1871 (Mansf. Dig., § 5940), for an appeal from a final decision of the County Court opening a county road is not repealed by the general act of later date (Mansf. Dig., § 1436), regulating appeals from final orders and judgments of the County Court. *Baughner v. Rudd*, 53 Ark. 417.

Connecticut.—It is provided by Gen. Stat., § 3461, that every railroad company, after its line has been established, may alter the location of its road with the approval of the railroad commissioners, and take lands for additional tracks and stations; and by section 3466 that where land has been conveyed to a railroad company for its track with any reservation or condition which interferes with the furnishing by the company of proper depot accommodations, such reservation or condition may, with the approval of the commissioners, be condemned in the same manner that land might be taken. And it is provided by section 3518 that any person aggrieved by any order of the commissioners, upon any proceeding "relative to the location, abandonment, or changing of depots or stations," may appeal to the superior court. It was held that cases arising under sections 3461 and 3466 were entirely distinct from those arising under section 3518, and that an order made by the railroad commissioners upon a petition brought under those two sections was not subject to the appeal provided for in the last section. *Cockcroft's Appeal*, 60 Conn. 161.

Indiana.—Under 1 Rev. Stat. 1876, p. 302, § 66, relating to the incorporation of cities, an appeal from the common council of a city, on the assessment of damages in the location of streets, will lie to the Circuit Court. *Hamilton v. Fort Wayne*, 73 Ind. 1.

The statute authorizing appeals from the decisions of boards of commissioners is applicable to and authorizes an appeal in proceedings under the Act of 1877 relating to free turnpikes. *Hight v. Claman*, 121 Ind. 447.

Iowa.—Under Code of 1851, § 131, allowing an appeal from all orders and decisions of the county courts, on

the merits of any matter affecting the rights of individuals as distinguished from the public, including intermediate orders involving the merits, and necessarily affecting the decree or decision, no appeal is allowed from an order of the County Court establishing a road upon the petition of a plaintiff, as this is not a matter affecting the rights of a defendant as distinguished from the public. *Myers v. Simms*, 4 Iowa 500; *McCune v. Swafford*, 5 Iowa 552.

It was the intention of Laws of 1853, c. 31, in providing for the assessment of damages caused by locating a railway, to give an appeal to either party in the ordinary acceptance of the term, and upon such appeal the cause was to be heard upon exceptions taken to the action of the sheriff or jury, or the competency of either to act in the premises. *Mississippi, etc., R. Co. v. Rosseau*, 8 Iowa 373.

Massachusetts.—A judgment of the trial court upon a verdict of a jury assessing damages in a condemnation proceeding is a judgment in a "civil action," within the meaning of Pub. Stat., c. 187, §§ 16, 22, authorizing writs of review in civil actions. *Nantasket Beach R. Co. v. Ransom*, 147 Mass. 240.

Minnesota.—Under Gen. Stat., c. 34, tit. 1, §§ 13-27, no right of appeal is given from the judgment authorized to be entered by the District Court upon the trial therein of an appeal from the award of commissioners for damages occasioned by taking property for railroad purposes; nor does such an appeal lie under Gen. Stat., c. 86, regulating appeals in civil actions. *Conter v. St. Paul, etc., R. Co.*, 24 Minn. 313.

Mississippi.—The third section of the Act of February 28, 1884, entitled "An act to incorporate the Board of Levee Commissioners for the Yazoo-Mississippi Delta and for other purposes," authorizes such board to have land condemned for levee purposes upon "appraisement" by three commissioners appointed by the clerk of the chancery court, and gives either party "aggrieved at such appraisement" the right to appeal to that court, and although no special provision is made for an appeal in such case to the

appeal from such decisions.¹ Some of the statutes make the report of the commissioners final unless an appeal to a jury is taken;² others make the second report of the commissioners

Supreme Court, it is manifest that the legislature, by granting an appeal to the chancery court, intended to confer the right of appeal to this court, under the general law, as in other cases in the chancery court. *Levee Com'rs v. Harkleroads*, 62 Miss. 807.

New Hampshire.—The Act of 1859, providing for the laying out of a toll bridge, being silent as to appeals from the selectmen, the court adopted the usual course as to appeals in such cases, and entertained an appeal under the general law. *Pemigewasset Bridge v. New Hampton*, 47 N. H. 151.

New York.—The provision of the General Railroad Act of 1850, § 18, to the effect that "on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners," does not entitle a party, as a matter of right, to a second hearing and appraisal. The word "may" should not be construed as equal to "shall" or "must," but as granting a discretionary power. *New York, etc., R. Co. v. Coburn*, 6 How. Pr. (N. Y. Supreme Ct.) 223.

Pennsylvania.—Under the lateral railroad act of May 5, 1832, an appeal does not lie to the Supreme Court from a decree of the common pleas overruling exceptions to a report of viewers. *Hall's Appeal*, 56 Pa. St. 238.

No right of appeal from an award of viewers to appraise damages was given to either party under the charter of the Philadelphia and Erie railroad company and its supplements. *Cake v. Philadelphia, etc., R. Co.*, 87 Pa. St. 307.

The Act of June 13, 1874, P. L. 283, allowing and regulating appeals from assessments of land damages where "an appeal is not provided for or regulated by existing laws," does not apply, either in whole or in part, to cases in which subsequent statutes, authorizing the creation of corporations, provide for and regulate such appeals. *Miller v. South West Pennsylvania Pipe Lines*, 2 Pa. Dist. Rep. 602.

A railroad company obtained the appointment of viewers to assess certain alleged damages sustained by G in the construction of its road. When

the viewers made their award the company and the claimant both filed exceptions, and the latter appealed, although no appeal was allowed under the Act of 1846 and its supplements incorporating the railroad. The court, on June 16, 1874, overruled the exceptions of both parties, quashed the appeal, and entered judgment on the award. On June 13, 1874, an act of the general assembly was approved, allowing appeals in proceedings of this kind, and on June 17, 1874, the claimant appealed from the award under the provisions of this act. The company asked the court to strike off this appeal, which was refused, and the case proceeding to trial resulted in a verdict for the plaintiff largely in excess of the award of viewers. It was held that the appeal under the Act of 1874, and all the proceedings thereafter, were erroneous. *Pennsylvania R. Co. v. Gorsuch*, 84 Pa. St. 411.

By the Act of April 10, 1867, the Pennsylvania railroad was authorized to straighten its track. Viewers were appointed under the provisions of the Act of March 27, 1848, to assess the damages. This latter act embraced no right to appeal from the assessment, and there were no other acts giving this right as against said company, until the Act of June 13, 1874. The court below held that as there was no provision for appeal applicable to said company until 1874, and as the company had not accepted the benefit of any legislation under the new constitution, the Act of 1874, in so far as it applied to the Act of 1848, was unconstitutional, and struck off the appeal. This was held to be error, as the provision of the Act of 1874 was merely a change in the remedy and did not impair any franchise of the company. *Long's Appeal*, 87 Pa. St. 114.

1. *Houghton's Appeal*, 42 Cal. 35; *Central Branch Union Pac. R. Co. v. Atchison, etc., R. Co.*, 28 Kan. 453, 10 Am. & Eng. R. Cas. 528; *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77, where the award was held to be final unless appealed from in ten days from time of filing it.

2. *Northampton Bridge Case*, 116 Mass. 442.

final;¹ others allow an appeal to an intermediate appellate court but deny it to the court of last resort.² Such a proceeding is not a "case at law" within the meaning of a constitutional provision securing an appeal "in all cases at law which involve the title or possession of real estate," etc.³

d. WAIVER OF RIGHT—ESTOPPEL.—The acceptance by the landowner of the amount assessed is a waiver of his right to appeal. A party cannot appeal from an order under which he has accepted a benefit.⁴ But a deposit of the amount awarded, not taken up or used by the landowner, will not deprive him of the right to appeal;⁵ otherwise if he receives the money from the depository.⁶ Payment of the damages will not, in all cases, deprive the condemning party of the right to appeal;⁷ the award

1. *Matter of Prospect Park, etc.*, R. Co., 85 N. Y. 489, 14 Am. & Eng. R. Cas. 362; *Matter of Southern Boulevard R. Co.*, 141 N. Y. 532; *Matter of Prospect Park, etc.*, R. Co., 20 Hun (N. Y.) 184.

2. *Matter of Canal, etc., Streets*, 12 N. Y. 406; *Matter of Central Park*, 50 N. Y. 493; *Matter of Delaware, etc.*, Canal Co., 69 N. Y. 209; *Matter of State Reservation*, 102 N. Y. 734.

3. Cal. Const., art. VI., § 4; *Houghton's Appeal*, 42 Cal. 35. *Contra*, however, under a constitutional provision conferring appellate jurisdiction in "all other cases." *St. Louis, etc.*, R. Co. v. *Lux*, 63 Ill. 523, explaining *Coon v. Mason County*, 22 Ill. 666. In *Indiana*, the court did not think the provision of the statute (Local Laws 1847-48, § 1), that such decisions "shall be final," sufficiently explicit to warrant the appellate court in refusing to take jurisdiction. *Lawrenceburgh, etc.*, R. Co. v. *Smith*, 3 Ind. 253.

4. *Mississippi, etc.*, R. Co. v. *Byington*, 14 Iowa 572; *Rentz v. Detroit*, 48 Mich. 544; *Matter of New York, etc.*, R. Co., 39 Hun (N. Y.) 338.

When the Rule does Not Apply.—An order vacating the appointment of commissioners of appraisal was, by a subsequent judgment obtained by the moving party, adjudged to be a nullity. Thereafter said party made a motion based upon the order for the appointment of new commissioners and upon the hearing, with the consent of the opposite party, and as a condition of the hearing of the motion gave a stipulation that the judgment should be amended by striking out the provision in reference to the order. It was held that the opposing party was not

estopped from appealing from the order granting the motion; that the rule prohibiting a party from appealing from an order under which he has accepted a benefit did not apply. *Matter of New York, etc.*, R. Co., 126 N. Y. 632, 36 N. Y. St. Rep. 459, reversing 59 Hun (N. Y.) 615.

5. *Matter of New York, etc.*, R. Co., 98 N. Y. 12, holding that even the receipt of the money will not prevent an appeal, under section 18 of the Gen. Railroad Law of 1850, c. 140.

6. *Baltimore, etc.*, R. Co. v. *Johnson*, 84 Ind. 420, 10 Am. & Eng. R. Cas. 408, holding it to be error, in such a case, to strike out an answer by the condemning party which alleges such receipt of the money in bar of the further prosecution of the appeal.

Receipt on Condition.—Where a company deposits the amount of an award with the county treasurer, under an order of the court pending an appeal, the receipt of the money by the landowner before the appeal is decided, upon condition that he would return the same to the company in case of a reversal of the judgment, is not a satisfaction or extinction of the judgment, and is no ground for dismissing the appeal. *Chicago, etc.*, R. Co. v. *Phelps*, 125 Ill. 482.

7. *Com. v. Hall*, 8 Pick. (Mass.) 440, where the company had to get possession or lose its franchise, and payment was necessary in order to get possession.

Illustration.—A railroad was located across lands used for the manufacture and shipping of brick, and the company went into possession. Pending condemnation proceedings the court passed an order allowing the company

deposit or tender of them for the purpose of obtaining possession will never do so.¹ The right to appeal from an order appointing commissioners is not foreclosed by the appellant's appearance, pending the appeal, before the commissioners, and cross-examining witnesses;² nor by his altering of his fence line, pending his appeal, so as to conform to the line of the highway laid out.³

2. What Is Appealable—*a. IN GENERAL—JUDGMENTS—In General* an appeal will lie only from a final, not from an interlocutory, decision or ruling.⁴ Errors of law, not mere questions of fact, are reviewable.⁵ So-called "appeals" from reports of commissioners, in order to obtain a jury trial on the question of the amount of damages, are treated elsewhere.⁶

Judgments.—The judgment, if a final one, is always appealable.⁷

b. ORDERS—What Orders Are Final and Appealable.—Any order which "puts an end to the case" is sufficiently final to authorize an appeal therefrom.⁸ The following orders have been held to be final and appealable: An order appointing commissioners;⁹ an order confirming or setting aside the report of commissioners;¹⁰

to remain in possession pending the proceeding, upon depositing a certain sum to secure any award that might be made against it, and required the company to keep a gap open across its right of way to allow the bricks to be transported from where they were made to where they were shipped. After the report of the commissioners was confirmed the company paid the amount of the damages and closed the gap. It was held that the company did not lose the right to appeal by either paying the damages or closing the gap. *Matter of New York, etc., R. Co.*, 29 Hun (N. Y.) 646, *affirmed* in part in 94 N. Y. 287.

1. *Indianapolis, etc., R. Co. v. Brower*, 12 Ind. 374; *St. Louis, etc., R. Co. v. Evans, etc., Fire Brick Co.*, 85 Mo. 307. *Contra* in *Kansas*, see *Missouri Pac. R. Co. v. Gruendel* (Kan. App. 1896), 44 Pac. Rep. 439.

2. *Matter of New York, etc., R. Co.*, 126 N. Y. 632, 36 N. Y. St. Rep. 459, *reversing* 59 Hun (N. Y.) 615.

3. *Endicott's Petition*, 24 Pick. (Mass.) 339.

4. *Denver, etc., R. Co. v. Jackson*, 6 Colo. 340; *American Union Tel. Co. v. Wilmington, etc., R. Co.*, 83 N. Car. 420.

5. *Matter of New York, etc., R. Co.*, 99 N. Y. 388.

6. See *supra*, IX. 1. *Powers of the Legislature*; IX. 2. *Right to Jury Trial*; IX. 3. *Application for Jury*; IX. 4. *Summoning and Impanelling*.

7. *San Francisco, etc., R. Co. v. Mahoney*, 29 Cal. 112; *Hyde Park v. Dunham*, 85 Ill. 569; *Chesapeake, etc., Canal Co. v. Hoyer*, 2 Gratt. (Va.) 514.

Final Judgments.—Thus a judgment confirming or setting aside the report of commissioners or viewers, in whole or in part, is a final judgment, and appealable. *Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509.

But a judgment appointing commissioners to fix damages for land proposed to be taken is not final. *Ludlow v. Norfolk*, 87 Va. 319. The remedy in such cases is by motion to set aside the erroneous judgment, and not by appeal. *Greenleaf v. Brooklyn, etc., R. Co.*, 37 Hun (N. Y.) 435.

8. So held of an order of the board of county commissioners refusing to pay the damages assessed by viewers to the appellants. *Smith v. Searce*, 34 Ind. 285. See also *Chicago, etc., R. Co. v. Chicago*, 148 Ill. 141.

9. *In re St. Paul, etc., R. Co.*, 34 Minn. 227, 22 Am. & Eng. R. Cas. 94. Such a proceeding is a "special proceeding" and such order affects a "substantial right" and is therefore appealable under N. Y. Code Civ. Pro., § 3334. *Matter of Broadway, etc., R. Co.*, 69 Hun (N. Y.) 275; *Matter of South Market St.*, 80 Hun (N. Y.) 246. But see *infra*, this section.

10. *Phillips v. Pease*, 39 Cal. 582; *Morris v. Chicago*, 11 Ill. 650; *Tracy v. Elizabethtown, etc., R. Co.*, 78 Ky.

an order refusing to set aside such confirmation;¹ an order condemning land for the use of a railroad;² an order refusing to direct payment of the damages assessed;³ an order dismissing the proceeding,⁴ or a cross-petition filed therein,⁵ or dismissing an appeal from the commissioners' award;⁶ an order setting aside the verdict of a sheriff's jury;⁷ and an order granting or refusing to grant a new trial.⁸

What Orders Are Interlocutory and Not Appealable.—As a general rule no appeal will lie from a purely interlocutory order in condemnation proceedings,⁹ and the following have been held to be interlocutory and not appealable: An order appointing commissioners to assess damages;¹⁰ an order affirming their report;¹¹ an order refusing to open and construct a road;¹² an order refusing to set aside a final order of condemnation;¹³ an order granting a new trial¹⁴ on the ground of excessive damages,¹⁵ or an order refusing to dismiss an appeal from the award of the commissioners.¹⁶

c. MATTERS OF DISCRETION IN COURT BELOW.—It is a well settled rule that an appellate court will not review the orders and

309; *St. Louis, etc., R. Co. v. Evans, etc., Fire Brick Co.*, 85 Mo. 307; *Rochester, etc., R. Co. v. Beckwith*, 10 How. Pr. (N. Y. Supreme Ct.) 168; *Albany, etc., R. Co. v. Dayton*, 10 Abb. Pr. N. S. (N. Y. Supreme Ct.) 182; *Matter of New York, etc., R. Co.*, 33 Hun (N. Y.) 231. Otherwise where not only the court but the governor must confirm, and the latter has not done so. *People v. Pfeiffer*, 59 Cal. 89.

1. *Denver, etc., R. Co. v. Jackson*, 6 Colo. 340. *Contra*, see *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 295.

2. *Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 162, 52 Wis. 537; or refusing to set aside such an order, *Milwaukee, etc., R. Co. v. Strange*, 63 Wis. 178.

3. *St. Louis, etc., R. Co. v. Clark*, 119 Mo. 357.

4. *Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 608.

5. *Johnson v. Freeport, etc., R. Co.*, 116 Ill. 521, 24 Am. & Eng. R. Cas. 266.

6. *Warren v. First Div. St. Paul, etc., R. Co.*, 18 Minn. 384.

7. *Rose v. Taunton*, 119 Mass. 99.

8. *San Francisco, etc., R. Co. v. Mahoney*, 29 Cal. 112.

9. *American Union Tel. Co. v. Wilmington, etc., R. Co.*, 83 N. Car. 420; *Norfolk, etc., R. Co. v. Warren*, 92 N. Car. 620; *Pack v. Chesapeake, etc., R. Co.*, 5 W. Va. 118.

10. *Williams v. Hartford, etc., R. Co.*, 13 Conn. 110; *Hendrick v. Carolina*

Cent. R. Co., 98 N. Car. 431; *St. Joseph Terminal R. Co. v. Hannibal, etc., R. Co.*, 94 Mo. 535; *Freshour v. Logansport, etc., Turnpike Co.*, 104 Ind. 463; *Davie County v. Cook*, 86 N. Car. 18.

11. *Hill v. Salem, etc., Turnpike Co.*, 1 Rob. (Va.) 278. Except as to the amount of damages. *Evans v. Shields*, 3 Head (Tenn.) 70. To raise any errors committed before the commissioners the award must be appealed from. *N. Y. Gen. Railroad Act of 1850*, § 18; *Matter of Metropolitan El. R. Co.*, 67 Hun (N. Y.) 652, 51 N. Y. St. Rep. 827.

12. *Sangamon County v. Brown*, 13 Ill. 207.

13. *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 295, holding that the appeal should be from the original decision.

14. *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388.

Motion in Nature of Motion for New Trial.—A motion to vacate an order of the Supreme Court of the District of Columbia, confirming a report of commissioners in condemnation proceedings, is in the nature of a motion for a new trial, and is not appealable. *District of Columbia v. Prospect Hill Cemetery*, 5 App. Cas. (D. C.) 497.

15. *Road in Kiskiminitas Tp.*, 32 Pa. St. 9, holding that the remedy is to move for an alias view.

16. *Minnesota Cent. R. Co. v. Peterson*, 31 Minn. 42.

rulings of an inferior tribunal in matters committed to the discretion of the latter, unless an abuse of such discretion, or a refusal to exercise it, be shown; and this rule has been extended to such nonjudicial bodies as commissioners,¹ and municipal boards.² When applied to inferior courts, in condemnation proceedings, it is held that their rulings, with regard to such matters as limiting the number of witnesses to be examined, or whose fees and costs shall be taxed;³ granting or refusing applications for bills of particulars;⁴ vacating orders granting possession to petitioners pending the proceedings;⁵ rulings on objections to the conduct of a petitioner and one of the commissioners in viewing the premises before the meeting for that purpose;⁶ granting or refusing leave to dismiss or abandon the application to condemn, where such motion is addressed to the court's discretion;⁷ decisions on motions to set aside reports for misconduct of commissioners or viewers, where the evidence is conflicting as to such misconduct,⁸ or for interference of a party with the jury;⁹ or granting or refusing new trials,¹⁰ will not be reviewed.¹¹

3. Who may Appeal—In General.—A corporation is a "person" within the statute allowing appeals;¹² and under a statute allowing an appeal to "any party" or "any party in interest," the owner of any distinct interest may appeal,¹³ as may also the party seeking to condemn the land.¹⁴ Ordinarily the right to appeal is limited

1. *People v. Collins*, 19 Wend. (N. Y.) 56.

2. *Little Miami, etc., R. Co. v. Dayton*, 23 Ohio St. 510, approved in *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586.

3. *Chicago, etc., R. Co. v. Aldrich*, 134 Ill. 9.

4. *Kansas City, etc., R. Co. v. Kennedy*, 49 Kan. 19.

5. *People v. Pitkin County*, 11 Colo. 147, where it appeared that the right to condemn the land in controversy did not exist.

6. *Patten's Petition*, 16 N. H. 277.

7. *Kremer v. Chicago, etc., R. Co.*, 51 Minn. 15, 51 Am. & Eng. R. Cas. 382.

8. *Matter of Prospect Park, etc., R. Co.*, 85 N. Y. 489, 14 Am & Eng. R. Cas. 362, dismissing appeal from 24 Hun (N. Y.) 199.

9. *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238.

10. *Georgia Southern R. Co. v. Jones*, 90 Ga. 292.

11. **But Where a Judge does Not Exercise His Discretion**, and rules as a matter of law, upon the evidence, that a party is entitled to a new trial, the appellate court may revise his ruling. *Wamesit*

Power Co. v. Lowell, etc., R. Co., 130 Mass. 455.

12. *People v. May*, 27 Barb. (N. Y.) 238.

13. *Knauff v. St. Paul, etc., R. Co.*, 22 Minn. 173, followed in *Wilkin v. St. Paul, etc., R. Co.*, 22 Minn. 177; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 379. But see *Sangamon County v. Brown*, 13 Ill. 207.

Appellant must have Been Interested in the Land at Time of Condemnation.—Where commissioners award damages for injuries to a tract of land to a certain land and cattle company as the owner, and also allow nominal damages to another party for injuries to the same land, and the latter appeals from such award to the District Court, before he can recover damages in said court he must show that he had some interest in the land over which the right of way was condemned, at the time of the condemnation proceedings. *Chicago, etc., R. Co. v. Easley*, 46 Kan. 337.

14. *Hanover Borough Alley*, 4 Pa. Dist. Rep. 160; *Lee v. Northwestern Union R. Co.*, 33 Wis. 222. So under N. Y. Acts of 1850, § 18, and 1851, § 3, the company as well as the owner

to parties to the proceedings,¹ but some cases hold that a person not a party, who thinks himself aggrieved, may appeal,² provided he shows some ground for so thinking.³

Instances.—Instances of the application of the rules as to the right of particular parties to appeal in condemnation cases will be found in the notes.⁴

may appeal. *Troy, etc., R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Matter of Metropolitan El. R. Co.*, 57 Hun (N. Y.) 130. *Contra* in *North Carolina*, see *Raleigh, etc., R. Co. v. Jones*, 1 Ired. (N. Car.) 24, followed in *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77; and in *Missouri*, see *Foster v. Dunklin*, 44 Mo. 216. The condemning party cannot appeal from an order apportioning the damages among the different claimants, as it has no interest in the question. *Haswell v. Vermont Cent. R. Co.*, 23 Vt. 228; *Spaulding v. Milwaukee, etc., R. Co.*, 57 Wis. 304.

1. *People v. Pfeiffer*, 59 Cal. 89; *Connable v. Chicago, etc., R. Co.*, 60 Iowa 27, 10 Am. & Eng. R. Cas. 520; *Cedar Rapids, etc., R. Co. v. Chicago, etc., R. Co.*, 60 Iowa 35, 10 Am. & Eng. R. Cas. 522, holding that where a right of way is condemned upon personal service of notice thereof upon the supposed owner of the land, a person not made a party to the proceedings, though he be the real owner of the land, cannot appeal from the award of the jury. To the same effect is *Barr v. Stevens*, 1 Bibb (Ky.) 292, and *Canyonville, etc., Road Co. v. Douglas County*, 5 Oregon 280.

2. *Fleming v. Hight*, 95 Ind. 78; *Lawless v. Ress*, 1 Bibb (Ky.) 495.

3. *Cosby v. Lynn*, 4 Bibb (Ky.) 249.

4. **Heir of Executor.**—Where the defendant landowner dies, his heirs alone can appeal, unless it be shown that his executor has been given some interest in the land by the will. *Bower v. Grayville, etc., R. Co.*, 92 Ill. 223.

Husband or Wife.—Where a homestead is taken, the title to which is in the wife, both husband and wife are jointly interested and may jointly appeal. *Chicago, etc., R. Co. v. Anderson*, 42 Kan. 297, 39 Am. & Eng. R. Cas. 41.

Party in Possession.—Where one in possession of the land taken, having only a life interest, is awarded a gross sum as owner, he may appeal from such award without joining with him the owner of the fee. *Chicago, etc., R.*

Co. v. Ellis, 52 Kan. 41, 57 Am. & Eng. R. Cas. 480, holding that on such an appeal the appellant can only recover for such an interest or estate as he can establish in himself, and that his appeal cannot inure to the benefit of the holder of the legal title who does not appeal.

Tenants in Common may join in an appeal, *Sangamon County v. Brown*, 13 Ill. 207; and if the company fails to cause a separate award to be made to the several tenants in common, a settlement with one of them will not deprive the others of a right to appeal. *Ruppert v. Chicago, etc., R. Co.*, 43 Iowa 490.

Mortgagor or Mortgagee.—Ordinarily the mortgagor is the proper party to appeal, especially if in possession (see *supra*, VI. 2. c. *Mortgagor and Mortgagee*); but the mortgagee should be made a party to the proceedings to condemn, *Calumet River R. Co. v. Brown*, 136 Ill. 322; or if the proceedings are discontinued as to him without adjudicating his rights, his right to appeal cannot be denied him, *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

Vendor and Vendee.—Where the land is sold before proceedings to condemn are instituted, the vendee is the proper party and he alone can appeal. *Elizabethtown, etc., R. Co. v. Helm*, 8 Bush (Ky.) 681. If sold pending the proceedings and before the assessment of damages, the grantor, being still entitled to the damages, has the right of appeal. *Milwaukee, etc., R. Co. v. Strange*, 63 Wis. 178, 20 Am. & Eng. R. Cas. 413; *Pomeroy v. Chicago, etc., R. Co.*, 25 Wis. 641. If sold after the award and before the time to appeal expires, there is a conflict of authority as to the right to damages and the consequent right to appeal. That the right is with the vendor, see *McFadden v. Johnson*, 72 Pa. St. 335. That it is with the vendee, see *Carli v. Stillwater, etc., R. Co.*, 16 Minn. 260.

Vendor Trustee for Vendee.—Where, by virtue of an agreement for the sale

4. Appeals to Court of Last Resort.—Whether an appeal to the court of last resort will lie, in condemnation proceedings, depends upon the wording of the local constitutions and statutes, which differ so widely in the various jurisdictions that no rules of general application can be formulated from them. The cases interpreting these provisions, except so far as referred to in other parts of this article, are collected in the notes.¹

5. Jurisdiction on Appeal.—Appellate jurisdiction in condemnation proceedings is regulated by a multitude of local statutes, among which there is great diversity and but little harmony; and in so far as the decisions upon this question are but judicial interpretations of these statutory provisions, they will be found collected in the notes.²

of lands in equity, a vendor is trustee for the vendee, and the lands are condemned by a railroad company under its charter, if the vendee desires to appeal from the award he may do so in the name of the vendor, and equity will protect his rights in the appeal as against the vendor. *McIntyre v. Easton*, etc., R. Co., 26 N. J. Eq. 425.

1. *Alabama*.—*Odum v. Rutledge*, etc., R. Co., 94 Ala. 488; *Alabama Midland R. Co. v. Newton*, 94 Ala. 443; *Louisville, etc., R. Co. v. Peoples' St. R., etc., Co.*, 101 Ala. 331.

California.—*Eureka, etc., R. Co., v. McGrath*, 74 Cal. 49.

Florida.—*Jacksonville, etc., R. Co. v. Adams*, 29 Fla. 260.

Illinois.—*St. Louis, etc., R. Co. v. Lux*, 63 Ill. 523; *Peoria, etc., R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129.

Kentucky.—*Henderson, etc., R. Co. v. Dickerson*, 16 B. Mon. (Ky.) 297.

Maryland.—*Wilmington, etc., R. Co. v. Condon*, 8 Gill & J. (Md.) 443; *Cumberland, etc., R. Co. v. Pennsylvania R. Co.*, 57 Md. 267, 10 Am. & Eng. R. Cas. 351; *George's Creek Coal, etc., Co. v. New Central Coal Co.*, 40 Md. 425.

Massachusetts.—*Dwight Printing Co. v. Boston*, 122 Mass. 583.

Minnesota.—*Lehmick v. St. Paul, etc., R. Co.*, 19 Minn. 464.

Missouri.—*North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Lee v. Tebo*, etc., R. Co., 53 Mo. 178; *St. Louis, etc., R. Co. v. Evans, etc., Fire Brick Co.*, 85 Mo. 307, 22 Am. & Eng. R. Cas. 517.

New York.—*New York Cent. R. Co. v. Marvin*, 11 N. Y. 276; *Rensselaer, etc., R. Co. v. Davis*, 43 N. Y.

137; *Matter of New York, etc., Bridge*, 137 N. Y. 95; *Matter of Prospect Park, etc., R. Co.*, 85 N. Y. 489, 14 Am. & Eng. R. Cas. 362, *dismissing* appeal from 24 Hun (N. Y.) 199; *Matter of New York, etc., R. Co.*, 94 N. Y. 287, 17 Am. & Eng. R. Cas. 145, *affirming* in part 29 Hun (N. Y.) 646; *Matter of Southern Boulevard R. Co.*, 128 N. Y. 93, *dismissing* appeal from 58 Hun (N. Y.) 497; *Matter of Metropolitan El. R. Co.*, 128 N. Y. 600, *dismissing* appeal from 58 Hun (N. Y.) 563; *Brooklyn El. R. Co. v. Flynn*, 147 N. Y. 344.

Pennsylvania.—*Twelfth-St. Market Co. v. Philadelphia, etc., Terminal R. Co.*, 142 Pa. St. 580, 47 Am. & Eng. R. Cas. 98; *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67.

West Virginia.—*Pack v. Chesapeake, etc., R. Co.*, 5 W. Va. 118.

Wisconsin.—*Shealy v. Chicago, etc., R. Co.*, 72 Wis. 471.

2. *California*.—The Supreme Court has jurisdiction of appeals in special cases, such as proceedings to condemn land for a public use. *Stockton, etc., R. Co. v. Galgiani*, 49 Cal. 139.

Delaware.—The court of chancery has no jurisdiction to pass upon the question of the sufficiency of the damages allowed by commissioners in a condemnation proceeding. *Wilson v. Baltimore, etc., R. Co.*, 5 Del. Ch. 524.

Illinois.—An appeal will lie directly from the County Court to the Supreme Court in a proceeding to condemn land for a railroad. *Kankakee, etc., R. Co. v. Straut*, 101 Ill. 653.

The appellate court has no jurisdiction of a question involving the right to exercise a franchise; but in an ordinary condemnation proceeding to

6. Taking and Perfecting an Appeal—*a.* IN GENERAL—TIME, ETC.—In General.—An appeal in a condemnation proceeding being of statutory origin, the statute must be strictly pursued; if it is

determine the amount that must be paid a landowner for a right of way, no such question is directly involved, and the court may take jurisdiction of such proceeding on appeal. Springfield, etc., R. Co. v. Peters, 8 Ill. App. 300.

Indiana.—The principal object of proceedings to appropriate land for the right of way of a railroad is to appropriate and acquire a title to the land, the assessment of damages being a mere incident to, and arising out of, the act of appropriation, and the Supreme Court has jurisdiction on appeal. Evansville, etc., R. Co. v. Swift, 128 Ind. 34.

Iowa.—The District Court has appellate jurisdiction of causes originating in the County Court, justice's court, and of the reports of county commissioners appointed to assess damages for rights of way in certain cases. Runer v. Keokuk, 11 Iowa 543.

Kentucky.—The court of appeals has jurisdiction of an appeal from a judgment of the Fayette Circuit Court confirming the verdict of a jury in proceedings under writs of *ad quod damnum*, had in the county at the instance of appellee, to condemn a part of appellant's land for railroad purposes under appellee's charter. Tracy v. Elizabethtown, etc., R. Co., 78 Ky. 309, 14 Am. & Eng. R. Cas. 328.

Louisiana.—A provision in a charter giving the company the right to embrace several landholders as defendants in one expropriation suit does not make a judgment rendered therein appealable because the aggregate amount allowed to all of the landholders exceeds one thousand dollars, where the amount allowed to each one individually is less than that amount. Louisiana Western R. Co. v. Hopkins, 33 La. Ann. 806.

Massachusetts.—The verdict of a jury summoned under Gen. Stat., c. 63, § 22, to assess damages for land taken for a railroad must be adjudicated upon in the superior court; and if the officer presiding at the trial returns to the superior court, with the verdict, a bill of exceptions which he certifies to be conformable to the truth, and which the presiding judge allows, without him-

self passing upon the question of law presented, the Supreme Court has no jurisdiction of the exceptions. Tucker v. Massachusetts Cent. R. Co., 116 Mass. 124.

Missouri.—It is the practice of the St. Louis court of appeals to transfer the cause to the Supreme Court whenever the jurisdiction of the appeal is the subject of serious doubt; and where a railroad company is proceeding to condemn lands for dams and reservoirs, the question whether the proceeding involves the title to real estate is sufficiently doubtful to justify the transfer of the cause to the higher court. Musick v. Kansas City, etc., R. Co., 43 Mo. App. 326, followed in St. Louis, etc., R. Co. v. Lewright, 44 Mo. App. 212.

Proceedings to condemn right of way for a railroad involve title to real estate, and the Supreme Court has not only exclusive jurisdiction thereof, but also exclusive superintending control over the action of the trial courts in respect thereto; and a court of appeals cannot interfere therein by mandamus. Joplin, etc., R. Co. v. McGregor, 53 Mo. App. 366.

New York.—Under the provision of the Act of 1883, to provide new reservoirs for the city of New York (Laws of 1883, c. 490, § 21), which gives a claimant for damages for land taken the right to appeal from a decision of the general term to the court of appeals, the jurisdiction of the latter on such an appeal is governed by the general rules of law regulating appeals to it. Such an appeal, therefore, does not bring up for review "a question of fact arising upon conflicting evidence." (Code Civ. Pro., § 1337.) Matter of Thompson, 121 N. Y. 277.

See, also, under the provision of the act in relation to the water supply of the city of New York (Laws of 1877, c. 445, § 8), which permits an appeal to be taken from the general term to this court by a claimant for damages for land appropriated under the act. Matter of Thompson, 127 N. Y. 463.

Ohio.—Where land has been entered upon by a railroad company, valued under a judge's warrant, and an appeal from the valuation has been taken

not complied with the court will decline to consider the appeal.¹

Where the Statute Is Silent as to how the appeal may be taken and perfected, the appellant must follow the form of procedure adopted in similar cases.² The appellant must prosecute his appeal, and cannot rely upon his own delay to show an abandonment of the proceedings by the respondent.³

Time within Which to Appeal.—As in other cases, appeals must be taken within the time limited by statute,⁴ or, in the absence of such statutory limitation, within a reasonable time, which will depend upon the circumstances of the particular case.⁵ The time is ordinarily computed from the time of filing or serving the order or judgment appealed from,⁶ and varies in the different jurisdic-

and carried to the common pleas, it is error in that court to order the warrant and proceedings under it to be quashed. Though the warrant contains no statement of an attempt to purchase the land of the owner, of his disability in law to contract, of his absence from the country, or that the land appropriated is indispensable to the construction of the road, the common pleas has jurisdiction of the appeal. *Little Miami R. Co. v. Perrin*, 16 Ohio 479.

Pennsylvania.—In cases where the law gives an appeal, the Supreme Court will not examine the merits of an award, inquisition, appraisal, or similar finding. But an error apparent on the record may be corrected in the Supreme Court, and the power is not limited to the absence of a right of appeal. *Delaware Div. Canal Co. v. McKeen*, 52 Pa. St. 117. An appeal to the common pleas from an assessment of damages to the owner of property taken for public use, entered under the Act of June 13, 1874 (P. L. 283), vests in that court exclusive jurisdiction of the question of damages. *In re Widening of Chestnut Street*, 128 Pa. St. 214. In the case of a lateral railroad, the supervisory powers of the courts in the proceedings to assess damages extend only to the question of damages, the necessity of the road, wharf, or landing, and whether or not the wharf or landing is necessary to the owner. *Youghiogeny River Coal Co. v. Robertson*, 1 Pa. Dist. Rep. 809, 12 Pa. Co. Ct. Rep. 1.

Virginia.—Under the Code of 1860, c. 174, § 1, the case of a railroad company asking the County Court to ascertain the compensation to a landowner for the land proposed to be taken for its purposes, which has re-

mained in the court for more than one year without being determined, may be removed to the Circuit Court. In such a case, if the Circuit Court sets aside the report of the commissioners, that court should not send the case back to the County Court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the County Court by the statute. *Virginia, etc., R. Co. v. Campbell*, 22 Gratt. (Va.) 437.

Where the amount allowed for compensation for land taken is less than five hundred dollars, the court of appeals has not jurisdiction to review the judgment of the court below. *Richmond, etc., R. Co. v. Knopffs*, 86 Va. 981.

1. *Bryant v. Knox, etc., R. Co.*, 61 Me. 300.

2. *Matter of Metropolitan El. R. Co.*, 57 Hun (N. Y.) 130.

3. *Bradley v. Northern Pac. R. Co.*, 38 Minn. 234.

Affidavit that Appeal Is Not for Purpose of Delay.—An appeal is fatally defective when the required affidavit that the same is not for the purpose of delay has been omitted. *Hanover Borough Alley*, 4 Pa. Dist. Rep. 160.

4. *Monagle v. Bristol County*, 8 Cush. (Mass.) 360; *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455.

5. *Waite v. Port Reading R. Co.*, 48 N. J. Eq. 346, 47 Am. & Eng. R. Cas. 263, holding sixteen days not an unreasonable time under the circumstances of the case.

6. *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77; *Bowers v. Braddock*, 172 Pa. St. 596.

Showing Time of Filing.—The failure of the county clerk to indorse upon the report the time when it was filed

tions. In some it is sixty days,¹ in others thirty days,² and in others ten days.³

b. PARTIES.—The question as to who may be the appellant has already been considered.⁴ Where the landowner appeals, the condemning corporation is the proper party defendant, and *vice versa*;⁵ but in highway cases, and others in which private parties petition for the improvement, such petitioners are the proper defendants on a landowner's appeal,⁶ and not the tribunal or board of officers by whose order the improvement is made.⁷

Joinder of Parties.—In *Illinois* and *Wisconsin* each separate owner may have his damages assessed separately, and may appeal from the judgment without joining the others.⁸ So, in *Indiana*, where

in his office will not preclude a party from showing when it was actually filed, and thus establishing that the appeal was taken within the prescribed time. *Kansas City, etc., R. Co. v. Hurst*, 42 Kan. 462. See also *St. Louis, etc., R. Co. v. Quinn*, 24 Kan. 370.

Service of Order.—An order appointing commissioners in proceedings by a railroad company under the N. Y. General Railroad Act to acquire title to lands situate in C county was granted in the county of M, October 30, 1873. On the sixth of November a copy of the order was served by mail on the attorney for the landowners. The latter served notice of appeal May 14, 1874, stating therein that the order was entered November 11, 1873. A motion to dismiss the appeal was made upon the notice and other papers. No other proof of the time of entry of the order appeared. Before the appeal was taken the commissioners made their report. A copy thereof reciting the granting of the order was served on the owner, who appeared and opposed the confirmation thereof. An order of confirmation was made, but the owner did not accept the compensation awarded. The appeal was dismissed by the general term. This was held to be error, that there was no service of notice of the order sufficient to limit the time of appeal, and that the appearance of the appellant, in opposition to the confirmation of the report, was not a waiver of the right of appeal. *Matter of New York, etc., R. Co.*, 60 N. Y. 112, *following Rensselaer, etc., R. Co. v. Davis*, 43 N. Y. 137.

1. *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309; *Clinton v.*

Missouri Pac. R. Co., 122 U. S. 469; *Gifford v. Republican Valley, etc., R. Co.*, 20 Neb. 538.

2. *Pruitt v. Shelbyville Lateral Branch R. Co.*, 2 Ind. 530; *Jamison v. Burlington, etc., R. Co.*, 69 Iowa 670; *Clark v. Maine Shore Line R. Co.*, 81 Me. 477; *Gwinner v. Lehigh, etc., R. Co.*, 55 Pa. St. 126; *Geissinger v. Hellertown*, 133 Pa. St. 522; *Bowers v. Braddock*, 172 Pa. St. 596; *Seattle, etc., R. Co. v. O'Meara*, 4 Wash. 17.

3. *Kansas City, etc., R. Co. v. Hurst*, 42 Kan. 462; *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77.

4. See *supra*, XV. 3. *Who may Appeal.*

5. *Baker v. Windham*, 25 Conn. 597; *Chase v. Sullivan R. Co.*, 20 N. H. 195; *Chicago, etc., R. Co. v. Butts*, 55 Kan. 660.

6. *Myers v. Old Mission, etc., Road*, 7 Iowa 315; *Deaton v. Polk County*, 9 Iowa 594.

7. *Schmied v. Keeney*, 72 Ind. 309. So, also, in a railroad case, where several owners of separate tracts of land sought to be condemned are interested, the company cannot, by a single appeal in which the board of county commissioners is recognized as the adverse party, transfer the entire proceeding to the District Court, so as to affect the landowners. *Missouri Pac. R. Co. v. Gruendel* (Kan. App. 1896), 44 Pac. Rep. 439.

8. *Johnson v. Freeport, etc., R. Co.*, 116 Ill. 521, 24 Am. & Eng. R. Cas. 266; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 379, 20 Am. & Eng. R. Cas. 235, holding that if the railroad company desires other parties to be before the court for its protection it is its duty to bring them in, and that where, in such case, the railroad com-

separate judgments are rendered, one defendant may appeal alone.¹ In *Iowa*, where damages are assessed jointly to two or more, one cannot appeal without joining the others, or making them parties in some way;² but where one joint owner fails to claim damages before the supervisors, he cannot be made a party to an appeal to the Circuit Court at the instance of the other joint owner.³ In *Minnesota*, where one of the owners is a married woman her husband may be joined with her in an appeal from the award.⁴

c. FILING EXCEPTIONS—BILL OF EXCEPTIONS.—In the matter of perfecting the appeal in condemnation cases by filing exceptions and settling a bill of exceptions, the practice is largely assimilated to that prevailing in appeals generally.⁵

pany has also appealed from the whole award, both appeals may be tried together, with all the parties before the court. But see *Watson v. Milwaukee*, etc., R. Co., 57 Wis. 332.

1. *Larsh v. Test*, 48 Ind. 130.

2. *Chicago, etc., R. Co. v. Hurst*, 30 Iowa 73, *followed* in *Cedar Rapids, etc., R. Co. v. Chicago, etc., R. Co.*, 60 Iowa 35, 10 Am. & Eng. R. Cas. 522.

But where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto. *Dixon v. Rockwell, etc., R. Co.*, 75 Iowa 367, *following* *Lance v. Chicago, etc., R. Co.*, 57 Iowa 636, 5 Am. & Eng. R. Cas. 617.

3. *Hanrahan v. Fox*, 47 Iowa 102.

4. *Wilkin v. St. Paul, etc., R. Co.*, 22 Minn. 177.

Substitution of Parties.—A railroad company which has appropriated private property for right of way purposes is not entitled, on appeal to the District Court from an award of damages, to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way. *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361.

While condemnation proceedings were pending the company sold all of its rights and property to a new corporation, and under Wis. Rev. Stat. 1858, c. 135, § 1, the purchasing company was substituted as a defendant, upon motion, but no notice was served upon the company. It was held that a judgment against it without notice should be reversed. *Sturtevant v. Milwaukee, etc., R. Co.*, 11 Wis. 61.

5. **Time of Filing Exceptions—Indiana.**—Where the appeal is perfected within the statutory time by the filing of exceptions, the respondent may file exceptions after the expiration of the time to appeal, and even after the cause has come back to the trial court upon reversal. *Midland R. Co. v. Smith*, 125 Ind. 509, 44 Am. & Eng. R. Cas. 222.

The Filing of Separate Exceptions, each containing some valid objection to the assessment, is not ground for demurrer, though all might have been included in one general exception. *White Water Valley R. Co. v. McClure*, 29 Ind. 536.

The Exceptions may be Amended, pending a motion to strike them out, by the filing of an additional exception presenting a question triable on the appeal, such as the inadequacy of the damages. *Pittsburgh, etc., R. Co. v. Swinney*, 59 Ind. 100.

Bill of Exceptions.—In *Illinois* the report or award and the judgment thereon are a part of the record, and will be noticed on appeal without a bill of exceptions, but an application for change of venue is not a part of the record unless made so by bill of exceptions. *Chicago, etc., R. Co. v. Melville*, 66 Ill. 329.

In *Missouri* the action of the court in taxing against the defendant costs accruing after the setting aside of the commissioners' report is a matter of record not required to be preserved in a bill of exceptions. *St. Louis, etc., R. Co. v. Lewright*, 113 Mo. 660. Also, in proceedings instituted under the charter of the condemning party, a bill of exceptions cannot be taken unless authorized by the charter, and if taken will form no part of the record.

d. NOTICE OF APPEAL—(1) *Necessity and Sufficiency*—**Necessity.**—Notice of appeal must be given when the statute so provides,¹ and, it seems, even though the statute is silent on that point.²

Waiver of Notice.—Laches in raising the objection that notice of appeal was not given will waive the objection,³ but the mere appearance of the respondent in the appellate court as a witness,⁴ or for the purpose of moving to dismiss the appeal, is no waiver of the notice or of defects therein.⁵

Sufficiency.—One notice of appeal is sufficient, though there be separate awards for different tracts belonging to the same owner, in the same county.⁶ The notice may be signed by the attorney for the appellant.⁷ It must point out with particularity the errors and defects complained of.⁸ But it need not describe the land taken,⁹ nor state the steps already taken in the matter of perfecting the appeal.¹⁰

(2) *Service and Filing.*—Any one not a party may serve the notice of appeal.¹¹ Service upon a director of the condemning company is service upon the company;¹² and service upon the

Hannibal, etc., R. Co. v. Morton, 27 Mo. 317. A motion asking the court to award a jury to assess damages is not a part of the record proper. The record proper is, by law, the petition, summons, and all subsequent pleadings, including the verdict and judgment. If any error is apparent on the face of the record proper the Supreme Court will reverse the judgment, whether exceptions were taken or not. Kansas City, etc., R. Co. v. Carlisle, 94 Mo. 166.

1. Butte County v. Boydston, 68 Cal. 189; Burlington, etc., R. Co. v. Sinnamon, 9 Iowa 293; Maxwell v. La Brune, 68 Iowa 689; Morris Aqueduct v. Jones, 36 N. J. L. 206; Matter of Metropolitan El. R. Co., 57 Hun (N. Y.) 130; Neff v. Chicago, etc., R. Co., 14 Wis. 370; Burns v. Spring Green, 56 Wis. 239. *Contra*, see Dubuque, etc., R. Co. v. Shinn, 5 Iowa 516; Weyer v. Milwaukee, etc., R. Co., 57 Wis. 329.

2. Highway Com'rs v. Claw, 15 Johns. (N. Y.) 537.

Failure to Give Notice—Dismissal.—But where each party appeals, the failure of one party to give notice will not warrant the dismissal of his appeal. Republican Valley R. Co. v. Linn, 15 Neb. 234, 14 Am. & Eng. R. Cas. 198.

3. Selma, etc., R. Co. v. Gammage, 63 Ga. 604, 1 Am. & Eng. R. Cas. 41. In this case the record showed laches for nine years.

4. People v. Osborn, 20 Wend. (N. Y.) 186.

5. Spurrier v. Wirtner, 48 Iowa 486. *Contra*, see Robertson v. Eldora R., etc., Co., 27 Iowa 245.

6. Neff v. Chicago, etc., R. Co., 14 Wis. 370; Larson v. Superior Short Line R. Co., 64 Wis. 59, 22 Am. & Eng. R. Cas. 165.

And a single notice that several persons whose lands have been taken, each acting severally and for himself, appeal from the award made to each of them, is sufficient. Larson v. Superior Short Line R. Co., 64 Wis. 59.

7. Weyer v. Milwaukee, etc., R. Co., 57 Wis. 329, 10 Am. & Eng. R. Cas. 508.

8. Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350.

9. Chase v. Sullivan R. Co., 20 N. H. 195.

10. Andrews v. Marion, 23 Minn. 372.

11. Conway v. McGregor, etc., R. Co., 43 Iowa 32, holding, however, that only an officer can collect fees for service. And see generally article APPEALS, vol. 2, p. 221 *et seq.*

Sheriff.—The sheriff who conducts proceedings for the condemnation of a right of way is in no sense a party to the proceedings, and he is not disqualified from serving notices of appeal from an award made therein. Cedar Rapids, etc., R. Co. v. Chicago, etc., R. Co., 60 Iowa 35, 10 Am. & Eng. R. Cas. 522.

12. Iowa Rev., § 2825; Robertson v. Eldora R., etc., Co., 27 Iowa 245, hold-

attorney of the respondent is good service.¹ Service on the deputy sheriff is service on the sheriff, where the latter knows of the appeal and directs service to be so made.² Failure to file the notice with the clerk, when that is required, is fatal to the jurisdiction of the court.³

e. SECURITY. (See in general article APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 963.)—**Necessity.**—Security on appeal is not indispensable in all cases. Where not required by statute,⁴ or by the court granting the appeal, the appellate court is not necessarily without jurisdiction because of the omission to give security.⁵ Where the landowner appeals he need not, ordinarily, file a bond,⁶ but in some jurisdictions he must do so.⁷ Still his omission to file a bond will not of itself operate to dismiss the appeal, as in such a case the court can require one to be filed,⁸ or

ing that even if such service were not good, an appearance by the company to object to it would operate as a general appearance, and cure the defect.

1. *Hahn v. Chicago, etc.*, R. Co., 43 Iowa 333, holding that it is not essential that service be also made upon the sheriff. *Contra*, see *Hartman v. Belleville, etc.*, R. Co., 64 Ill. 24. And see generally article APPEALS, vol. 2, p. 222.

2. *Waltmeyer v. Wisconsin, etc.*, R. Co., 64 Iowa 688, 20 Am. & Eng. R. Cas. 394.

Where the Statute Requires Service on an "Agent" only, without designating the kind of agent, service on a civil engineer in charge of the surveys and location, and of an office of the company within the county, is good. *Jamison v. Burlington, etc.*, R. Co., 69 Iowa 670, 27 Am. & Eng. R. Cas. 413.

Town Commissioners.—A requirement that notice be served on the commissioner or commissioners of a town means that all the commissioners shall be served if there is more than one. *People v. Lawrence*, 54 Barb. (N. Y.) 589.

Service on Board of Aldermen.—Mo. Rev. Stat. 1889, § 1589, in providing that, in case of appeal from assessments of damages for property taken for public use by cities, notice of appeal shall be given to the board of aldermen, does not require such notice to be served on the board while in session. *Edina v. Shoot*, 129 Mo. 354.

Service on Clerk.—Where notice is required to be served on the clerk of the court, filing it with him, with notice of its contents, though informal, is good as against a motion to dismiss.

Black v. Chicago, etc., R. Co., 18 Wis. 208.

3. *Klein v. St. Paul, etc.*, R. Co., 30 Minn. 451, holding that the defect was not cured by the company executing and filing a bond, immediately after the service of the notice, conditioned to pay appellant whatever sum might be awarded her upon such appeal, nor by moving the court to dismiss the appeal for such want of jurisdiction.

4. *Robertson v. Eldora R., etc.*, Co., 27 Iowa 245; *Gurney v. St. Paul*, 36 Minn. 163; *Nebraska R. Co. v. Van Dusen*, 6 Neb. 160; *Gettysburg Memorial Assoc. v. Sherfy*, 117 Pa. St. 256, followed in *Perry's Appeal* (Pa. 1888), 13 Atl. Rep. 66.

5. *Peoria County v. Harvey*, 18 Ill. 364. *Contra*, see *Schwede v. Burnstown*, 35 Minn. 468.

6. *Robertson v. Eldora R., etc.*, Co., 27 Iowa 245.

7. *Grinnell v. Mississippi, etc.*, R. Co., 18 Iowa 570; *Missouri River, etc.*, R. Co. v. *Owen*, 8 Kan. 409; *Beckwith v. Kansas City, etc.*, R. Co., 28 Kan. 484, 10 Am. & Eng. R. Cas. 442.

When Required and when Not.—If a landowner is not entitled to have a jury assess his damages, the legislature may require of him a bond on appeal; if he is so entitled, the right is secured by the appeal given by sections 22 and 23, chapter 34, Minn. Gen. Stat.; and section 24, requiring of him a bond, with sureties, on such appeal, may be treated as nugatory. *Weir v. St. Paul, etc.*, R. Co., 18 Minn. 155.

8. *Robertson v. Eldora R., etc.*, Co., 27 Iowa 245.

Contrary Doctrine.—In proceedings by the appellant to acquire title to

dismiss the appeal at its option.¹ Where several appeal one may be security for another, and on the consolidation of such appeals no outside security will be required.²

Sufficiency.—A bond signed by the appellants only is not a compliance with the statute,³ neither is a bond signed by the surety only and not specifying any amount in which he is held liable.⁴ The description of the premises in the bond may be aided by a reference therein to the report of the commissioners, where the land is accurately described.⁵

Filing ; Approval ; Amending.—The clerk is usually the proper officer to approve the appeal bond,⁶ and it should be filed with him and not with the sheriff.⁷ Where the bond does not correspond with

lands for the purposes of its railroad, under Minn. Gen. Stat., c. 34, the owner having appealed to the District Court from the award of the commissioners, the company, in order to obtain the right to go on with the construction of its road over the lands, notwithstanding the appeal, filed a bond under section 23 of said chapter, and took possession of the lands. After verdict and judgment in the District Court the company appealed to the Supreme Court, filing the proper bond for costs, etc. Upon an application to the Supreme Court by the respondent for an order requiring the company to file a new bond under that section, and to make a deposit of the damages awarded by the verdict, or that, in default thereof, the appeal be dismissed, said application alleging the insufficiency of the bond so filed by the company under section 23, it was held that the Supreme Court has no authority to require, as a condition of retaining an appeal, that the appellant secure the judgment below. *Rippe v. Chicago, etc.*, R. Co., 22 Minn. 44.

1. *Beckwith v. Kansas City, etc.*, R. Co., 28 Kan. 484, 10 Am. & Eng. R. Cas. 442.

2. *Leffel v. Obenchain*, 90 Ind. 50.

3. *McVey v. Heavenridge*, 30 Ind. 100.

4. *St. Louis, etc.*, R. Co. *v. Morse*, 50 Kan. 99; *McVey v. Heavenridge*, 30 Ind. 100, holding that in such cases the appellate court does not obtain sufficient jurisdiction to permit the bonds to be amended or supplied by new bonds.

Failure to Condition Bond in Proper Penalty.—It seems that the failure to condition the bond in a penalty of double the amount of the award, though such a penalty is required by

statute, is not in all cases fatal to the jurisdiction of the appellate court. So held where the bond was conditioned that the appellant would prosecute the appeal without unnecessary delay, and pay all costs and damages awarded against him, the bond being in the sum of five hundred dollars, and the award being in the sum of one thousand four hundred and eighty dollars. *Chicago, etc.*, R. Co. *v. Abilene Town-Site Co.*, 42 Kan. 97, 104.

5. *Kansas City, etc.*, R. Co. *v. Hurst*, 42 Kan. 462.

6. *Missouri River, etc.*, R. Co. *v. Owen*, 8 Kan. 409; *Saint Joseph, etc.*, R. Co. *v. Orr*, 8 Kan. 419, where the bond having been approved by the commissioners instead of the county clerk, a new bond was permitted to be filed.

7. *Iowa Rev. Stat.*, c. 55; *Grinnell v. Mississippi, etc.*, R. Co., 18 Iowa 570.

Time of Filing.—The owner of the land took an appeal from the assessment of the commissioners to the District Court by executing within proper time and with one good surety an undertaking, which undertaking was approved by the county clerk within proper time, but was not marked filed within proper time. The case was afterward tried in the District Court, the railroad company appearing and contesting the appeal on certain grounds and contesting the damages, but not raising the question that the appeal bond had not been filed in proper time; and no such question was raised in the Supreme Court by the petition in error, but was raised for the first time by the brief of counsel in the Supreme Court. It was held that the Supreme Court would not consider the question. *St. Louis, etc.*, R. Co. *v. Wilder*, 17 Kan. 239.

the requirements of the charter under which the proceedings are had, the general law relating to amendments of appeal bonds will apply, and the bond may be amended thereunder.¹

f. THE RECORD AND WHAT IT MUST SHOW—(1) In General.—The record must show affirmatively all facts necessary to give the court jurisdiction,² and that there was error in the proceedings below.³ The grounds of objection must also appear in the record.⁴

(2) *When it must Contain the Evidence.*—Unless the evidence appears in the record, the appellate court will not reverse a verdict

1. Selma, etc., R. Co. v. Gammage, 63 Ga. 604, 1 Am. & Eng. R. Cas. 41. See generally article APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 963.

2. White v. Memphis, etc., R. Co., 64 Miss. 566.

Attempt to Agree.—In proceedings for the condemnation of private property for public uses, in conformity with the Mo. Act of March 10, 1849 (Sess. Acts 1849, p. 593), as a general rule it must appear from the record that an attempt has been made to purchase the land of the owner, before it can be appropriated *in invitum*. But where the owner appears in court after the time for filing exceptions is past, and obtains leave to file them on condition of waiving all objections save as to the sufficiency of the damages, he cannot afterward avail himself of the failure of the record to show such attempt at bargain. U. S. v. Reed, 56 Mo. 565.

Plat.—Where, in assessment of damages, a plat is used, the plat must appear on the record. Missouri Pac. R. Co. v. Hays, 15 Neb. 224, 14 Am. & Eng. R. Cas. 177.

Transcript.—A paper headed "Transcript," but consisting only of a certified copy of the report of the commissioners appointed by the county judge to assess the damages, etc., containing their assessment and award of damages, is sufficient to give the appellate court jurisdiction of the cause. Nebraska, etc., R. Co. v. Storer, 22 Neb. 90.

Minutes of Proceedings Below.—Where an appeal is taken from an order denying costs in eminent domain proceedings, it is not necessary to print the minutes of the proceedings before the commissioners where the same were not considered by the court below on the question of costs, as they cannot be considered on the appeal. Manhat-

tan R. Co. v. Taber, 7 Misc. Rep. (N. Y. Supreme Ct.) 347.

Certificate of Sheriff.—An objection to the method adopted by a sheriff in impaneling a jury to assess the damages cannot be considered by this court, if the facts stated in the objection are not sustained by the certificate of the sheriff. Childs v. New Haven, etc., Co., 133 Mass. 253, 14 Am. & Eng. R. Cas. 352.

3. Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378; Hannibal, etc., R. Co. v. Muder, 49 Mo. 165; Quincy, etc., R. Co. v. Ridge, 57 Mo. 599; Kansas City v. Kansas City, etc., R. Co., 84 Mo. 410; Coster v. New Jersey R., etc., Co., 24 N. J. L. 730, affirming 23 N. J. L. 227; Matter of Buffalo, etc., R. Co., 59 Hun (N. Y.) 626, 37 N. Y. St. Rep. 343; Sturtevant v. Milwaukee, etc., R. Co., 11 Wis. 63.

Illustration.—On an appeal from a judgment in condemnation proceedings, plaintiff's only assignment of error was "the action of the learned judge at the trial, after the jury had been sworn, in calling before him one of the counsel for appellant and the counsel of said company respondent and saying to them: 'I will not allow a verdict in this case for more than four thousand dollars to stand.'" Nothing was printed in appellant's paper book except the names of the parties, the history of the case, the assignment of the error, and argument. In appellee's paper book it was stated that no bill of exception had been sealed in the case, and that the language of the trial judge had been misstated. It was held that the judgment should be affirmed. Harris v. Schuylkill River East Side R. Co., 156 Pa. St. 252.

4. Walker v. Boston, etc., R. Co., 3 Cush. (Mass.) 1.

and judgment of condemnation on the ground that the verdict is contrary to the evidence.¹ Nor can the appellate court say, in such a case, that the instructions of the court were calculated to mislead the jury;² nor whether the question of the necessity of the taking was properly decided;³ nor whether a view of the premises was properly ordered.⁴ The evidence not being preserved in the record, the appellate court will presume that there was evidence justifying the action of the court below in confirming the report of the commissioners,⁵ and affidavits *dehors* the record will not be received to show the contrary.⁶

7. Hearing and Determination—*a.* WHAT QUESTIONS ARE UP FOR REVIEW.—Ordinarily only questions of law are open for consideration on the appeal, questions of fact being conclusively determined in the court below.⁷ But where, under the statute,

1. *Midland Pac. R. Co. v. McCartney*, 1 Neb. 398, *followed* in *Midland Pac. R. Co. v. Williamson*, 1 Neb. 406; *Midland Pac. R. Co. v. Day*, 1 Neb. 407; *Midland Pac. R. Co. v. Newman*, 1 Neb. 408.

2. *Peoria, etc., R. Co. v. Barnum*, 107 Ill. 160, 14 Am. & Eng. R. Cas. 331, holding also that where the jury view the premises over which a right of way is sought to be established, and no other evidence is given, the instructions given can only be considered as abstract propositions of law.

3. *San Francisco v. Kiernan*, 98 Cal. 614.

4. *Rozell v. Anderson*, 91 Ind. 591.

5. *Huston v. Clark*, 112 Ill. 344; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127.

6. *Rondout, etc., R. Co. v. Field*, 38 How. Pr. (N. Y. Supreme Ct.) 187; *New York, etc., R. Co. v. Corey*, 5 How. Pr. (N. Y. Supreme Ct.) 177; *New York, etc., R. Co. v. Coburn*, 6 How. Pr. (N. Y. Supreme Ct.) 223.

Illustration.—Church officials in the District of Columbia made application to a justice for a jury to assess damages to the church property by reason of laying a track in front of the building and operating trains thereon, and for maintaining a depot near the church building. The inquest was held, and the marshal certified the warrant and inquisition to the Supreme Court of the District. The railroad company appeared and assigned various errors based on the improper admission of evidence in hearing the inquest, but the evidence was in no way made part of the record. It was

held that such assignments of error could not be considered; that the evidence could not be supplied by ordinary affidavits. *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127.

7. *Lee v. Tebo, etc., R. Co.*, 53 Mo. 178; *Combs v. Smith*, 78 Mo. 32; *Patten's Petition*, 16 N. H. 277; *Matter of Union El. R. Co.*, 113 N. Y. 275, *affirming* 49 Hun (N. Y.) 609, 17 N. Y. St. Rep. 630.

Questions Which may be Raised.—Such questions as whether the company had a legal right to take the property in question, *Northern R. Co. v. Concord, etc., R. Co.*, 27 N. H. 183; or whether the appraisers were legally qualified to act, may be raised. *Kellogg v. Price*, 42 Ind. 360.

The court may, in a proper case, order an issue to be made up between the parties as in an action of trespass *quare clausum*. *Philadelphia, etc., R. Co. v. Smick*, 2 Whart. (Pa.) 273.

Necessity of Taking.—But the appellate court will not interfere with the conclusions of the court below as to the necessity of the taking, if reached after due proceedings, the power to condemn having been duly proved, and the purpose being a public one. *Matter of Union El. R. Co.*, 113 N. Y. 275, *affirming* 49 Hun (N. Y.) 609, 17 N. Y. St. Rep. 630.

Order for Possession.—Nor will an order for possession, made by the court below after the allowance and perfecting of the appeal, authorizing the petitioner to enter upon the premises pending the appeal, be involved in the appeal. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21.

the whole case is before the court on appeal, all questions affecting the substantial rights of the parties will be considered. In such cases the trial on appeal is *de novo*,¹ and upon a subsequent appeal to the court of last resort the rulings of the court below will be reviewed,² and set aside or reversed if found to be erroneous.³

b. INTENDMENTS—Presumption of Regularity, Generally.—Where the evidence heard in the court below in condemnation proceedings is not preserved in the record on appeal, every presumption will be indulged by the appellate court in favor of the findings of the court below upon all questions of fact.⁴ The same rule applies to objections to the qualifications of jurors,⁵ or to the oath

Authority of Officers and Directors.—And collateral inquiries will not be made into the authority of particular officers or directors of the petitioner to manage its affairs. *In re Minneapolis, etc.*, R. Co.'s Petition, 36 Minn. 481, 30 Am. & Eng. R. Cas. 279.

1. *Indiana.*—*Kemp v. Smith*, 7 Ind. 471; *Heady v. Vevay, etc.*, Turnpike Co., 52 Ind. 117; *Keicher v. Killbuck Turnpike Co.*, 33 Ind. 333; *Hays v. Parrish*, 52 Ind. 132; *Bowers v. Snyder*, 66 Ind. 340; *Turley v. Oldham*, 68 Ind. 114; *Schmied v. Keeney*, 72 Ind. 309; *Corey v. Swagger*, 74 Ind. 211.

Maryland.—*Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

Missouri.—*Sedalia v. Missouri, etc.*, R. Co., 17 Mo. App. 105.

Pennsylvania.—*Hibberd's Appeal*, 2 Pa. Dist. Rep. 28.

Vermont.—*Hooker v. Montpelier, etc.*, R. Co., 62 Vt. 47.

Wisconsin.—*Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311, 10 Am. & Eng. R. Cas. 499.

2. *St. Joseph Terminal R. Co. v. Hannibal, etc.*, R. Co., 94 Mo. 535.

The county commissioners having awarded damages for land taken for a railroad, and the respondents having had their estimate revised by a jury, who also awarded damages, and the verdict of the jury having been accepted by the Court of Common Pleas, it is open to the respondents on appeal to insist that no damages could legally be assessed against them. *Com. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 25.

3. *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Port Huron, etc.*, R. Co. *v. Voorheis*, 50 Mich. 506, 14 Am. & Eng. R. Cas. 227; *Toledo, etc.*, R. Co. *v. Munson*, 57 Mich. 42, 20 Am. & Eng. R. Cas. 410.

4. *Fisher v. Chicago, etc.*, R. Co.,

104 Ill. 323, 10 Am. & Eng. R. Cas. 14; *Matter of New York, etc.*, R. Co., 59 Hun (N. Y.) 615, 35 N. Y. St. Rep. 540, affirmed in 128 N. Y. 617. As to presumptions on appeal generally, see article APPEALS, vol. 2, p. 420 *et seq.*

California Rule.—Under Cal. Code Civ. Pro. no findings of fact are implied in support of a judgment, but where the facts are found it must appear affirmatively that they support the judgment. So where the record on appeal shows that the court found generally the value of the land taken and the damages to the remainder of the tract, but it does not appear that these values were estimated on a gold basis, a judgment in gold coin cannot be sustained. *North Pac. R. Co. v. Reynolds*, 50 Cal. 90.

Notice of Intention to Apply for Condemnation.—So if it appear by the record that the notice of intention to apply for condemnation, which is not in the record, was satisfactory to the court below, the appellate court will presume that such notice was sufficient. *Coster v. New Jersey R., etc.*, Co., 23 N. J. L. 227, affirmed in 24 N. J. L. 730.

What Lands Considered.—The court will also presume that the findings of the inferior court as to what lands were considered by the jury, pursuant to the notice, in making the assessment, were correct. *Mississippi, etc.*, R. Co. *v. Byington*, 14 Iowa 572.

Where the Plaintiff's Title Is a Subject of Inquiry, the evidence not being carried up, the decision of that question by the jury will be presumed to have been right. *Directors of Poor v. Wrightsville, etc.*, R. Co., 7 W. & S. (Pa.) 236.

5. *Chesapeake, etc.*, R. Co. *v. Patton*, 9 W. Va. 648.

administered to them or to the commissioners,¹ and to the allowance of amendments,² rulings as to the right to open and close,³ and to the action of the court in setting aside the commissioners' report.⁴

Presumption in Favor of Award of Damages.—Where the jury award a gross sum for the value of the land taken and damages to that not taken, it will be presumed, in the absence of the evidence in the record, that the finding was justified.⁵ But it will not be presumed that the jury allowed damages upon improper grounds,⁶ or

1. *Bronnenburg v. O'Bryant*, 139 Ind. 17.

The recitals of an award showed that commissioners were appointed under the company's charter, and that before making the award they took the oath "required by law;" but it did not appear when they were appointed, nor what was the form of their oath. The award was made after the passage of the Wis. General Railroad Act of 1872, which prescribed a different form of oath from that prescribed by the company's charter. It was held that the court would presume, in favor of the legality of the acts of the commissioners, that they were appointed before the passage of the general statute, and that they took the oath prescribed therein. *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538, *distinguishing* *Moore v. Superior, etc., R. Co.*, 34 Wis. 173; *Bohlman v. Green Bay, etc., R. Co.*, 40 Wis. 157.

2. *State v. Beackmo*, 8 Blackf. (Ind.) 247, record not showing what the amendment was.

3. *St. Louis, etc., R. Co. v. Ovenbaum*, 4 Tex. App. Civ. Cas., § 120. In this case it did not appear from the bill of exceptions that the right granted to open and close was exercised.

4. *Quincy, etc., R. Co. v. Ridge*, 57 Mo. 599.

5. *Suver v. Chicago, etc., R. Co.*, 123 Ill. 293.

Time when Damages Accrued.—And if the award in such a case is silent as to the time when such damages accrued, it will be presumed to relate to the time when the award was filed. *Whitacre v. Saint Paul, etc., R. Co.*, 24 Minn. 311.

All Injuries Considered.—Where the proceedings have been regular, the award will be presumed to have embraced all the damages sustained by the landowner by reason of the taking of his land, and that all probable in-

juries were taken into consideration by the tribunal making the assessment, and included in the award. *Furniss v. Hudson River R. Co.*, 5 Sandf. (N. Y.) 551; *Hunt v. New York, etc., R. Co.*, 99 Ind. 593, 20 Am. & Eng. R. Cas. 436, holding that the Supreme Court will presume, in the absence of the evidence adduced at the trial, that if the quantity of land appropriated was augmented, or the damages of the owner increased, by reason of an amendment of the description of the land sought to be taken, these facts were considered by the jury in making their assessment.

6. *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107.

Illustrations.—The charge complained of was an express instruction allowing double damages; but the amount of the verdict not appearing in the record, the court held that there was no presumption that the jury allowed such double damages. *Georgia R., etc., Co. v. Baker*, 88 Ga. 28.

After a right of way had been condemned the landowner filed a bill to restrain the company from constructing its road until it provided suitable farm crossings, which were guaranteed to him by the statute. As a defense the company claimed that it was proceeding to construct crossings, but it appeared that they were not conveniently located, and were therefore not acceptable to the landowner; the company also insisted that additional damages for inconvenient crossings were assessed in the condemnation proceedings. The evidence showed that there was no agreement as to the location of the crossings, and none were indicated upon the profile of the road used in the condemnation proceedings. It was held that the landowner had a right to fix their location where they would be the most convenient to him,

on grounds not stated in the petition.¹

c. WHAT ERRORS ARE GROUND FOR REVERSAL—In General.—

In addition to the errors upon which reversals on appeal are most frequently based, such as the improper admission or rejection of evidence, erroneous instructions, and wrong verdicts and findings, which will be treated of presently, there are other errors which have been held to warrant reversal of judgments of condemnation. These are erroneous rulings on the pleadings;² disregard of a petition in intervention setting forth the rights of a minor in the land sought to be taken;³ trying the proceeding on a wrong theory;⁴ entering judgment without notice of the award to the adverse party;⁵ disregarding a bill of exceptions to the commissioners' proceedings,⁶ and the refusal of a new trial as to the assessment of damages.⁷

Admission of Improper or Exclusion of Proper Evidence.—Where it appears that improper evidence has been admitted or proper evidence excluded on the hearing before the tribunal to assess damages, and the appellate court cannot say that injustice has not been done to the appellant thereby, a rehearing will be granted.⁸

Erroneous Instructions.—Likewise, erroneous instructions giving the jury a wrong view of the law as to the amount of damages and working harm to the appellant will authorize a reversal.⁹

and a presumption would arise that the commissioners fixed the compensation with reference to such crossings, and therefore did not allow damages for inconvenient crossings. *Wheeler v. Rochester, etc., R. Co.*, 12 Barb. (N. Y.) 227.

1. *McCullough v. St. Paul, etc., R. Co.*, 52 Minn. 12, holding that where the petition and order appointing commissioners did not show an intent to acquire the right to remove a lateral support, it would be presumed that the commissioners did not allow damages for so doing.

2. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 44 Am. & Eng. R. Cas. 26.

3. *Hutchinson v. McLaughlin*, 15 Colo. 492.

4. *Parsons Water Co. v. Knapp*, 33 Kan. 752, holding that where a corporation commences condemnation proceedings to procure the right, among other things, to flood lands, and does not ask for the entire use of the water to the exclusion of the owner of the land, and the case is tried, over the objections of the party instituting the proceedings, upon the theory that such party would obtain the right to the exclusive use of the water, and would entirely exclude the owner of

the land from its use, it is error, and the error is material.

5. *New Orleans, etc., R. Co. v. Bougere*, 23 La. Ann. 803, holding that the company is entitled to notice of the award in order to show that it is extortionate in amount.

6. Such bill having been signed by the commissioners, and without which their report was manifestly imperfect and in need of amendment. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

7. So held where the corporation had entered, giving bond pending appeal, as provided by statute, and had made such changes in the property as would prevent a new jury viewing it as it was when the condemnation proceeding was begun. *Atchison, etc., R. Co. v. Schneider*, 127 Ill. 144.

8. *Matter of Rochester, etc., R. Co.*, 50 Hun (N. Y.) 29; *San Jose, etc., R. Co. v. Mayne*, 83 Cal. 566; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263; *Ball v. Keokuk, etc., R. Co.*, 71 Iowa 306; *St. Louis, etc., R. Co. v. Almeroth*, 62 Mo. 343; *Chicago, etc., R. Co. v. Hoffman*, 50 Kan. 697.

As to what is and what is not proper and admissible testimony upon the question of damages, see Am. and Eng. Encyc. of Law, title Eminent Domain.

9. Where the statute makes the

Erroneous Verdict or Finding.—Where the verdict is clearly not sustained by the evidence,¹ or fails to find facts required to be found by the statute,² or gives a tenant in possession the full value of his improvements and also allows him to remove them,³ or erroneously estimates the cost of fencing to be paid by the condemning party, to the prejudice of the landowner,⁴ and the trial judge sustains such erroneous verdict, the judgment entered thereon should be reversed.⁵

d. WHAT ERRORS MAY BE DISREGARDED—GENERALLY.—Where a party to a condemnation proceeding secures all the rights to which he is entitled, a mere irregularity will not be sufficient ground for reversal.⁶

e. NONPREJUDICIAL OR HARMLESS ERRORS.—Errors and irregularities which have prejudiced no rights of the appellant will not be regarded on his appeal, even though the rights of other parties who do not appeal may have been adversely affected.⁷

value of the property taken at a certain time the measure of damages, an instruction to assess its value as of a different time warrants reversal. *Twin Lakes Hydraulic Gold Min. Syndicate v. Colorado Midland R. Co.*, 16 Colo. 1.

So the entry on the land by the company having been lawful, an instruction that such entry was a trespass is reversible error, where the issue on trial was in the form of trespass *quare clausum fregit*. *Shenango, etc., R. Co. v. Braham*, 79 Pa. St. 447.

1. *Los Angeles, etc., R. Co. v. Rumpp*, 94 Cal. 432.

2. *Denver, etc., R. Co. v. Stark*, 16 Colo. 291, *following Pueblo, etc., R. Co. v. Rudd*, 5 Colo. 270.

3. *Chicago, etc., R. Co. v. Catholic Bishop*, 119 Ill. 525.

4. *Los Angeles, etc., R. Co. v. Rumpp*, 94 Cal. 432.

5. Error in Sustaining Wrong Verdict.—Where the trial judge, in passing upon the motion for a new trial, states that the verdict "does not meet the approval" of his judgment; that it is "largely in excess of what would be full compensation to the owner of the land;" that he will "stand out of the way," and overrule the motion, a new trial must be granted, and the questions at issue presented to another jury. *Kansas City, etc., R. Co. v. Ryan*, 49 Kan. 1.

6. *Louisville, etc., R. Co. v. Wunderlich*, 81 Ind. 105, 10 Am. & Eng. R. Cas. 410.

A Mere Defect in the Record which could have been supplied on certiorari

will be disregarded. *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469.

7. *Chicago, etc., R. Co. v. Elliott*, 117 Mo. 549; *Kansas City v. Smart*, 128 Mo. 272. See also, in general, article APPEALS, vol. 2, p. 499 *et seq.*

Illustrations.—Where the statute requires costs to be paid by the party initiating the proceedings, and they are adjudged accordingly, a defendant whose property is condemned to a public use cannot claim a reversal because the jury, in returning a verdict that no actual damage was sustained, failed to award merely nominal damages in his favor. *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211.

The appointment of a commissioner to execute the deed for a right of way, upon the tender of the amount agreed upon therefor, without giving the party a reasonable time in which to execute it, though irregular, works no prejudice and affords no ground for reversal, where the commissioner's deed is executed without cost to such party. *Robertson v. Central R. Co.*, 57 Iowa 376, 10 Am. & Eng. R. Cas. 420.

On an appeal by a railroad company from proceedings begun by the landowner to assess damages for right of way over his land, the company pleaded, in substance, a prior agreement with the owner to grant to it the right of way for five hundred dollars, which it had tendered and was ready and willing to pay. It was held that these facts could be proved upon the trial without being pleaded, and that defendant was not prejudiced by an order

This rule is frequently applied in cases where improper but harmless evidence was admitted,¹ or where faulty but harmless instructions were given in the court below.²

f. ERRORS WAIVED OR CURED BELOW—*Waiver of Errors*.—Irregularities in the formation of the tribunal to assess damages are waived by going on with the trial of the proceeding.³ This is also a waiver of the preliminary proof of the corporate existence of the petitioner,⁴ and of the necessity of the taking,⁵ and of the objection that too much land was taken,⁶ or that the valuation was fixed at a wrong date.⁷ Errors in admitting testimony or in giving instructions are generally waived unless a motion for a new trial is made in the lower court.⁸

Errors Cured Below.—Errors in the admission or exclusion of evidence are sometimes cured by the subsequent admission of further evidence,⁹ or by the instructions given to the jury.¹⁰

striking the plea from the files. *Corbin v. Wisconsin, etc., R. Co.*, 66 Iowa 269.

1. *Henry v. Centralia, etc., R. Co.*, 121 Ill. 264, 30 Am. & Eng. R. Cas. 273; *Kiernan v. Chicago, etc., R. Co.*, 123 Ill. 188; *Sanitary Dist. v. Loughran*, 160 Ill. 362; *Leavenworth, etc., R. Co. v. Paul*, 28 Kan. 816, 10 Am. & Eng. R. Cas. 490; *Teale v. Boston*, 165 Mass. 88; *Troy, etc., R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *Matter of Norwood, etc., R. Co.*, 47 Hun (N. Y.) 489; *Logeling v. New York El. R. Co.*, 5 N. Y. App. Div. 198.

2. *San José, etc., R. Co. v. Mayne*, 83 Cal. 566, 44 Am. & Eng. R. Cas. 158; *Cincinnati, etc., R. Co. v. Mims*, 71 Ga. 240; *Guess v. Stone Mountain Granite, etc., Co.*, 72 Ga. 320, 28 Am. & Eng. R. Cas. 236; *Jones v. Chicago, etc., R. Co.*, 68 Ill. 380; *Chicago, etc., R. Co. v. Dooling*, 95 Ill. 202; *Peoria, etc., R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; *Bell v. Chicago, etc., R. Co.*, 74 Iowa 343; *Fort-Street Union Depot Co. v. Backus*, 103 Mich. 556.

3. *Fitchburg R. Co. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 58.

On a proceeding to condemn three tracts of land, a new trial was awarded at the second term after verdict and judgment by consent of two of the parties, and thereupon the court, on its own motion, entered an order granting a new trial as to the other party who objected thereto. It was held that it was error to grant the new trial as to the party objecting, but that the error was cured by his subsequent election to proceed in the second trial. *Gage v. Chicago*, 141 Ill. 642.

4. *Ward v. Minnesota, etc., R. Co.*, 119 Ill. 287.

5. *Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

6. *Booker v. Venice, etc., R. Co.*, 101 Ill. 333, 5 Am. & Eng. R. Cas. 357; *Burke v. Sanitary Dist.*, 152 Ill. 125.

7. *Webster v. Kansas City, etc., R. Co.*, 116 Mo. 114.

8. *Midland Pac. R. Co. v. McCartney*, 1 Neb. 398, *disapproving Earp v. Pittsburgh, etc., R. Co.*, 12 Ohio St. 621.

9. *Le Roy, etc., R. Co. v. Hollis*, 39 Kan. 646. In this case it appeared that the farm contained about sixty-five acres, and by the construction of the road was cut into two pieces, one containing about three acres. On cross-examination a witness for the owner was asked whether, by reason of the fence that would be built by the company, the strip would not probably sell to the adjacent owners for more than if the road had not been constructed, and what the other portion would be worth if owned by one person and the strip by another, and the railroad was not built. It was held that error in excluding this testimony, if any, was cured by the subsequent statement of the witness that the main portion of the land was worth less after the construction of the road than before. See also *Leroy, etc., R. Co. v. Hawk*, 39 Kan. 638; *LeRoy, etc., R. Co. v. Crum*, 39 Kan. 642; *Chicago, etc., R. Co. v. Dill*, 41 Kan. 736.

10. *Chicago, etc., R. Co. v. Blume*, 137 Ill. 448.

g. OBJECTIONS NOT PROPERLY TAKEN BELOW.—In reviewing condemnation proceedings, as in other cases, the general rule is that errors and irregularities not called to the attention of the court below cannot be considered, unless the record contains matter which will enable the appellant to raise the point, for the first time, upon the appeal.¹ Ordinarily the objection must be made at the earliest opportunity after the facts upon which it is founded are known to the party, and he will be charged with knowledge of all facts which the records of the court in that particular case disclose.² These rules have been rigorously applied where objections were made in the appellate court to the jurisdiction of the tribunal to assess damages;³ to want of notice of the proceedings;⁴ to the absence of,⁵ or defects in pleadings;⁶ to the fact that the jury were not sworn;⁷ to the competency,⁸ or the sufficiency of evidence;⁹ and to the sufficiency and validity of a report or verdict which shows no error upon its face.¹⁰

h. REVIEWING THE EVIDENCE OR THE FACTS.—The duty or the competency of the appellate court to review the evidence or the facts in condemnation cases depends very largely upon the general appellate practice, which varies widely in this as in other respects in the different jurisdictions.¹¹

1. *Secombe v. Milwaukee, etc., R. Co.*, 23 Wall. (U. S.) 108; *Mitchell v. Metropolitan El. R. Co.*, 4 Silv. App. (N. Y.) 82; *Hays v. Briggs*, 74 Pa. St. 373; *Southern Cotton Press, etc., Co. v. Galveston Wharf Co.*, 3 Tex. App. Civ. Cas., § 255.

See, in general, upon this subject, article EXCEPTIONS AND OBJECTIONS.

2. *Burnham v. Goffstown*, 50 N. H. 560; *Metropolitan West Side El. R. Co. v. Siegel*, 161 Ill. 638.

3. *Field v. Vermont, etc., R. Co.*, 4 Cush. (Mass.) 150, holding that the objection that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration, if relied upon, must be taken before the commissioners as a ground for not ordering a jury.

4. *Borland v. Mississippi, etc., R. Co.*, 8 Iowa 148, distinguished in *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430, reviewed in *Ney v. Swinney*, 36 Ind. 454.

5. *Ellsworth, etc., R. Co. v. Maxwell*, 39 Kan. 651, following *Saint Joseph, etc., R. Co. v. Orr*, 8 Kan. 419.

6. *Matter of Union El. R. Co.*, 55 Hun (N. Y.) 611, 30 N. Y. St. Rep. 164, where the objection was that the reasons why the company was unable

to acquire title were stated disjunctively in the petition.

7. *Rockford, etc., R. Co. v. McKinley*, 64 Ill. 338.

8. *Chicago, etc., R. Co. v. Nix*, 137 Ill. 141; *Chicago, etc., R. Co. v. Greiney*, 137 Ill. 628; *Terre Haute, etc., R. Co. v. Crawford*, 100 Ind. 550, 27 Am. & Eng. R. Cas. 369; *Republican Valley R. Co. v. Hayes*, 13 Neb. 489, 10 Am. & Eng. R. Cas. 217; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 165; *Sloan v. Baltimore, etc., R. Co.*, 131 Pa. St. 568; *Bowen v. Atlantic, etc., R. Co.*, 17 S. Car. 574.

9. *Brown v. Calumet River R. Co.*, 125 Ill. 600, affirming 37 Ill. App. 113; *Mississippi, etc., R. Co. v. Rosseau*, 8 Iowa 373.

10. *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1; *Detroit Western Transit, etc., R. Co. v. Crane*, 50 Mich. 182, 10 Am. & Eng. R. Cas. 502; *Muire v. Falconer*, 10 Gratt. (Va.) 12.

Where there are three separate parcels involved, the objection that the verdict is for a gross sum for all cannot be raised for the first time in the Supreme Court. *Lake Superior, etc., R. Co. v. Greve*, 17 Minn. 322; *Knauff v. St. Paul, etc., R. Co.*, 22 Minn. 173; *Kankakee, etc., R. Co. v. Chester*, 62 Ill. 235.

11. In *Missouri* the report of the com-

i. REVIEWING THE AMOUNT AWARDED—(1) In General—Power of the Court.—While the verdict of the jury is conclusive as to the amount the company must pay to entitle it to appropriate the property in a particular case,¹ yet, on appeal, such verdict is subject to comparison with the facts in the record.² The court has power to set aside the proceedings for mere excess in the estimate of damages,³ but this should only be done where it is clear that the award is against the evidence.⁴

When the Award will Not be Disturbed.—Appellate courts are reluctant to interfere with awards in condemnation proceedings upon mere questions of damage,⁵ especially where it is doubtful whether the

missioners is not conclusive, but on written exceptions, filed by either party, the court may re-examine the evidence and set aside the report if it is wrong. Wagn. Stat. 328, § 4; *Hannibal Bridge Co. v. Schaubacker*, 49 Mo. 555.

In New York, where the record contains the report of the commissioners and the testimony taken at the hearing, the testimony should be considered as a part of the report in reviewing the proceedings. *Rondout, etc., R. Co. v. Deyo*, 5 Lans. (N. Y.) 298.

But as only a small portion of the evidence upon which the commissioners acted goes up on appeal (the commissioners acting largely upon their own judgment after viewing the premises), there can be no regular judicial review of the evidence. *Matter of Staten Island Rapid Transit Co.*, 47 Hun (N. Y.) 396, *appeal dismissed* in 110 N. Y. 648; *Matter of Boston Road*, 27 Hun (N. Y.) 409.

And where no erroneous methods of procedure are disclosed by the record, and no erroneous principles shown to have been adopted by the commissioners in making their award, it is the duty of the appellate court not to seek for technical errors in the admission or rejection of testimony, but rather to affirm the appraisal, where the commissioners have acted fairly, and have exercised properly the judgment which is required of them under the statute. *Matter of Silver Creek, etc., R. Co.*, 63 Hun (N. Y.) 635, 45 N. Y. St. Rep. 66.

No testimony can be received on appeal except such as was presented to the commissioners before the report was filed. *Matter of Washington Park*, 1 Sandf. (N. Y.) 283.

In Pennsylvania the Supreme Court will not review the evidence upon which the viewers assess the damages.

Winebiddle v. Pennsylvania R. Co., 2 Grant's Cas. (Pa.) 32. Such evidence is not a part of the record. *Ohio, etc., R. Co. v. Bradford*, 19 Pa. St. 363, *followed* in *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.

1. *Jersey City, etc., R. Co. v. Central R. Co.*, 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256. See also *supra*, XII. *i. e. Interpretation—Conclusiveness.*

2. *Grand Rapids, etc., R. Co. v. Weiden*, 70 Mich. 390.

3. *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445. *Contra* in *California*, *In re Beale St.*, 39 Cal. 495; and in *New York*, so far as reducing or increasing the award is concerned, *Rochester Water Works Co. v. Wood*, 60 Barb. (N. Y.) 137, 41 How. Pr. (N. Y.) 53; *Matter of Malone Water-Works Co.* (Supreme Ct.), 15 N. Y. Supp. 649.

4. *Fort-Street Union Depot Co. v. Jones*, 83 Mich. 415.

5. *Matter of Seaside, etc., El. R. Co.*, 83 Hun (N. Y.) 143; *District of Columbia v. Prospect Hill Cemetery*, 5 App. Cas. (D. C.) 497.

New York Rule.—The General Railroad Act of 1850, § 18, as amended in 1876, c. 198, provides that upon an appeal from the first report of commissioners of appraisal the court may direct a new appraisal before the same or new commissioners in its discretion, but that the second report shall be final and conclusive as to all the parties interested. It was held that a second award would not be disturbed where there were no legal errors or irregularities in the proceedings, and the amount of damages awarded was not grossly excessive or insufficient. *Matter of Southern Boulevard R. Co.* (Supreme Ct.), 49 N. Y. St. Rep. 732, 66 Hun (N. Y.) 627.

Pennsylvania Rule.—The Supreme

damages assessed are excessive,¹ and there does not seem to have been any palpable departure from the law in any matter prejudicial to the appellant.²

Conflict of Evidence.—If the verdict is based upon the evidence,³ or if the evidence be conflicting, and some of it sustains the verdict,⁴ it will not be set aside, even though the appellate court is not satisfied with it or with the amount awarded.⁵ To warrant a reversal the verdict must be palpably against the weight of evidence,⁶ and unjust upon the face of the evidence,⁷ plainly indicating that the result was reached through passion, prejudice, corruption, or mistake.⁸

Owner Not Benefited.—Where the landowner is not to receive any particular benefit from the improvement, the appellate court will not disturb a verdict merely because the damages are large.⁹

Court will not inquire into complaints of inadequacy or excessiveness of damages. The law does not provide for bringing up the evidence, and the review will be confined to errors appearing on the face of the report. *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100, *followed* in *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.

1. *New Orleans, etc., R. Co. v. McBride*, 38 Miss. 32.

2. *Lehigh Valley R. Co. v. Dover, etc.*, R. Co., 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87; *Hornellsville Electric R. Co. v. New York, etc., R. Co.*, 83 Hun (N. Y.) 407.

Where a condemnation of land for a railroad was set aside, by consent, for the purpose of making a new one, and the landowner allowed to retain the compensation paid on the original assessment, to be applied on the second, the court instructing the jury that the landowner was entitled to the value of the land sought to be condemned, with the improvements put thereon, and where it did not appear that the jury had not followed the instructions in the assessment, the Supreme Court, without deciding whether or not the law was stated correctly, refused to disturb the assessment on appeal by the landowner. *Mitchell v. Illinois, etc., R., etc.*, Co., 85 Ill. 566.

3. *Fayetteville, etc., R. Co. v. Combs*, 51 Ark. 324, 39 Am. & Eng. R. Cas. 140; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 36 Am. & Eng. R. Cas. 606.

4. *Louisville, etc., R. Co. v. Wunderlich*, 81 Ind. 105, 10 Am. & Eng. R. Cas. 410; *Matter of Munson*, 29 Hun (N. Y.) 325.

A verdict will not be disturbed as excessive where some of the testimony showed that the farm was damaged more than the amount of the verdict, leaving out of consideration the value of the land taken. *Doyle v. Kansas City, etc., R. Co.*, 113 Mo. 280; *Fink v. Republican Valley R. Co.*, 27 Neb. 660.

5. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 33 Am. & Eng. R. Cas. 169; *Philadelphia, etc., R. Co. v. Gesner*, 20 Pa. St. 240.

6. *Ohio Valley R., etc., Co. v. Thomas* (Ky. 1887), 5 S. W. Rep. 470; *Illinois, etc., R. Co. v. Von Horn*, 18 Ill. 257.

7. *Rochester, etc., R. Co. v. Budlong*, 6 How. Pr. (N. Y. Supreme Ct.) 467.

8. *Shoemaker v. U. S.*, 147 U. S. 282; *Calumet River R. Co. v. Moore*, 124 Ill. 329, 33 Am. & Eng. R. Cas. 179; *Metropolitan West Side El. R. Co. v. Johnson*, 159 Ill. 434; *Postal Telegraphic Cable Co. v. Louisville, etc., R. Co.*, 43 La. Ann. 522; *Kansas City v. Kansas City, etc., R. Co.*, 84 Mo. 410; *New Road in Byberry*, 6 Phila. (Pa.) 384.

Award of Arbitrators.—Where, in a submission to arbitrators to determine the value of property taken for a right of way, it is provided that their decision shall be final, and binding upon both parties, an alleged excessiveness in the estimate will not be reviewed on appeal, in the absence of any charge or pretension that the arbitrators acted fraudulently. *Baltimore, etc., R. Co. v. Canton Co.*, 70 Md. 405.

9. *Tonica, etc., R. Co. v. Roberts*, 22 Ill. 224, *followed* in *St. Louis, etc., R. Co. v. Mitchell*, 47 Ill. 165.

View.—These rules are applied with extra rigor in cases where the jury have viewed the *locus in quo*,¹ and every presumption will be indulged in favor of the correctness of the verdict, the jury or commissioners having had means for making up their award not in the possession of the court.²

(2) *Reducing Excessive Damages.*—Where the damages awarded for land taken are clearly excessive, the court may, instead of reversing the judgment, reduce the amount by requiring an alternative between a “remittitur” and a new trial.³ But an arbitrary reduction by the trial court, greatly lessening the verdict, the record showing no reason therefor except that the jury adopted the highest and most extreme estimate, is error.⁴

(3) *Inadequacy of Damages.*—This is not ground for reversal in condemnation proceedings unless the commissioners or jury adopted some wrong principle in making the assessment, or unless the award is grossly inadequate.⁵

The evidence showed that the land taken was of the value of two hundred and fifteen dollars; the fencing would cost four hundred dollars, and the land wasted by the angles in the course of the road, the inconvenience to the landowner, and the dangers in having to cross the track, amounted to at least two or three hundred dollars more. The jury awarded eight hundred dollars. The statute did not require the company to fence, and the evidence showed that no special benefit would result to the landowner, but rather an injury. It appeared that the question of damages was fairly submitted to the jury. It was held that the verdict should not be disturbed. *Tonica, etc., R. Co. v. Unsicker*, 22 Ill. 221.

1. *Chicago, etc., R. Co. v. Hopkins*, 90 Ill. 316; *McReynolds v. Burlington, etc., R. Co.*, 106 Ill. 152, 14 Am. & Eng. R. Cas. 172; *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163, 23 Am. & Eng. R. Cas. 97; *Akin v. Water Com'rs*, 82 Hun (N. Y.) 265. In such a case the preponderance of the evidence must be strong and clear to justify the Supreme Court in pronouncing the award of damages excessive and granting a new trial. *Chicago, etc., R. Co. v. Wolf*, 137 Ill. 360; *Hercules Iron Works v. Elgin, etc., R. Co.*, 141 Ill. 491.

2. *Peoria, etc., R. Co. v. Barnum*, 107 Ill. 160, 14 Am. & Eng. R. Cas. 331; *Pittsburgh, etc., R. Co. v. Lyons*, 159 Ill. 576; *Sanitary Dist. v. Loughran*, 160 Ill. 362; *Chicago, etc., R. Co. v. Mitchell*, 159 Ill. 406; *Matter of New York, etc., R. Co.*, 37 Hun (N. Y.) 317.

3. *Shaw v. Pennsylvania Schuylkill Valley R. Co.*, 17 Phila. (Pa.) 210. See also *supra*, XII. 1. i. *Damages Excessive or Inadequate*, and XII. 2. j. (5) *Excessive Damages*; and see generally article REMITTITUR.

Reducing Second Verdict.—Where two successive juries find for plaintiff a verdict for a much greater sum than the value of the land taken, and such is the opinion of the court after a review of the evidence, out of respect to the jury the second verdict will not be set aside, but its amount will be reduced by such a sum as the testimony imperatively demanded. *Watson v. Railroad Co.*, 15 Phila. (Pa.) 224.

4. *Parsons, etc., R. Co. v. Montgomery*, 46 Kan. 120.

Rule in New Hampshire.—Payment or tender of assessed land damages is required, under Gen. Laws, c. 160, §§ 22, 29, before land can be taken for a railroad use, without the owner's consent; the statute does not authorize a reduction of the damages on appeal when they have been paid to the landowner or the state treasurer, and the landowner does not waive his right of appeal by receiving the amount awarded. *Low v. Concord R. Co.*, 63 N. H. 557, 25 Am. & Eng. R. Cas. 199. And the landowner is entitled to the damages awarded by the commissioners, notwithstanding that on his appeal a less sum is awarded by a jury; but in such case the proprietors of the railroad are entitled to their costs. *Ranlet v. Concord R. Corp.*, 62 N. H. 561.

5. *Matter of Rochester (Supreme Ct.)*, 20 N. Y. Supp. 506.

j. ALLOWING AMENDMENTS.—The general rules relating to amendments in appellate courts in other proceedings may be said to apply where such amendments are requested or attempted in condemnation cases.¹ See, in general, article AMENDMENTS, vol. 1, p. 607.

k. CONSOLIDATION OF APPEALS.—Separate appeals taken from

The mere facts that the evidence would have warranted a larger verdict (Matter of Thompson (Supreme Ct.), 2 N. Y. Supp. 35), or that a greater number of witnesses testified for a larger award (Matter of Gilroy, 78 Hun (N. Y.) 260), and the jury based their verdict upon the testimony of the witnesses whose estimates were the lowest, instead of those whose estimates were the highest, will not warrant a reversal (Clarke v. Chicago, etc., R. Co., 23 Neb. 613, 33 Am. & Eng. R. Cas. 156, followed in Omaha Belt R. Co. v. Johnson, 24 Neb. 707; Northeastern Nebraska R. Co. v. Frazier, 25 Neb. 42, 36 Am. & Eng. R. Cas. 606; Fremont, etc., R. Co. v. Meeker, 28 Neb. 94), unless it plainly appears that the jury acted under a mistake (Allmon v. Chicago, etc., R. Co., 155 Ill. 17), or failed to take into consideration some proper item of damages. Matter of Thompson, 127 N. Y. 463.

1. In Illinois, where a railway company has instituted proceedings under a particular statute, the appellate court cannot allow an amendment permitting a condemnation under a different statute. Peoria, etc., R. Co. v. Black, 58 Ill. 33.

In Louisiana, where the landowner seems to be entitled to damages, but has failed to adduce sufficient evidence in support of his claim, his right to assert and prove such damages should be reserved to him, by the appellate court, by an amendment of the judgment. Mississippi, etc., R. Co. v. Wooten, 36 La. Ann. 441.

In Massachusetts the appeal to the Supreme Court from a judgment of the common pleas, accepting or rejecting the verdict of a jury, in a condemnation proceeding, is a summary proceeding provided as a substitute for a writ of error, and amendments may be made, as respects defects of form, as freely as upon writ of error or certiorari. Walker v. Boston, etc., R. Co., 3 Cush. (Mass.) 1.

In New York, if the minutes of the

testimony taken by the commissioners are defective, and no fraud is charged, they may correct their minutes pending the appeal. Matter of New York, etc., R. Co., 33 Hun (N. Y.) 293, deeming this a better practice than to try to determine what the evidence was by affidavits.

In Texas the objections to the report of the commissioners may be amended on appeal in a proper case. Thus in two applications by the appellant railway company against the same person to condemn a right of way through two tracts of land owned by appellee, the commissioners returned an assessment of the damages for the right of way through the two tracts in the aggregate. The owner filed an objection to the report, insisting that the damages caused by the way through one of the tracts were largely in excess of the aggregate sum allowed. On appeal to the District Court the appellant was allowed to amend his objections to the report of the commissioners, and allege the damages caused by the right of way through the other tract. It was held that as the damages had been assessed in the aggregate, the first objection should be held sufficient to put in issue the damages to both tracts, and the amendment was properly allowed. Gulf, etc., R. Co. v. Kerfoot, 85 Tex. 267, 51 Am. & Eng. R. Cas. 682.

Amendment of Judgment.—In Ft. Worth Ice Co. v. Chicago, etc., R. Co. (Tex. Civ. App. 1895), 33 S. W. Rep. 159, it was held that a judgment vesting a right of way over land in a railroad company, "for all necessary railway purposes," should, in the interest of the owner, be corrected, so as to limit the exercise of the easement to the purposes defined in Tex. Rev. Stat., art. 4216.

In West Virginia, where by mistake the verdict is for a wrong sum, it is amendable in the court below, and that not having been done, it will be amended in the appellate court. Ohio River R. Co. v. Harness, 24 W. Va. 511, 20 Am. & Eng. R. Cas. 405.

several awards of commissioners to the same party may be consolidated and heard together;¹ and the same course may be taken where separate awards are made to several tenants in common of a single tract of land.²

l. AFFIRMANCE.—Where no error appears in the record, the judgment appealed from will, of course, be affirmed,³ and the affirmance of the judgment operates as an affirmance of the order giving possession of the land condemned.⁴

m. REVERSAL.—**Generally.**—Where the facts before the court furnish strong reasons to apprehend that justice has not been done between the parties, the appellate court will set aside the report of the commissioners and order such further proceedings to be had as the statute directs.⁵ So, also, where it appears that

1. *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364, 20 Am. & Eng. R. Cas. 225; *Jamieson v. Cass County*, 56 Ind. 466.

2. *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332, 10 Am & Eng. R. Cas. 168.

So, also, where proceedings are instituted to condemn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal. *Matter of Prospect Park, etc., R. Co.*, 67 N. Y. 371, *affirming* 8 Hun (N. Y.) 30. But see *Ortman v. Union Pac. R. Co.*, 32 Kan. 419.

3. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

Where, after appealing, the condemning party becomes satisfied of the correctness of the award, and therefore does not desire to prosecute such appeal, the proper motion is to affirm the award, as such motion, if sustained, will carry interest and costs. *Robbins v. Omaha, etc., R. Co.*, 27 Neb. 73; *Berggren v. Fremont, etc., R. Co.*, 23 Neb. 620.

4. *Chicago, etc., R. Co. v. Cicero*, 157 Ill. 89. In *Johnson v. Metropolitan West Side El. R. Co.*, 160 Ill. 477, it was held that a decree dissolving an injunction against the construction of a railroad upon premises sought to be condemned, pending an appeal by the railroad company from the award of damages, will be affirmed where the judgment for damages has been affirmed. See also *Chicago, etc., R. Co.*

v. Phelps, 125 Ill. 482; *Atchison, etc., R. Co. v. Schneider*, 127 Ill. 144.

5. *Bennet v. Camden, etc., R., etc., Co.*, 14 N. J. L. 145, holding, however, that the jury, which may be impaneled to pass between the landowner and the company, ought not to be at all influenced by the fact that the court has set aside the report of the commissioners.

Rule Stated at Length.—After the court has acted, when it appears by the record that a proper application in writing was made to the court and notice given to the owner of the land, or he appeared, and it was recited that the court was of the opinion that the applicant had lawful right to take the land, the court appointing freeholders, and, with the action of the parties themselves, organizing the commissioners, this implies either the consent of the owner or the location of the land in a city or incorporated town, one or the other of which facts is indispensable, though either is sufficient to authorize the judgment as to that primary fact. After the commissioners have been appointed, however, if it should appear on the record, or be within the recollection of the court, that there was no proof or admission of either of these facts or of any other necessary to the judgment given and consequent action taken, or if the owner should show to the court that notwithstanding his employment of reasonable diligence he was, by fraud, accident, or mistake, prevented from defending or excepting to the proceeding, and that the actual facts were not adduced, or that those presented to the court might have been over-

some of the judges who appointed the commissioners were interested, as stockholders, in the petitioning company, and the landowner has not waived his objection to the court, their order appointing the commissioners will be reversed;¹ but the orders of the court below will not be reversed in the absence of a clear preponderance of evidence against their correctness.²

Reversal in Part.—Where the condemning party appeals from an order confirming the commissioners' report, if there is more than one tract of land involved, the order may be reversed as to one tract and affirmed as to another.³

Rendering Proper Judgment on Reversal.—When the amount the landowner is entitled to recover depends upon computation only, the Supreme Court, upon reversal, will render the judgment which should have been rendered below.⁴

Restitution.—The appellant landowner has not an absolute right to a restitution of possession, but the appellate court has a discretion in the matter.⁵

n. REMANDING.—In a question of damages, where the testimony is so conflicting that from it the court is unable to do justice between the parties, the case will be remanded to the court of first instance for a reassessment.⁶ Where the reversal and remand are upon the ground that the appellee failed to show a public use and the necessity of the taking therefor, which were conditions precedent to the right to condemn, the new trial should

thrown, or avoided, or did not warrant the judgment, the court before which the case was pending should set aside the judgment and action; and if, under any such circumstances, it failed to do so, and the facts should, by bill of exceptions or otherwise, appear in the record, the court of appeals would reverse the judgment. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

1. *Gregory v. Cleveland, etc., R. Co.*, 4 Ohio St. 675.

2. *Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 162.

3. *Stockton, etc., R. Co. v. Galgiani*, 49 Cal. 139.

The appeal, in such case, brings up the entire record, but the judgment is, in effect, several as to each tract damaged, and a reversal as to one tract does not necessarily require a reversal as to the others. *Chicago, etc., R. Co. v. Hildebrand*, 136 Ill. 467, 47 Am. & Eng. R. Cas. 145.

4. *Chicago v. Wheeler*, 25 Ill. 478.

5. *Cal. Code Civ. Pro.*, § 957; *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220.

6. *La. Civ. Code*, § 2608; *Bailey v. New Orleans*, 19 La. Ann. 271.

If one set of commissioners has made a report of the value of the property, which was set aside by the judge *a quo*, at the request of the company, and another has been appointed, which, after taking further testimony, has made a second report, reducing the value of the property to be taken below one-half that placed upon it by the first set of commissioners, the latter estimate being approved by the judge *a quo*, the Supreme Court will, on appeal, in the exercise of its discretionary powers in such cases, remand the cause to the court of the first instance, with instructions that a new commission be appointed and the case be in other respects proceeded with according to law. *New Orleans, etc., R. Co. v. Zeringue*, 23 La. Ann. 521.

Upon a Remand for a New Trial, after reversal, the condemning party is entitled, on the new trial, to a reassessment of damages, though the amount of the first award has been paid to the landowner, and the condemning party has gone into possession of the land. *Cincinnati Southern R. Co. v. Banning*, Ohio Prob. Rep. 114.

be *de novo*, under the general law, and not under the provisions of the appellee's charter.¹

o. DISMISSAL—DISCONTINUANCE.—Appeals in condemnation cases may in general be dismissed or discontinued by either party, in accordance with the rules of appellate procedure which prevail in other civil cases. The decisions relating to such dismissals and discontinuances are gathered in the note.²

8. Effect of Appeal while Pending—*a.* IN GENERAL—STAY.—An appeal from the assessment of damages by commissioners brings up the whole case so that all rights relating to such damages may be determined. Therefore a separate action involving the same rights will be dismissed with costs.³

1. Treacy *v.* Elizabethtown, etc., R. Co., 85 Ky. 270.

What Res Judicata on New Trial.—Where, on the hearing in the Supreme Court of an appeal in condemnation proceedings, the award of damages, which alone is appealed from, is set aside, and the question of damages ordered to be submitted to a new jury, if the parties enter upon a new trial without a motion for a rehearing, they adopt the decision on said appeal as the law of the case, and the questions then decided are therefore *res judicata*. Fort-Street Union Depot Co. *v.* Backus, 103 Mich. 556.

2. An Appeal from an Award by the Landowner will not be dismissed because the mortgagees have not joined in the appeal; nor will such appeal be dismissed, after the claimants have put in their proofs and rested, because the jury have not then examined the premises. Knauff *v.* St. Paul, etc., R. Co., 22 Minn. 173.

In such cases the landowner becomes the plaintiff, and must prove his damages if the railroad company fails to appear; it is error to dismiss the company's appeal because it is in default for want of an answer. Omaha, etc., R. Co. *v.* Umstead, 17 Neb. 459, 20 Am. & Eng. R. Cas. 399, followed in Omaha, etc., R. Co. *v.* Lamb, 17 Neb. 461; Omaha, etc., R. Co. *v.* Lamb, 17 Neb. 462.

Separate Awards in respect to each of two quarter sections which together constitute one tract are, in effect, an award as to the whole tract, and an appeal therefrom as one award should not be dismissed for duplicity. Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 10 Am. & Eng. R. Cas. 508.

A Partition of the Premises Pending

Appeal does not have the effect of dismissing it. The right of way is acquired when the damages assessed are paid to the sheriff, and all conveyances made afterwards are subject to the title of the company to such right of way. Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490.

The Effect of the Dismissal of an appeal is to leave the award appealed from effective as respects the amount, as though no appeal had been taken. Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn. 452.

Discontinuance or Withdrawal.—The company appealing from the award of commissioners may discontinue such appeal and accept the award, at any time, upon such terms as the court may order. Mass. Gen. Stat., c. 43, § 41; Fall River R. Co. *v.* Chase, 125 Mass. 483.

In *Pennsylvania*, however, after issue, trial, and verdict, and after the time limited for appeal, the appellant cannot withdraw the appeal and have the award confirmed. Schuylkill River East Side R. Co. *v.* Harris, 124 Pa. St. 216, holding, however, that where the court has entered an order of confirmation the appellee cannot enter an appeal *nunc pro tunc*, but may have such order vacated.

And under the lateral railroad law, an appeal from the report of viewers cannot be discontinued after twenty days have elapsed from the filing of the report, without the consent of the adverse party. Brown *v.* Corey, 43 Pa. St. 495.

3. Phifer *v.* Carolina Cent. R. Co., 72 N. Car. 433.

Exception.—A charter provided that the company might condemn for a right of way a strip two hundred feet

When It Vacates Judgment Appealed From.—Where the appellate court is required to try the case *de novo*, the effect of the appeal is to vacate the decision of the commissioners.¹

Payment of Fees.—An order upon the appellant to pay the fees of the commissioners may properly be made, notwithstanding the pendency of the appeal.²

Stay.—In *Iowa*, upon the company's appeal, the right of the landowner to withdraw the money deposited is suspended pending the appeal.³ In *New York*, whether the landowner shall have a stay, pending the appeal, is discretionary with the general term, and must be determined by the circumstances of the particular case.⁴

b. EFFECT ON PETITIONER'S RIGHT TO ENTER.—In most jurisdictions where the condemning party appeals from the award of damages, it is allowed to enter upon the land for the purpose of constructing the improvement, upon the payment, or tender,⁵

wide, and might take additional lands where the board of directors, by resolution, declared them necessary for the use of the company. A landowner objected to condemnation proceedings to condemn a strip three hundred feet wide, that the directors had not properly authorized the taking of the additional one hundred feet. He appealed from the award of the commissioners, and also instituted a separate proceeding to set aside the award upon the same ground, but it was objected that the appeal was a bar to the second proceeding. It was held that the right of the company to condemn the additional one hundred feet could not be determined on appeal, and therefore the appeal was not a bar to the other proceeding, and it was also held proper to restrain the company from constructing its road over the land, on the ground that the condemnation had not been authorized by the directors. *Stringham v. Oshkosh, etc., R. Co.*, 33 Wis. 471.

1. *Pool v. Breese*, 114 Ill. 594.

But an appeal by defendant upon the question of compensation alone, accompanied by an abandonment of other defenses, does not vacate the judgment appealed from. *Los Angeles, etc., R. Co. v. Rumpff*, 104 Cal. 20. Nor does the mere prayer of an appeal to the court of last resort, and an intention to prosecute it, have that effect. *Lake Erie, etc., R. Co. v. Kinsey*, 87 Ind. 514, 14 Am. & Eng. R. Cas. 309.

As to Parties Not Appealing.—While

an appeal from the order of commissioners establishing a road vacates such order as to the parties appealing, it does not do so as to parties who do not appeal. *Fleener v. Claman*, 126 Ind. 166.

Failure to Pay Amount Awarded.—It being uncertain whether the award will stand, it is improper to vacate it, pending the appeal, for failure to pay the amount awarded. *New York, etc., R. Co. v. Townsend*, 36 Hun (N. Y.) 630.

Effect on Foreclosure Suit.—Where a foreclosure suit is in progress against the land condemned, pending an appeal from the award, it is not necessary to make the condemning party a party to such foreclosure suit. *Farmers', etc., Bank v. Eldred*, 20 Wis. 196, holding that it might concern the railroad company to know to whom it must pay the damages that might be awarded, but that the rights of the mortgagor could not be prejudiced because the company was not before the court.

2. Wis. Rev. Stat., §§ 1848, 1852; *Taylor v. Chicago, etc., R. Co.*, 81 Wis. 82, one judge dissenting.

3. *Peterson v. Ferreby*, 30 Iowa 327.

4. *Manhattan R. Co. v. Stroub*, 70 Hun (N. Y.) 363.

5. See *supra*, XIV. 1. *Necessity of Payment or Its Equivalent to Passing of Title.* *Oliver v. Union Point, etc., R. Co.*, 83 Ga. 257, 39 Am. & Eng. R. Cas. 107; *Indianapolis, etc., R. Co. v. Brower*, 12 Ind. 374. *Contra*, see *Browning v. Camden, etc., R., etc., Co.*, 4 N. J. Eq. 47.

or deposit,¹ or payment into court,² or securing by bond, of the compensation ordered to be paid by the judgment appealed from.³ Some cases hold, however, that this cannot be done where the landowner and not the company appeals, such an appeal operating as a supersedeas, and depriving the company of the right to enter until it is determined.⁴ If the company attempt to enter and construct their road, according to these decisions, an injunction will issue to restrain them.⁵

c. EFFECT AS A WAIVER OF IRREGULARITIES BELOW.—An appeal by the landowner from the award of the commissioners is an entry of appearance by him, and waives all questions as to the sufficiency of notice or jurisdiction of the person.⁶ Such an appeal also waives the objection that the appraisers were not properly sworn,⁷ and the objection that the commissioners were

1. *Ligare v. Chicago, etc., R. Co.*, 50 Ill. App. 84; *Manhattan R. Co. v. Taber*, 78 Hun (N. Y.) 434.

Exception.—Where a railroad company is already in possession of land and operating its road thereon under a license, and institutes a proceeding to condemn the land, it may appeal from the County Court to the Circuit Court without depositing in court the amount of the judgment for damages, or surrendering possession of the land. *Ashland Coal, etc., R. Co. v. Davidson* (Ky. 1892), 20 S. W. Rep. 270.

2. *Fisher v. Yavapai County* (Arizona, 1894), 36 Pac. Rep. 176; *State v. McHatton*, 15 Mont. 159; *Mercer, etc., R. Co. v. Delaware, etc., R. Co.*, 26 N. J. Eq. 464.

Exception.—A railroad company appealed an eminent domain proceeding from the Circuit Court to the court of appeals, accompanying which was a supersedeas, issued at the instance of both parties. After the court of appeals had affirmed the judgment, but before any mandate of that court was issued, the Circuit Court ordered the amount of the judgment paid into court and granted a writ of possession. It was held that such order was illegal and void, and that no costs could be imposed on either party under it. *Piel v. Covington Short Route Transfer R. Co.* (Ky. 1889), 12 S. W. Rep. 759.

3. *Neale v. Superior Ct.*, 77 Cal. 28; *Mitchell v. Illinois, etc., R., etc., Co.*, 68 Ill. 286; *Chicago, etc., R. Co. v. Phelps*, 125 Ill. 482; *Centralia, etc., R. Co. v. Henry*, 31 Ill. App. 456; *Central Branch Union Pac. R. Co. v.*

Atchison, etc., R. Co., 28 Kan. 453, 10 Am. & Eng. R. Cas. 528.

Exception.—While ordinarily the legal effect of the approval of a bond given by a railroad company in condemnation proceedings is to pass the title to the land or easement to which it relates, this effect does not necessarily follow where the entry of the railroad company is in clear violation of the covenants contained in a written contract with the landowner. *Simple v. Cleveland, etc., R. Co.*, 172 Pa. St. 369.

4. *Jersey City, etc., R. Co. v. Central R. Co.*, 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256; *Watson v. Pittsburgh, etc., R. Co.*, 2 Pittsb. (Pa.) 99.

5. *Connelly v. Griswold*, 7 Iowa 416; *Browning v. Camden, etc., R., etc., Co.*, 4 N. J. Eq. 47; *Kansas City v. Kansas Pac. R. Co.*, 18 Kan. 331; *Iowa College v. Davenport*, 7 Iowa 213. *Contra*, see *Cooper v. Anniston, etc., R. Co.*, 85 Ala. 106, 36 Am. & Eng. R. Cas. 581.

6. *Atchison, etc., R. Co. v. Patch*, 28 Kan. 470; *Whitely v. Mississippi Water Power Co.*, 38 Minn. 523, 36 Am. & Eng. R. Cas. 624; *Rheiner v. Union Depot, etc., Co.*, 31 Minn. 289, holding that one who has taken and prosecuted such an appeal may not afterwards pursue the inconsistent remedy of an action to restrain the corporation from the use of the land, upon the ground of such defect in the condemnation proceedings.

Where the Appeal Is from the Award of the Sheriff's Jury, objections to their jurisdiction are not waived. *Stough v. Chicago, etc., R. Co.*, 71 Iowa 641.

7. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

not of the requisite number.¹

9. **Certiorari**.—*a.* **WHEN IT LIES.**—The use of this writ as a mode of review in street and highway condemnations has been treated in a previous article.² In railway condemnation proceedings the writ will lie where the court below has proceeded without having jurisdiction if there be no other adequate remedy,³ as where the statute under which the proceedings are had makes no provision for appeal,⁴ or where the time to appeal expired before the relator had knowledge of the facts complained of.⁵ The writ will also lie to correct errors and irregularities in the appointment or proceedings of the tribunal assessing the damages;⁶ and one

1. *Williamson v. Cass County*, 84 Ill. 361.

But such an appeal, bringing in question only the sufficiency of the damages, is not inconsistent with a proceeding to vacate the appointment of the commissioners and to oppose the condemnation. *In re Minneapolis R. Terminal Co.*, 38 Minn. 157.

2. See article **CERTIORARI**, vol. 4, p. 1.

3. *Dunlap v. Toledo, etc.*, R. Co., 46 Mich. 190.

Illustration.—When, in a proceeding to condemn land, the District Court makes an order which it has no jurisdiction to make in relation to the use of the property sought to be condemned, and there is no appeal from the order, certiorari is the proper remedy to annul the order before the damages it authorizes have been sustained. The fact that a trespass under such order may be enjoined in equity does not prevent it from being reviewed on certiorari, for the mere fact that the order is void will not alone authorize an injunction. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 528.

4. *People v. Mosier*, 56 Hun (N. Y.) 64.

5. *Joliet, etc., R. Co. v. Barrows*, 24 Ill. 562.

6. **Errors and Irregularities by or Relating to the Commissioners.**—If the proceedings of county commissioners, in estimating damages for land taken, are irregular, the remedy is to be sought by an application to the Supreme Court for a certiorari, and not by an application to the commissioners for a jury to revise the damages. If the latter course be taken, it is an admission that the previous proceedings are regular and a waiver of exceptions

thereto. *Fitchburg R. Co. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 58.

Under Mass. Stat. of 1857, c. 287, an adjudication by county commissioners, laying out a highway across a railroad, which does not state whether the highway is to be carried over or under or on a level with the railroad, or show that special notice was given to the railroad corporation, is erroneous and will be quashed on certiorari, although the railroad corporation actually appeared and were heard before the commissioners. *Old Colony, etc., R. Co. v. Plymouth County*, 11 Gray (Mass.) 512.

If a party would go back to the proceedings of commissioners to show anything unfair or unlawful in the mode of their appointment, or in the proceedings prior thereto, he must bring his case before the court by certiorari, or in some other manner in the due course of law. *Bennet v. Camden, etc.*, R., etc., Co., 14 N. J. L. 145, reviewed in *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

Errors Committed by the Jury.—Where, on an appeal to the Supreme Court from the confirmation of the report of a jury, a new appraisal is directed to be made before a new panel, the common-law writ of certiorari lies, if taken in proper season, to correct grave errors committed by the jury in their proceedings, affecting injuriously the rights of the parties; but such correction will not extend to the final facts to be adjudicated upon by the jury—namely, the necessity of taking the property for the public use, and the just damages or compensation to be made therefor. *Backus v. Gartner*, 89 Mich. 209.

Under a charter which directs an inquest to be summoned by the sheriff

named in the petition as having some interest in the land may have the writ, in order to question the petitioner's authority to institute such proceedings, without showing that he really has such an interest.¹

But certiorari will not lie to review condemnation proceedings where a remedy by appeal is provided;² or where the relator is guilty of delay or laches in suing out the writ;³ or has failed to make objection to the irregularity in the court below, which could have corrected it;⁴ or has applied for the writ prematurely.⁵

b. RETURN AND PROCEEDINGS THEREON—Return.—The return may contain the record, the proceedings in the nature of a record, the rulings on evidence, instructions given and refused, and the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions, and

for estimating the damages sustained by owners of land occupied by the railroad, who shall make a report to the court, and that, when the report is confirmed, judgment shall be entered, provided that, if the report be not confirmed and justice may seem to require it, a new inquisition may be awarded by the court, it was held that the court may set aside the proceedings for mere excess in the estimate of damages; and that the Supreme Court has the same power, when the proceedings are brought up by certiorari; and that in such a case a *procedendo* would not be awarded, but the parties would be left to commence again *de novo*. Pennsylvania R. Co. v. Heister, 8 Pa. St. 445, criticised in Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445, explained in Lehigh Valley R. Co. v. Lazarus, 28 Pa. St. 203, reviewed in Greenville, etc., R. Co. v. Partlow, 5 Rich. (S. Car.) 428.

1. Central R. Co. v. Hudson Terminal R. Co., 46 N. J. L. 289, 20 Am. & Eng. R. Cas. 294.

2. Church v. Northern Cent. R. Co., 45 Pa. St. 339.

Illustrations.—Where the only complaints made by an owner of land against proceedings condemning a portion of it for right of way are that the damages awarded are inadequate, and that the award was made on a day subsequent to that fixed in the notice, he has a plain, speedy, and adequate remedy by appeal, and certiorari will not lie. Cedar Rapids, etc., R. Co. v. Whelan, 64 Iowa 694, 20 Am. & Eng. R. Cas. 395.

Under the N. Y. General Railroad

Act of 1850, § 18, a second report of commissioners in a condemnation proceeding is final and conclusive on all the parties interested; and where an appeal is thus prevented the proceedings cannot be reviewed by certiorari. People v. Betts, 55 N. Y. 600, followed in Matter of Delaware, etc., Canal Co., 69 N. Y. 209, reviewed in Matter of Prospect Park, etc., R. Co., 85 N. Y. 489, 14 Am. & Eng. R. Cas. 362.

3. Bresler v. Ellis, 46 Mich. 335; Hildreth v. Rutherford, 52 N. J. L. 501.

Illustration.—Me. Rev. Stat. 1857, c. 51, § 6, provides substantially that when a party failed to prosecute a petition for a revision of the land damages awarded by the county commissioners at the next regular term after the filing of the same, it should be dismissed unless good cause for delay is shown. The determination of the county commissioners as to the sufficiency of the excuse offered for delay is not to be revised by the Supreme Court by certiorari, even though a warrant for a jury had issued before the order of dismissal was entered. Portland, etc., R. Co. v. Cumberland County, 64 Me. 505.

4. Plymouth v. Plymouth County, 16 Gray (Mass.) 341; St. Paul, etc., R. Co. v. Murphy, 19 Minn. 500.

5. **Premature Application.**—Exceptions were filed to the report of viewers for a lateral railroad and an appeal to the common pleas was taken. The exceptions were overruled while the appeal was pending; there was no final judgment, and a certiorari from the Supreme Court was premature. Hall's Appeal, 56 Pa. St. 238.

the prejudice thereby worked to the relator.¹

The Hearing must be upon the writ and return; the papers upon which the writ was granted may be considered on the question of jurisdiction to issue the writ, and, possibly, as establishing as facts such matters as were embraced in the writ and omitted from the return.²

Affidavits may be taken and read to show that the commissioners have acted upon illegal principles in valuing the land and assessing the damages.³ Ordinarily, however, if the proceedings are regular and authorized by law, they cannot be disturbed by anything outside the record.⁴

What Questions may be Considered.—On certiorari by the landowner, bringing up the appointment of the commissioners, the appellate court has power to pass upon all questions which affect the right of the company to take the relator's lands, so far as they show that as to him no such right exists;⁵ and also to pass upon the questions whether the judge *a quo*, upon the facts before him, should have appointed the commissioners,⁶ and whether a *bona fide* reasonable effort to purchase the land required was unsuccessfully made.⁷

1. Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508. See, in general, article CERTIORARI, vol. 4, p. 211 *et seq.*

Conclusiveness. — If responsive, and covering the points of error appearing in the affidavit for the writ, the return is conclusive upon the respondents and the court. *Traverse City, etc., R. Co. v. Seymour*, 81 Mich. 378.

Sufficiency of Return. — Where commissioners who, under summons of the sheriff, had assessed plaintiff's damages on account of land taken for railroad purposes, showed by their answer to a writ of certiorari that they had kept within their lawful sphere, and proceeded regularly, so far as they were concerned, it was held that the answer was sufficient. The question whether the company had a right to condemn the land for the purposes named in the proceeding was one with which they had nothing to do. *Forbes v. Delashmutt*, 68 Iowa 164.

2. *People v. Dains*, 38 Hun (N. Y.) 43. And see, in general, article CERTIORARI, vol. 4, p. 252 *et seq.*

3. *New-Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25.

Depositions.—On a certiorari to remove proceedings for the assessment of damages in the case of a canal, etc., the Supreme Court will not examine into exceptions which depend on

depositions taken in the court below, relating to the assessment of damages. *Allison v. Delaware, etc., Canal Co.*, 5 Whart. (Pa.) 482; *Philadelphia, etc., R. Co.'s Case*, 6 Whart. (Pa.) 25.

4. *Conestoga Bridge*, 150 Pa. St. 541.

Illustration.—Where one petitioned for viewers to assess damages done her, as owner of one-third of certain lands, and as administratrix of her daughter who had died seized of a one-fifth interest therein, and the court, after viewers appointed, and report assessing damages made, on exceptions thereto by the company, that the petitioner had not title, as set forth in the petition, set aside the proceedings at her costs, on certiorari, it was held that as the *quantum* of title could only appear by evidence *dehors* the record, and as the ground of the decision below, setting aside the proceedings upon such evidence, could not be legally known to a court of error, the judgment must be reversed and the case reinstated, to be proceeded in according to law. *Church v. Northern Cent. R. Co.*, 45 Pa. St. 339.

5. *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548, *affirming* 38 N. J. L. 17.

6. *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558.

7. *Chambers v. Carteret, etc., R. Co.*, 54 N. J. L. 85, holding that on

But matters of fact will not, ordinarily, be reinvestigated,¹ nor questions decided which could not be passed upon by the court whose action is up for review.²

10. Writ of Error.—The practice relating to the review of condemnation proceedings by writ of error, the general procedure thereon, and the effect of suing out the writ, vary widely in the different jurisdictions. The investigator should consult the general article ERROR, WRIT OF, *post*, as well as the cases cited in the note.³

11. Mandamus—Prohibition.—Neither of these writs will lie where there is an adequate remedy by appeal to redress the wrong complained of.⁴ Mandamus has been held not to lie even where

such a certiorari, if it appear that the petitioning company knew the name of the owner of the land, and in its application for appointment of commissioners did not give the name of such owner, but named as owner another person known by it not to have any interest in the land, the order appointing commissioners will be set aside at the instance of the real owner and the person named as owner.

1. *Low v. Galena, etc., R. Co.*, 18 Ill. 324; *Allen v. Levee Com'rs*, 57 Miss. 163; *Breden v. Pittsburg, etc., R. Co.*, 165 Pa. St. 262.

2. **Corporate Existence, etc.**—The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed on by the inferior tribunals for assessing damages in condemning lands, and cannot, therefore, be considered on certiorari to review the action. *Schroeder v. Detroit, etc., R. Co.*, 44 Mich. 387.

Amount of Damages.—And the appellate court cannot determine the amount of damages, on the merits, where the principle under which the commissioners assessed them was correct. *New-Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25.

3. *Alabama*.—*Talladega County v. Thompson*, 15 Ala. 134; *Hill v. Bridges*, 6 Port. (Ala.) 197; *Folmar v. Folmar*, 68 Ala. 120; *Bottoms v. Brewer*, 54 Ala. 288.

California.—*Sacramento, etc., R. Co. v. Harlan*, 24 Cal. 334.

Colorado.—*Hutchinson v. McLaughlin*, 15 Colo. 492.

Connecticut.—*Williams v. Hartford, etc., R. Co.*, 13 Conn. 110.

Indiana.—*Lawrenceburgh, etc., R. Co. v. Smith*, 3 Ind. 253.

Kentucky.—*Rice v. Danville, etc., Turnpike Road Co.*, 7 Dana (Ky.) 81; *Pack v. Whitney*, 6 B. Mon. (Ky.) 117.

Maryland.—*Moores v. Bel-Air Water Co.*, 79 Md. 391.

Mississippi.—*New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

Missouri.—*Hannibal, etc., R. Co. v. Morton*, 20 Mo. 70.

New Jersey.—*Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281; *Sullivan v. North Hudson R. Co.*, 51 N. J. L. 518, 40 Am. & Eng. R. Cas. 324. *New York*.—*King v. New York*, 36 N. Y. 182.

Ohio.—*Cincinnati, etc., R. Co. v. Bailey*, 39 Ohio St. 170, 10 Am. & Eng. R. Cas. 513; *Little Miami R. Co. v. Hopkins*, 19 Ohio St. 279; *Cleveland, etc., R. Co. v. Wick*, 35 Ohio St. 247; *Buckingham v. Steubenville, etc., R. Co.*, 10 Ohio St. 25; *Atlantic, etc., R. Co. v. Sullivan*, 5 Ohio St. 276; *Steubenville, etc., R. Co. v. Patrick*, 7 Ohio St. 170; *Meily v. Zurmehly*, 23 Ohio St. 627.

Pennsylvania.—*Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. (Pa.) 411; *Com. v. McAllister*, 2 Watts (Pa.) 190.

Virginia.—*Atlantic, etc., R. Co. v. Reid*, 87 Va. 119.

West Virginia.—*Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

United States.—*Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 19 Wall. (U. S.) 62; *Luxton v. North River Bridge Co.*, 147 U. S. 337.

4. *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328. *Compare Budd v. New Jersey R., etc., Co.*, 14 N. J. L. 467.

Illustration.—Whether or not the failure to agree or to authorize the suit is a bar to the condemnation proceedings is not a question going to the

the court below refused to appoint commissioners, under the erroneous view that it had no power to make the appointment.¹

XVI. COSTS AND FEES—1. Necessity of a Statute.—Costs are the creatures of the statute, and in condemnation proceedings costs are only recoverable when authorized by statute, and according to the terms and in the amount so authorized.² The better opinion is that general statutory provisions relative to costs in civil actions or suits have no application to condemnation proceedings, which are special proceedings and not "actions" nor "suits."³

2. Landowner's Right to Costs—*a. GENERALLY.*—One whose property is taken against his will, in these proceedings, is constitutionally entitled to recover his court costs reasonably incurred in such proceedings. The common-law rule forbidding the recovery of costs by either party in actions at law does not control.⁴ The company must pay the costs awarded to the land-

jurisdiction of the superior court, but is a question of law to be determined by it in the course of the proceeding; and any error in such determination is subject to review upon appeal, and does not furnish ground for a writ of prohibition. *Bishop v. Superior Ct.*, 87 Cal. 226.

1. *State v. Neville*, 110 Mo. 345. But see, on this subject, *supra*, IX. 5. *d. Order of Appointment—Compelling Appointment.*

2. *St. Louis v. Meintz*, 107 Mo. 611; *Metler v. Easton, etc.*, R. Co., 37 N. J. L. 222; *Herbein v. Philadelphia, etc.*, R. Co., 9 Watts (Pa.) 272, *following Philadelphia, etc.*, R. Co. *v. Johnson*, 2 Whart. (Pa.) 275; *Gifford v. Dartmouth*, 129 Mass. 135. See also, in general, article COSTS, vol. 5, p. 110.

3. *Cherokee v. Sioux City, etc.*, Town Lot, etc., Co., 52 Iowa 279; *Hawkins v. Robinson*, 5 J. J. Marsh. (Ky.) 9; *Gifford v. Dartmouth*, 129 Mass. 135; *Matter of Union El. R. Co.*, 55 Hun (N. Y.) 163; *Cornish v. Milwaukee, etc.*, R. Co., 60 Wis. 476, 17 Am. & Eng. R. Cas. 142; *Wisconsin Cent. R. Co. v. Kneale*, 79 Wis. 89. *Contra*, see *Folmar v. Folmar*, 71 Ala. 136; *Senaker v. Sullivan County*, 4 Sneed (Tenn.) 116; *Aldrich v. Providence*, 15 R. I. 613.

4. *Dolores No. 2 Land, etc.*, Co. *v. Hartman*, 17 Colo. 138. In this case the court said: "The eminent domain act is entirely silent upon this subject. And there are decisions which hold that under these circumstances the common-law rule forbidding the recovery of costs by either party in

actions at law is decisive against such recovery. *Metler v. Easton, etc.*, R. Co., 37 N. J. L. 222; *Gifford v. Dartmouth*, 129 Mass. 135. These cases proceed upon the theory that condemnation proceedings are governed by the cost rule prevailing at law rather than that existing in equity; if correct in this particular, they would settle the question at bar were it not for a constitutional inhibition which is in our judgment pertinent and controlling. Section 15 of the Bill of Rights declares, *inter alia*, 'that private property shall not be taken or damaged for public or private use without just compensation;' a declaration which is repeated at the beginning of the eminent domain act. The undeniable intent of this provision is to secure the landowner, whose property is taken against his will, a fair compensation therefor. It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceeding whereby his premises are taken. In some instances such costs will amount to nearly or quite as much as the compensation awarded. But if the owner must disburse for costs the money received for his land, the compensation cannot be regarded as 'just' within the meaning of the constitutional guaranty. However it might be as to attorney's fees and other like expenses, we do not hesitate to say that the spirit of the constitution clearly covers the class of expenses usually taxed as costs. Hence, though it be conceded that the statute relating to costs in ordinary civil actions can-

owner before it can take possession.¹ Condemnation proceedings are "special proceedings," in which the statute allows costs the same as in civil actions.² But the landowner is not entitled to the costs of the preliminary hearing unless he succeeds in having the petition dismissed.³

b. DISCRETIONARY POWERS OF COURT.—The allowance of costs in condemnation proceedings, at the rates allowed in actions at law, is discretionary with the court,⁴ as respects the costs subsequent to the coming in of the commissioners' report.⁵ They may be taxed by the judge at chambers after the rendition of judgment.⁶

When the Owner's Default is Opened as a matter of favor, and the report sent back to the commissioners for further hearing, the costs of the former hearing, at which the owner failed to appear, may be taxed against him as a condition of opening the default.⁷

not apply, courts should nevertheless award them to respondents in condemnation proceedings. We do not assert that if respondent appeals from an award, the legislature or court may not make a reasonable regulation or order requiring him under proper circumstances to bear the whole or a part of the costs of the appeal." See also *infra*, XVII. 5. *Costs on Discontinuance*.

1. Chicago, etc., R. Co. v. Bull, 20 Ill. 218; San Francisco v. Collins, 98 Cal. 259; Manhattan R. Co. v. Kent, 80 Hun (N. Y.) 557.

2. Matter of Syracuse, etc., R. Co., 4 Hun (N. Y.) 311; Matter of South Market St., 80 Hun (N. Y.) 246; Rensselaer, etc., R. Co. v. Davis, 55 N. Y. 145, holding that a landowner is entitled to full costs upon hearing of a condemnation proceeding both before the commissioners and on appeal, the same as in an ordinary action.

What Included.—Where, in cases of this kind, the law authorizes the costs and expenses of the proceeding to be added to the amount of damages and recompense found by the jury, the costs of a previous inquisition in the same proceeding set aside by the court may properly be included in the amount found by the jury. Owners of Ground, etc. v. Albany, 15 Wend. (N. Y.) 374.

Under the Pa. statute providing that if any damages be awarded, and the report of the viewers be confirmed, the cost and expenses incurred shall be defrayed by the company, it was held that this included the petitioner's bill of costs for service on the

viewers of notice of their appointment, and for mileage in such service; also for serving subpoenas on their witnesses and mileage, and for the attendance of their witnesses, and their mileage. Pennsylvania R. Co. v. Keiffer, 22 Pa. St. 356.

3. Dansville, etc., R. Co. v. Hammond, 77 Hun (N. Y.) 39.

Still the fact that the petitioner becomes entitled to the costs of such hearing does not deprive the landowner of his right to other taxable costs in the further conduct of the proceedings. Manhattan R. Co. v. Taber, 78 Hun (N. Y.) 434.

4. N. Y. Code Civ. Pro., § 3240; Matter of New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123; Dolores No. 2 Land, etc., Co. v. Hartman, 17 Colo. 138.

Railroad Intersection.—The allowance of costs in a special proceeding rests in the discretion of the court, a proceeding instituted under the statute by a railroad company, to acquire the right to cross the tracks of another railroad company, not being, in the strict sense of the term, a condemnation proceeding to acquire title to land, and the rule of discretion in respect to the granting of costs is applicable to such a proceeding. Hornellsville Electric R. Co. v. New York, etc., R. Co., 83 Hun (N. Y.) 407.

5. Chicago, etc., R. Co. v. Elliott, 117 Mo. 549.

6. Granite Mountain Min. Co. v. Weinstein, 7 Mont. 440.

7. Matter of Brownell St. (Supreme Ct.), 44 N. Y. St. Rep. 485.

c. EFFECT OF TENDER OR OFFER OF JUDGMENT.—Under some of the statutes the condemning party may offer to allow, or to confess, judgment for an amount less than the damages claimed, and in this event, if the landowner rejects the offer and does not recover more than was offered, he must pay the costs of the condemning party incurred subsequent to the offer.¹ Where the award obtained exceeds the amount of the offer, the landowner is entitled to full costs.²

3. Costs on Appeal.—a. IN GENERAL.—The proceeding being *in invitum*, it would seem proper that the condemning party should pay the costs, not only up to judgment, but of an appeal lawfully taken in good faith by the landowner, even though such appeal be unsuccessful, and it has been so held.³ So, also, if the landowner appeals and the condemning party appears and disclaims all interest in the land, judgment should be in favor of the landowner for his costs.⁴ Where the condemning party appeals from an order confirming the commissioners' report, the appellate court has no power to award costs against the landowner.⁵ In some states the "prevailing party" is entitled to costs.⁶

Separate Bills of Costs should not be allowed, in condemnation proceedings, to the petitioner against two persons answering, where it was alleged in the petition that such persons were copartners, and owned the premises sought to be condemned as such, if such is found in the decision to be the fact. *Syracuse v. Benedict*, 86 Hun (N. Y.) 343.

1. *Chicago, etc., R. Co. v. Townsend*, 45 Kan. 771; *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323.

Colorado Rule.—While the Colorado statute allows no costs to a party to whom compensation shall be awarded, if the amount thereof shall not be in excess of any lawful tender made by the petitioner before proceedings are commenced, it does not provide that he shall be liable for other costs. *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489.

2. N. Y. Code Civ. Pro., § 3372; *U. S. v. Engeman*, 27 Abb. N. Cas. (U. S. Cir. Ct.) 141, 46 Fed. Rep. 898.

And this is so notwithstanding the fact that the condemning party became entitled to the costs of the trial of the issue upon the pleadings. The court cannot deprive the landowner of his right to costs in such a case. *Manhattan R. Co. v. Taber*, 78 Hun (N. Y.) 434.

3. *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50. *Contra*, see *New*

Orleans Pac. R. Co. v. Gay, 31 La. Ann. 430.

4. *St. Louis, etc., R. Co. v. Martin*, 29 Kan. 750, 10 Am. & Eng. R. Cas. 514.

Sale of Road Pending Appeal.—Where a railroad company condemns a right of way, and then appeals from the award of the jury, and the costs of the appeal are taxed to it, but, pending the appeal, the company sells its road to another company and itself becomes insolvent, the purchasing company is liable to the landowner for the costs of the appeal, and they should be declared a lien on the land taken by condemnation. *Frankel v. Chicago, etc., R. Co.*, 70 Iowa 424, 28 Am. & Eng. R. Cas. 257.

5. *Matter of New York, etc., R. Co.*, 94 N. Y. 287, 17 Am. & Eng. R. Cas. 145, *affirming in part* 29 Hun (N. Y.) 646, where, the general term having given costs of appeal to the company, the court of appeals reversed its action as to that and affirmed its judgment in other respects.

6. *Bangor, etc., R. Co. v. Chamberlain*, 60 Me. 285; *Goodwin v. Boston, etc., R. Co.*, 63 Me. 363; *Connecticut River R. Co. v. Clapp*, 1 Cush. (Mass.) 559; *State v. Blake*, 36 N. J. L. 442; *People v. Van Alstyne*, 3 Keyes (N. Y.) 35.

Affirmance in Part.—Where proceedings to condemn lands were affirmed

b. WHERE OWNER FAILS TO SECURE INCREASED AWARD—Owner's Appeal.—Some cases hold that where the landowner appeals from the award of damages, and fails to obtain a more favorable judgment, he must pay the costs of the appeal;¹ but if the commissioners' assessment is affirmed, the same amount being awarded by the jury as by the commissioners, the owner appealing is entitled to costs,² or, at least, should not be compelled to pay them.³

Company's Appeal.—The prevailing doctrine seems to be that where the company seeking the condemnation appeals from the award as excessive, and on the new trial succeeds in reducing it, the landowner must pay the costs of such appeal;⁴ but well considered cases to the contrary are not wanting, in which the costs of the appeal are awarded to the landowner if the jury find in his favor for any amount, though less than was fixed by the commissioners.⁵ In other cases it is held that no costs can be taxed

so far as the findings of the jury were concerned, but beyond that were reversed, costs of the Supreme Court and of the proceedings below were allowed to the appellants. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378.

Who Deemed Prevailing Party.—Under Wis. Rev. Stat., § 1849, which provides that upon an appeal from an award costs shall be allowed to the successful party, the plaintiff is such party if, on his appeal, the award is increased, or if, on the defendant's appeal, the award is not reduced. Otherwise the defendant is the successful party. *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364, 20 Am. & Eng. R. Cas. 225.

Appeal under Special Charter.—In *South Carolina*, in an appeal under a special charter, it was held that neither party was entitled to costs. *Greenville, etc., R. Co. v. Partlow*, 6 Rich. (S. Car.) 286.

1. *Los Angeles, etc., R. Co. v. Rumpp*, 104 Cal. 20; *Vicksburg, etc., R. Co. v. Calderwood*, 15 La. Ann. 481; *Atchison, etc., R. Co. v. Plant*, 24 Neb. 127.

Interest Not an Increase.—Under this rule the addition of interest upon the award appealed from is not an "increase" of the award. *First Baptist Soc. v. Fall River*, 119 Mass. 95; *Metler v. Easton, etc., R. Co.*, 37 N. J. L. 222.

2. *Hanrahan v. Fox*, 47 Iowa 102; *Kidder v. Oxford*, 116 Mass. 165.

3. *People v. McRoberts*, 62 Ill. 38;

Harris v. Coltraine, 3 Hawks (N. Car.) 312. *Contra*, see *Metler v. Easton, etc., R. Co.*, 37 N. J. L. 222.

Dismissal of Appeal.—When the owner of land appeals to the Circuit Court, where, at his instance, the appeal is dismissed, it is only the appeal that is dismissed, and not the inquest, making it improper to charge the company with costs. *Mississippi Cent. R. Co. v. Beatty*, 35 Miss. 668.

Apportioning the Costs.—Where the damages allowed are less than the damages awarded by the commissioners, the costs of the appeal should not all be taxed to the railroad company; and in a case where the claim of neither party was fully sustained, the costs should have been apportioned. *Noble v. Des Moines, etc., R. Co.*, 61 Iowa 637, 14 Am. & Eng. R. Cas. 208; *Burlington, etc., R. Co. v. Spere*, 24 Neb. 125.

The assessment on appellant's land was reduced from \$302.50 to \$250. On appellant's motion to apportion the costs, the court ordered and adjudged that he pay two-thirds of the costs. It was held that this was not such an abuse of the discretion of the court as to justify a reversal. *Spear v. Drainage Com'rs*, 113 Ill. 632.

4. *Centreville, etc., Turnpike Co. v. Jarrett*, 4 Ind. 213; *Indiana Cent. R. Co. v. Atkinson*, 6 Ind. 149; *Leak v. Selma, etc., R. Co.*, 47 Ga. 345; *Burrill v. Martin*, 12 Me. 345; *In re Hartwell's Petition*, 2 Mich. N. P. 97; *Schuyllkill Nav. Co. v. Kittera*, 2 Rawle (Pa.) 438.

5. *New Haven, etc., Co. v. North-*
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against the landowner under such circumstances.¹ In still others neither party is allowed costs in such cases.²

4. Compelling Allowance or Payment.—In one state, at least, the costs of the application for the original assessment of damages should be taxed by the commissioners and not by the appellate court.³ The effect of the company's failure to pay or deposit the costs and expenses awarded, within the statutory time after confirmation of the award of the jury, is a waiver and abandonment of the condemnation proceeding, and of all rights acquired in the land condemned.⁴ A judgment for costs is enforceable by

ampton, 102 Mass. 116; Williams v. Taunton, 126 Mass. 287; Owsley v. Oregon R., etc., Co., 1 Wash. 491. In Matter of New York, etc., R. Co., 94 N. Y. 294, the court of appeals said: "If the appeal to the general term had been taken by the landowners, and they had been defeated, it may be that the court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the landowners, and to acquire their land against their will. In such a case to compel the landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it. In the present case the costs allowed are small compared with the amount of the award, which was thirty-five thousand five hundred dollars, but that can make no difference in the principle. If the company can recover against the landowner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such

costs, and if there were, it would be a violation of the constitutional right of the landowner."

1. Carolina Cent. R. Co. v. Phillips, 78 N. Car. 49.

Where, in pursuance of sections 2473-2477, Washington Code, three disinterested householders duly appraised the damages done to petitioner by reason of entry upon his lands by a railroad company, and the location and construction of its line of road, without taking the proceedings required by statute therefor, and where, at the election of the company, the court ordered pleadings to be filed by the parties and issue made for a proper determination of the parties, and a trial was had in the District Court which resulted in the finding of a verdict for the petitioner in a sum less than that awarded by the householders, the company, having made no offer to pay the petitioner either the amount of the verdict or any sum whatever, was not entitled, in pursuance of section 2475, to have the cost of the suit taxed against the owner. Owsley v. Oregon R., etc., Co., 1 Wash. 491, 36 Am. & Eng. R. Cas. 679.

2. Morse, Petitioner, 18 Pick. (Mass.) 443; Com. v. Boston, etc., R. Co., 3 Cush. (Mass.) 25; Harvard Branch R. Corp. v. Rand, 8 Cush. (Mass.) 218; Gray v. Lowell, etc., R. Co., 4 Cush. (Mass.) 609.

3. Mass. Gen. Stat., c. 63, § 21; New Haven, etc., Co. v. Northampton, 102 Mass. 116.

4. Derby v. Gage, 60 Mich. 1, 25 Am. & Eng. R. Cas. 233. But when the owner, upon the payment into court of the compensation awarded, and upon motion for an order for possession, does not make objection that he has not been paid his costs, it may be presumed that such costs have been paid, or at least that the owner thereby

suit in equity to make the costs a lien upon the land,¹ and it has been held that their allowance may be enforced, in a proper case, by mandamus.²

5. Allowance in Addition to Costs.—In *New York* the court has power to grant an allowance in addition to costs where no offer to purchase has been made, and where no answer has been put in, though the proceeding is not difficult or extraordinary.³ The court cannot grant such an allowance in a proceeding under a special statute which does not provide for such allowance, or for the granting of any costs whatever.⁴ The court, and not the commissioners, should make the allowance,⁵ owners under disability not being entitled thereto.⁶

waives the right to insist upon the non-payment as error. *Chicago, etc., R. Co. v. Chicago*, 148 Ill. 141.

1. *Frankel v. Chicago, etc., R. Co.*, 70 Iowa 424, 28 Am. & Eng. R. Cas. 257.

2. **Mandamus to Compel Allowance of Costs.**—A person whose land was injured by the construction of a railroad through it, applied to the county commissioners to assess the damages; and the commissioners reported that, it being understood and agreed by them that the railroad corporation should construct a culvert, wasteway, etc., for his benefit, they had assessed the damages at the sum of five hundred dollars. Upon the acceptance of this report the landowner applied for a jury, and obtained a verdict for the sum of six hundred dollars; but no reference was made in the verdict to the construction of a culvert, etc. The commissioners thereupon, after hearing the parties, rendered judgment in favor of the landowner for the amount of the verdict, but without costs, on the ground that he had not obtained an increase of damages. It was held that that part of the award of the commissioners relating to the construction of a culvert was not absolutely void, but might be rendered binding on the parties by ratification; and that the refusal of the costs to the landowner was not such a disregard of the plain duty on the part of the commissioners as would justify the Supreme Court in interfering by a writ of mandamus. *Morse, Petitioner*, 18 Pick. (Mass.) 443.

3. *N. Y. Code Civ. Pro.*, c. 23; *Matter of Lake Shore, etc., R. Co.*, 65 Hun (N. Y.) 538, holding that the amount of costs to be recovered, in such case, is not controlled by the Code, § 3251, subd. 3, since a hearing before commis-

sioners is not in any sense "a motion or a reference;" neither is it controlled by section 1015, for it is not the "taking of an account."

Under General Railroad Act.—But under the General Railroad Act of 1850 only what are strictly costs can be allowed, and not an extra allowance as provided for in section 309 of the Code Pro., as that section only applies to actions proper, and not to special proceedings. *Rensselaer, etc., R. Co. v. Davis*, 55 N. Y. 145.

Federal Condemnation.—Where the United States proceeds in a federal court to acquire lands in this state under an act of Congress which requires the proceeding "to be prosecuted in accordance with the laws relating to condemnation of property of the states wherein the property may be situated," the provisions of the condemnation act as to costs apply, and the award of costs, with an extra allowance to a defendant receiving an award in excess of the offer, is proper. *U. S. v. Engeman*, 27 Abb. N. Cas. (U. S. Cir. Ct.) 141.

4. *Matter of Brooklyn*, 148 N. Y. 107, affirming 88 Hun (N. Y.) 176, reversing 10 Misc. Rep. (N. Y.) 650, 24 Civ. Pro. Rep. (N. Y.) 117, and holding that Code Civ. Pro., § 3372, does not apply to such a case.

5. *Matter of Daly* (Supreme Ct.), 37 N. Y. Supp. 128.

6. *Manhattan R. Co. v. McKee*, 1 N. Y. App. Div. 488.

The Amount of the Allowance may be fixed by the court, according to the facts of the case, at any figure not exceeding five per cent. of the damages allowed. *St. Lawrence, etc., R. Co. v. DeCamp* (Supreme Ct.), 23 N. Y. Supp. 544.

6. Fees and Expenses.—These are purely statutory matters, of local interest only. The cases relating to them are collected in the notes.¹

1. Clerk's Fees.—A proceeding by a railroad company to condemn a right of way is only one case, although there may be several defendants who are owners of separate tracts of land over which it is sought to condemn its right of way; nor does the fact that the several defendants file separate exceptions convert such proceedings into different cases, nor authorize the making up of separate transcripts on change of venue; and the clerk is not entitled to fees for such separate transcripts. *Kansas City, etc., R. Co. v. Erwin*, 50 Mo. App. 552.

Commissioners' Fees and Expenses.—There is no provision of law by which the Atlantic & St. Lawrence R. Co. can be compelled, by an order of the county commissioners, to pay for the services of the commissioners, and for their expenses incurred while they were employed on petitions presented by the company, for the assessment of damages sustained by persons by the location of that railroad over their lands. *Atlantic, etc., R. Co. v. Cumberland County*, 28 Me. 112.

Counsel Fees have been allowed under special statutory provisions. *Boston, etc., R. Co. v. Charlton*, 161 Mass. 32; *Gibbons v. Missouri Pac. R. Co.*, 40 Mo. App. 146; *Boston, etc., R. Co. v. Wentworth*, 20 N. H. 406; *North Carolina R. Co. v. Goodwin*, 110 N. Car. 175; *Taylor v. Chicago, etc., R. Co.*, 83 Wis. 645. But in the absence of such statutes, fees paid to attorneys and counsel are, generally, not recoverable in the condemnation proceeding. *San José, etc., R. Co. v. Mayne*, 83 Cal. 566, 44 Am. & Eng. R. Cas. 158; *Coburn v. Townsend*, 103 Cal. 233; *Higbee v. Peed*, 98 Ind. 420; *Leisse v. St. Louis, etc., R. Co.*, 72 Mo. 561; *St. Louis v. Meintz*, 107 Mo. 611.

Jurors' Fees.—In *Illinois*, jurors' fees are proper county charges in railway condemnations. *Chicago, etc., R. Co. v. Eaton*, 136 Ill. 9. In *Louisiana*, under the Act of 1855, the plaintiffs in condemnation proceedings are not bound to pay the jurors for their attendance. *Vicksburg, etc., R. Co. v. Hart*, 15 La. Ann. 507. Under Gen. Stat. Mass., c. 63, § 22, the landowner's

costs include jurors' fees. *New Haven, etc., Co. v. Northampton*, 102 Mass. 116.

Sheriff's Fees.—Where a sheriff summons a jury which on the same day assesses damages to several tracts of land belonging to different owners, merely directing the jury to proceed from one tract to the other is not a distinct summons, and therefore the sheriff is only entitled to fees as for summoning one jury. *Robb v. Albia, etc., R. Co.*, 44 Iowa 440. Where application is made under Gen. Stat. Mass., c. 63, § 22, for the assessment of damages by jury, the landowners' costs include the fees of the sheriff. *New Haven, etc., Co. v. Northampton*, 102 Mass. 116.

Term Fees.—In the costs of an application, under Gen. Stat. Mass., c. 63, §§ 21, 22, to county commissioners to estimate the damages to the owner of land taken by a railroad corporation, and for a jury to assess the damages, a term fee for the hearing before the commissioners upon the issuing of the warrant for a jury should not be allowed; nor, it seems, should a term fee, attorney's fee, travel, or attendance, upon the original application before the commissioners. *New Haven, etc., Co. v. Northampton*, 102 Mass. 116, *followed in Childs v. New Haven, etc., Co.*, 135 Mass. 570, 17 Am. & Eng. R. Cas. 139.

Trial Fees.—The right to award costs being discretionary, the court may refuse to award the landowner a trial fee where no issue has been joined nor any question of fact tried. *Matter of New York, etc., R. Co.*, 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123. The determination of the damages where no answer is filed is not a trial, and therefore the landowner is not entitled to a trial fee. *Matter of Lake Shore, etc., R. Co.*, 65 Hun (N. Y.) 538.

Witnesses' Fees.—Where eminent domain proceedings are appealed to the Circuit Court, and there dismissed by the company, it is error to tax against the company costs for more than four witnesses, unless the court certify, as provided by statute, that a greater number were necessary. *Peoria, etc., R. Co. v. Bryant*, 15 Ill. 438.

XVII. ABANDONMENT—DISCONTINUANCE—1. Right to Abandon or Discontinue—Generally.—A railroad company which, in the exercise of the right of eminent domain, has instituted condemnation proceedings may subsequently abandon its purpose of taking the property and discontinue the proceedings,¹ and, if it so desires, may select a route other than the one first proposed.²

Compensation Too Large.—Where the condemning party considers the compensation assessed too high,³ or so high as to render it expedient to go around instead of through the tract, it may abandon the proceedings, and leave the landowner undisturbed.⁴

After the defendant had examined six witnesses on the question of damages to land not taken, the petitioner gave notice that it would move the court to tax the costs of any further witnesses to the defendant. The defendant examined nine other witnesses, and petitioner moved the court to tax the costs of them to the defendant, which the court overruled. This case was complicated, and involved lands of three different owners. It was held that there was no error in overruling the motion, which was addressed to the sound discretion of the court. *Chicago, etc., R. Co. v. Eaton*, 136 Ill. 9.

A person who prevails, upon an application for a sheriff's jury to assess the damages occasioned by the taking of his land by a railroad corporation, is entitled to be allowed, in the taxation of costs in the superior court, as part of his "legal costs" given by Mass. Pub. Stat., c. 112, § 100, the fees of his witnesses for travel and attendance before the sheriff's jury, and the officer's fees for summoning the witnesses; and it is immaterial that the items in question do not appear in the sheriff's certificate of costs returned to the superior court. *Childs v. New Haven, etc., Co.*, 135 Mass. 570, 17 Am. & Eng. R. Cas. 139.

Under the Pa. Act of February 8, 1834, supplementary to the act to incorporate the Philadelphia, Germantown and Norristown R. Co., one who obtains an award for damages is not entitled to the costs of his witnesses examined before the jury appointed to assess the damages. *Philadelphia, etc., R. Co. v. Johnson*, 2 Whart. (Pa.) 275.

Whether a party to the distribution of money in court may be allowed costs for witnesses, subpoenas, etc., is a matter for the discretion of the court under the circumstances; as against

an undisputed lien, no such costs will be allowed, but as against a contesting claim, the successful party is entitled to costs out of that part of the fund contested for. *Easton's Appeal*, 47 Pa. St. 255.

1. *Denver, etc., R. Co. v. Lamborn*, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115; *Schreiber v. Chicago, etc., R. Co.*, 115 Ill. 340, 23 Am. & Eng. R. Cas. 130. But see *Matter of Southern Boulevard R. Co.*, 63 Hun (N. Y.) 631, 43 N. Y. St. Rep. 611.

2. *Chicago, etc., R. Co. v. Gates*, 120 Ill. 86, 30 Am. & Eng. R. Cas. 268. In *Cooper v. Anniston, etc., R. Co.*, 85 Ala. 106, 36 Am. & Eng. R. Cas. 581, *Stone, C. J.*, said: "Nor is there anything in the objection that, having once obtained a right of way, the railroad company is bound to adhere to it and cannot proceed for a further condemnation. The power is continuous, and coextensive with the wants of the corporation. It should be a clear case of abuse to justify withholding relief on the ground that the easement asked for is not necessary to the successful operation of the railroad."

Greater Latitude than in Other Cases.—In fact, condemnation proceedings may be abandoned by the company conducting them with even greater freedom than a plaintiff in an ordinary suit can take a nonsuit and discontinue. Note to *Denver, etc., R. Co. v. Lamborn*, 8 Colo. 380, 23 Am. & Eng. R. Cas. 122.

3. *Union Mut. L. Ins. Co. v. Slee*, 123 Ill. 57.

4. *Leavenworth, etc., R. Co. v. Whitaker*, 42 Kan. 634. In such a case the company may change its route to some other locality, being liable for costs, and also for any other expense incurred at the instance of the company, and upon the faith of its acceptance of the route and assessment.

Abandonment as to Part of the Land described in the petition is within the power of the petitioner, if the part abandoned is not needed for the purposes of the improvement.¹

Experimental Proceedings.—But a party in condemnation proceedings is not entitled to resort to experimental suits and assessments.²

2. At what Stage of the Proceedings the Right Ceases.—The General Rule, in the absence of statutory provisions to the contrary, is that the condemning party may discontinue the proceedings at any time before the rights of the parties have become vested.³ There

Gear v. Dubuque, etc., R. Co., 20 Iowa 523.

Landowner's Title Defective.—The condemning party, having in its petition admitted title in the landowner for the purpose of condemnation, must, after becoming aware of the fact that his title is only qualified and partial, seasonably abandon the condemnation proceedings, or apply within the proper time for leave to amend the petition, or after verdict seek relief by a motion for a new trial. *Wilcox v. St. Paul, etc., R. Co., 35 Minn. 439*, holding that under such circumstances relief could not be obtained by a motion upon affidavits for an order that a judgment be entered for a sum less than that awarded by the verdict.

1. Peoria, etc., R. Co. v. Bryant, 57 Ill. 473, where the court said: "The railway company is not bound to take and pay for the land described in the petition, if less is needed for its purposes. Upon no principle is it estopped by the allegations in the petition, as to the quantity of land to be taken, when its engineer is of opinion that a less quantity is sufficient for the right of way. * * * Suppose that a railway company, through inadvertence, or misapprehension of its necessities, or incompetency or unskillfulness of its agents, filed a petition for a wider strip of land than subsequent investigation showed was necessary, the petition should not be conclusive. By any fair interpretation of the statute, the company should not be compelled to pay for more land than is taken or required."

So, where a company seeks to condemn lands for depot, engine house and machine shops, and for right of way, it may, after the award, abandon the proceedings as to all except the right of way if it chooses so to do; but in that case there will have to be a new award of damages resulting from the

right of way alone. *Denver, etc., R. Co. v. Lamborn, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115.*

2. In Neal v. Pittsburgh, etc., R. Co., 31 Pa. St. 19, the court said that "though railroad companies may make experimental surveys at pleasure before finally locating their road, yet certainly it has never been granted to them to have experimental suits at law as a means of chaffering with the landowners for the cheapest route. The law allows this proceeding after the road is located, and after a proper effort to agree upon compensation has failed; and the damages found and confirmed under it settles the right of the landowner to such damages as completely as any other form of judgment, and he has the same right to execution." So, also, in *District of Columbia v. Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497*, it is held that the public authorities, in the pursuit of an avowed purpose to acquire certain land by condemnation for public use, may not, while persisting in the avowal of such purpose, withdraw from the inquisition and the judgment of the court thereon because they are dissatisfied with the result, and seek by other methods to procure a smaller valuation of the desired property.

3. Chicago, etc., R. Co. v. Gates, 120 Ill. 86, 30 Am. & Eng. R. Cas. 268.

After These Rights Become Vested and Absolute.—the right of the condemning party to the property and the right of the landowner to the money—the proceedings cannot be abandoned. *North Missouri R. Co. v. Lackland, 25 Mo. 515; Drath v. Burlington, etc., R. Co., 15 Neb. 367, 20 Am. & Eng. R. Cas. 385; Matter of Rhinebeck, etc., R. Co., 67 N. Y. 242, 16 Am. Ry. Rep. 74; Hudson River R. Co. v. Outwater, 3 Sandf. (N. Y.) 689; Neal v. Pittsburgh, etc., R. Co., 31 Pa. St. 19;*

is not even a cavil as to the correctness of this rule, but as to the time when the rights of the parties become vested there is a diversity of opinion.¹

Prior to Confirmation of Report or Award.—There seems to be no denial of the right of the condemning party to abandon the proceedings where they have not been confirmed or consummated.² It may do so at any time prior to the confirmation of the commissioners' report,³ after the assessment of damages has been made,⁴ and the award has been filed;⁵ and either before the submission of the inquiry to a jury,⁶ or after verdict and prior to judgment.⁷

Brattleboro First Nat. Bank v. West River R. Co., 49 Vt. 167.

Necessity of Owner's Consent.—Where there has been such an actual taking under the power of eminent domain as invests the donee of the power with title, and gives to the landowner a vested right of compensation, the former cannot be permitted to discontinue the condemnation proceedings without the consent of the latter. This rule applies not only to railroad corporations, but also to municipal and quasi-municipal corporations. *Wood v. State Hospital*, 164 Pa. St. 159.

1. Note to *In re Jersey City Water Com'rs*, 31 N. J. L. 72, 86 Am. Dec. 202.

2. *Illinois*.—*Joliet, etc.*, R. Co. v. Barrows, 24 Ill. 562.

Indiana.—*Pittsburgh, etc.*, R. Co. v. Swinney, 97 Ind. 586.

Iowa.—*Hastings v. Burlington, etc.*, R. Co., 38 Iowa 316; *Corbin v. Cedar Rapids, etc.*, R. Co., 66 Iowa 73.

Missouri.—*North Missouri R. Co. v. Lackland*, 25 Mo. 515; *North Missouri R. Co. v. Reynal*, 25 Mo. 534.

New York.—*Matter of Syracuse, etc.*, R. Co., 4 Hun (N. Y.) 311; *Rensselaer, etc.*, R. Co. v. Davis, 55 N. Y. 145; *New York, etc.*, R. Co. v. Thorne, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 190; *Matter of Military Parade Ground*, 60 N. Y. 319.

Ohio.—*State v. Cincinnati, etc.*, R. Co., 17 Ohio St. 103; *Dayton, etc.*, R. Co. v. Marshall, 11 Ohio St. 497.

Pennsylvania.—*Neal v. Pittsburgh, etc.*, R. Co., 31 Pa. St. 19; *Penn Alley*, 1 Pa. Dist. Rep. 141.

Vermont.—*Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39.

West Virginia.—*Chesapeake, etc.*, R. Co. v. Bradford, 6 W. Va. 220.

3. *Matter of Syracuse, etc.*, R. Co., 4 Hun (N. Y.) 311.

4. *Gear v. Dubuque, etc.*, R. Co., 20 Iowa 523, 89 Am. Dec. 550, where the company found that it was beyond its ability or interest to pay the assessment. *Matter of Rhinebeck, etc.*, R. Co., 8 Hun (N. Y.) 34, affirmed in 67 N. Y. 242; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *Hyde Park v. Dunham*, 85 Ill. 569.

5. *Mabon v. Halsted*, 39 N. J. L. 640, where it was held that the movers would be entitled to a reasonable time after the award was filed to accept or reject it, and strongly intimated that the limit of this time might be the sixty days in which either party could appeal from the report.

In *In re Jersey City Water Com'rs*, 31 N. J. L. 73, the principle is stated by the court, drawing a distinction between condemnation proceedings initiated by a private corporation and those taken by purely public officers or agents, that a public agent should not be compelled to proceed to the public detriment, and inasmuch as the price is an important element in determining whether the public good is consistent with the taking of the land, the agent should have an election to take the same or not at the price settled.

6. *Dayton, etc.*, R. Co. v. Marshall, 11 Ohio St. 497, where it was held that under the Ohio Act of April 30, 1852, the company may discontinue the proceedings at any time before the submission of the inquiry to the jury. See also *Burlington, etc.*, R. Co. v. Sater, 1 Iowa 421.

7. *Witt v. St. Paul, etc.*, R. Co., 35 Minn. 404; *Louisville, etc.*, R. Co. v. Ryan, 64 Miss. 399.

In *New York*, however, it rests entirely within the discretion of the court to grant or refuse the company's application to discontinue the proceedings; and even upon the allowance of the

After Confirmation—New York Rule.—The time at which the proceedings have advanced to such an extent as to have vested mutual rights is, under the *New York* decisions, when the report of the commissioners has been confirmed; after such confirmation, therefore, the company cannot, of itself, abandon the proceedings and refuse to pay the award, the confirmation determining the rights of both parties, subject only to the right of review as to the amount of the appraisal.¹ This rule is the same as, or at least very similar to, that adopted in a few other jurisdictions,² including *Louisiana*,³ *Nebraska*,⁴ *New Hampshire*,⁵ *New Jersey*,⁶ and *Pennsylvania*.⁷

Contrary Rule.—Opposed to the New York rule is the contrary doctrine which obtains in the great majority of the states in this country.⁸ In these jurisdictions the test laid down is to inquire

application the court may impose terms upon the company. *Matter of South Market St.*, 76 Hun (N. Y.) 86; *New York, etc., R. Co. v. Thorne*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 190; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689.

1. *Matter of Rhinebeck, etc., R. Co.*, 67 N. Y. 242; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *Hawkins v. Rochester*, 1 Wend. (N. Y.) 53; *People v. Syracuse*, 78 N. Y. 56; *Schneider v. Rochester*, 90 Hun (N. Y.) 171.

In *Crowner v. Watertown, etc., R. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 457, the facts were these: The company deposited to the plaintiff's credit the amount of an award to him for damages for locating a portion of their road over his land, and recorded the order reciting the proceedings, as required by the General Railroad Act of 1850. The plaintiff appealed from this award and secured a second appraisal, with an increase of compensation, which the company refused to pay on the ground that subsequently to the original appraisal they had so changed their route that the plaintiff's land was no longer necessary for them. It was held that the company were liable for the increased compensation.

2. Note to *In re Jersey City Water Com'rs*, 31 N. J. L. 72, 86 Am. Dec. 204; note to *Matter of Rhinebeck, etc., R. Co.*, 67 N. Y. 242, 16 Am. Ry. Rep. 82.

3. *Mayor's Application, etc.*, 4 Rob. (La.) 357; *New Orleans Praying for Opening of Streets*, 20 La. Ann. 497.

4. *Drath v. Burlington, etc., R. Co.*, 15 Neb. 367, 20 Am. & Eng. R. Cas.

385; *Dietrichs v. Lincoln, etc., R. Co.*, 12 Neb. 225.

5. *Clough v. Unity*, 18 N. H. 75.

6. *In re Jersey City Water Com'rs*, 31 N. J. L. 72; *Jersey City v. Gardner*, 33 N. J. Eq. 622. Compare *Vanwickle v. Camden, etc., R., etc., Co.*, 14 N. J. L. 162.

7. *Levering v. Philadelphia, etc., R. Co.*, 8 W. & S. (Pa.) 459; *Davis v. North Pennsylvania R. Co.*, 2 Phila. (Pa.) 146; *Neal v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 19, affirming 2 Grant's Cas. (Pa.) 137; *Fischer v. Catawissa R. Co.*, 175 Pa. St. 554, where it was held that when the damages have been ascertained by a report and judgment thereon, the right of the landowner to such damages is completely settled, and he is entitled to execution.

In Kentucky.—The case of *Duncan v. Louisville*, 8 Bush (Ky.) 98, seems to follow the New York rule, but this case has been distinguished in the later Kentucky case of *Manion v. Louisville, etc., R. Co.*, 90 Ky. 491, 47 Am. & Eng. R. Cas. 107. See *infra*, p. 677, note 8.

8. Note to *Matter of Rhinebeck, etc., R. Co.*, 67 N. Y. 242, 16 Am. Ry. Rep. 82. Mr. Lewis, in his work on Eminent Domain (§ 656), says: "The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded."

whether the title to the land has vested in the condemning party, and a right to the damages in the landowner, and the discontinuance of the proceedings is permitted until the happening of that event, which does not occur prior to the actual payment or securing of the compensation in the manner required by law, or until the condemning party has entered into possession of the

This doctrine is the rule in the following jurisdictions:

Alabama.—Hendrick *v.* Johnson, 5 Port. (Ala.) 208; Hendricks *v.* Johnson, 6 Port. (Ala.) 472.

California.—Bensley *v.* Mountain Lake Water Co., 13 Cal. 306.

Colorado.—Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115.

Connecticut.—Carson *v.* Hartford, 48 Conn. 68; Stevens *v.* Danbury, 53 Conn. 9.

Illinois.—Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 23 Am. & Eng. R. Cas. 130; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 317; Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Chicago *v.* Barbican, 80 Ill. 482; Beveridge *v.* West Chicago Park Com'rs, 7 Ill. App. 460.

Iowa.—Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523; Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

Kansas.—St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Kansas City *v.* Kansas Pac. R. Co., 18 Kan. 331; Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514. In the last case, Brewer, J., in discussing this question, used the following language: "Until this question of compensation is settled, and payment made, the company can abandon the route selected and select another. The fact that it has instituted condemnation proceedings does not compel it to carry them to a close and pay the amount awarded."

Kentucky.—Cave *v.* Calmes, 3 A. K. Marsh. (Ky.) 36; Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 47 Am. & Eng. R. Cas. 107.

In the Manion case, Pryor, J., having cited with approval section 656 of Lewis on Eminent Domain, used the following language: "Such is the correct rule on the subject, and to adjudge otherwise would require the applicant, whether a private corporation, or a state, or municipality, to submit to the imposition of exorbitant values upon property condemned for public use,

and to often take possession or purchase that which would be detrimental instead of beneficial to the public interests."

In this case it will be noticed that Duncan *v.* Louisville, 8 Bush (Ky.) 98, was distinguished; in that case the city was compelled to take the property condemned under a statute regulating the manner in which the city could avoid liability, namely, by dismissing the petition before final judgment, and the city having failed to do so, it was held that it had elected to take the property. The learned editor of the American Decisions in the note to *In re* Jersey City Water Com'rs, 31 N. J. L. 72, 86 Am. Dec. 205, states the rule in Kentucky to be the same as the New York rule, citing only the case of Duncan *v.* Louisville, 8 Bush (Ky.) 98, and this notwithstanding the case of Cave *v.* Calmes, 3 A. K. Marsh. (Ky.) 36, which would seem not to bear out his position. At any rate such cannot be said to be the case since the decision in Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 47 Am. & Eng. R. Cas. 107, which directly approves the Cave case, and distinguishes the Duncan case.

Maine.—Curtis *v.* Portland, 60 Me. 55.

Maryland.—Baltimore *v.* Musgrave, 48 Md. 272; Black *v.* Baltimore, 50 Md. 235; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395.

Massachusetts.—Hunt *v.* Whitney, 4 Met. (Mass.) 603. Compare Pinkerton *v.* Boston, etc., R. Co., 109 Mass. 527.

Mississippi.—Williams *v.* New Orleans, etc., R. Co., 60 Miss. 689, 20 Am. & Eng. R. Cas. 378.

Missouri.—North Missouri R. Co. *v.* Lackland, 25 Mo. 515; Simpson *v.* Kansas City, 111 Mo. 237; Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105.

Ohio.—State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103; Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497.

Vermont.—Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

land.¹ In these jurisdictions the company may abandon the proceedings at any time before final judgment;² or after affirmance of the verdict in favor of the landowner;³ or after judgment assessing the damages,⁴ or even after appeal from the judgment.⁵

But the right to abandon is lost if the company have reduced the land to possession, and constructed the public improvements thereon,⁶ or if private rights have attached which would be

West Virginia.—Chesapeake, etc., R. Co. v. Bradford, 6 W. Va. 220.

Wisconsin.—State v. Mills, 29 Wis. 322.

1. *Colorado.*—Denver, etc., R. Co. v. Lamborn, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115.

Illinois.—Chicago, etc., R. Co. v. Hopkins, 90 Ill. 317; St. Louis, etc., R. Co. v. Teters, 68 Ill. 144; Peoria, etc., R. Co. v. Rice, 75 Ill. 329.

Iowa.—Burlington, etc., R. Co. v. Sater, 1 Iowa 421; Gear v. Dubuque, etc., R. Co., 20 Iowa 523.

Mississippi.—Williams v. New Orleans, etc., R. Co., 60 Miss. 689, 20 Am. & Eng. R. Cas. 378.

Missouri.—North Missouri R. Co. v. Lackland, 25 Mo. 515; Leisse v. St. Louis, etc., R. Co., 2 Mo. App. 105.

Ohio.—State v. Cincinnati, etc., R. Co., 17 Ohio St. 103; Dayton, etc., R. Co. v. Marshall, 11 Ohio St. 497.

In *Schreiber v. Chicago, etc., R. Co.*, 115 Ill. 340, 23 Am. & Eng. R. Cas. 130, it was held that until the selection by the company becomes binding, the owner may exercise all the rights of ownership not materially interfering with the condemnation proceedings, such as removing machinery and buildings from the premises sought to be condemned.

In *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39, the defendants located the route of their road across the plaintiff's land, and caused his damages to be appraised and the award of the commissioners to be made; afterwards, before paying or depositing the amount awarded, they altered the location of their road and thereby changed entirely the route across plaintiff's land. It was held that as there had been no payment or tender for the damages assessed, the company had no vested right to the land, and the landowner had none to the damages and could not recover from the company.

2. *North Missouri R. Co. v. Lackland*, 25 Mo. 515.

3. *State v. Cincinnati, etc., R. Co.*, 17 Ohio St. 103.

4. *St. Louis, etc., R. Co. v. Teters*, 68 Ill. 144; *Gear v. Dubuque, etc., R. Co.*, 20 Iowa 524.

As where the County Court has entered judgment assessing the damages under the *Kentucky* statute. The theory on which a company is permitted to abandon the proceedings after the County Court has entered judgment assessing damages against it under the Gen. Stat. Ky., c. 18 b., § 7, incurring no further liability than the costs of the proceedings, is based upon the fact that the owner has no cause of action for the damages awarded prior to the entry of the company on the premises, or before its acceptance in some manner by which the landowner is divested of the title. *Manion v. Louisville, etc., R. Co.*, 90 Ky. 491, 47 Am. & Eng. R. Cas. 107.

5. *Denver, etc., R. Co. v. Lamborn*, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115, where it is decided that upon the final determination of the proceedings in the trial court a review may be had in the Supreme Court, and the company is not precluded of its right to abandon upon obtaining such review; *Burlington, etc., R. Co. v. Sater*, 1 Iowa 421, where it is said that the company has the right to abandon the proposed route upon payment of full costs, and to dismiss the proceedings when the owner appeals to the District Court from the award of the sheriff's jury. See also *Curtis v. Portland*, 60 Me. 55; *Clarke v. Manchester*, 56 N. H. 502.

6. *Chicago v. Hayward*, 60 Ill. App. 582; *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126, 22 Am. & Eng. R. Cas. 106. In this case, where plaintiff's land had been condemned at the instance of one company and reduced to the company's possession, the money paid to the clerk, and a road constructed and operated thereon and afterwards sold to another company, it was held that the first company could

prejudiced by the abandonment,¹ such as rights acquired under contract between the parties.²

Rule as Affected by Peculiar Statutory Provisions.—There are a few cases which, by reason of certain peculiar statutory provisions obviously influencing the courts in their conclusions, cannot properly be considered as being either strictly within the New York rule, or classified as cases holding the contrary doctrine, though in effect some seem to follow one rule and some the other.³

not by motion discontinue the proceedings, such action being an interference with vested rights.

The land having once been taken, and the company, for any period of time, having taken possession of it, or having at any time perfected its liability to the owner for the damages awarded by the commissioners, no subsequent change of intention by the company can defeat the landowner's claim to damages awarded. *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39; *North Missouri R. Co. v. Lackland*, 25 Mo. 532; *Leisse v. St. Louis, etc., R. Co.*, 2 Mo. App. 105; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Blackshire v. Atchison, etc., R. Co.*, 13 Kan. 514; *Bellingham Bay, etc., R. Co. v. Strand* (Wash. 1896), 44 Pac. Rep. 140.

1. *Pinkerton v. Boston, etc., R. Co.*, 109 Mass. 527; *Crowner v. Watertown, etc., R. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 457.

Estoppel by Acquiescence in Width of Right of Way.—When the company acquiesces in the width of a right of way adopted in the report, with knowledge of it, then it is concluded. *Peoria, etc., R. Co. v. Bryant*, 57 Ill. 473.

2. In the case *Matter of Southern Boulevard R. Co.* (Supreme Ct.), 43 N. Y. St. Rep. 611, where a preliminary injunction, restraining the construction of the road, had been vacated upon a stipulation that the company should vigorously prosecute its condemnation proceedings, and the company had given an undertaking to indemnify the landowner, Van Brunt, P. J., used this language: "Without considering the question as to whether the petitioner may discontinue its proceeding as matter of right, it seems to be sufficient now to say that its discontinuance would certainly imperil the rights of the respondents under the undertaking which has been given, and would seem to be a violation of the stipulation which was given as a

condition of vacating the injunction referred to. It is no answer to this position to say that if that stipulation was violated the remedy for the respondents was the reinstatement of the injunction. The appellant has been pursuing these condemnation proceedings apparently in consequence of the giving of that stipulation, and the respondents have been relying upon its terms, and the protection which the undertaking gave to them. They, therefore, have a right to claim that these proceedings shall be continued in such a manner as will protect them in their undertaking, and also in a manner which conforms to the spirit of the injunction. They are to be vigorously prosecuted, which evidently means with the utmost diligence, and the discontinuance of these proceedings, and the commencement of new ones, would deprive the respondents of their rights under the undertaking, and would be a palpable violation of the spirit of the stipulation. It seems to us, therefore, that even if, under ordinary circumstances, the appellant might have an absolute right to discontinue, yet, the respondents having acquired rights which would thereby be imperiled, such absolute right was voluntarily relinquished by the appellant."

3. **Colorado.**—Under a statute providing that the petitioner may take possession pending condemnation proceedings, upon depositing the sum to be ascertained by the judge of the probate court, it has been held that the right to abandon is not affected by the company's taking possession of the land. *Denver, etc., R. Co. v. Lamborn*, 8 Colo. 380, 23 Am. & Eng. R. Cas. 115.

Kentucky.—*Duncan v. Louisville*, 8 Bush (Ky.) 98. See *supra*, p. 677, note 8, for observations on the rule of that case.

Minnesota.—Under Gen. Stat. 1878, c. 34, § 36, the judgment entered on

3. What Amounts to an Abandonment or Discontinuance—In General.—While it is true that in a majority of cases "the intention to abandon has been manifested by affirmative acts," yet what really constitutes an abandonment of the proceedings depends upon the

the verdict determines the right of a corporation to appropriate land in controversy upon payment of the amount adjudged to be due to the landowner, and the latter may recover the amount assessed as fixed by the judgment. Prior to the judgment the corporation may renounce the right to acquire the land, and may abandon the condemnation proceedings, but not thereafter. *Witt v. St. Paul, etc., R. Co.*, 35 Minn. 404.

Following *Witt v. St. Paul, etc., R. Co.*, 35 Minn. 404, the court, in *Wilcox v. St. Paul, etc., R. Co.*, 35 Minn. 439, denied the right of a corporation to abandon proceedings after verdict, after having taken possession of land. It should be noticed that in the *Witt* case the right to abandon was denied after judgment upon the verdict, while in the *Wilcox* case this right was denied after verdict and before entry of judgment; yet in the latter case the court based its ruling entirely upon the holding of the former case. It seems, however, that the denial of the right to abandon in these cases arose not so much with reference to the time when the company asked permission to exercise the right, but rather was based upon the fact that it had entered upon and was in possession of the land, and sought to abandon the proceedings without also giving up possession.

In *Curtis v. Saint Paul, etc., R. Co.*, 21 Minn. 497, where proceedings had been instituted under the General Statutes, tit. I., c. 34, and a bond given for taking an appeal, it was held that the statute authorized judgment to be entered on the verdict found, which judgment vested the right of the company to the property, and the right of the landowner to the compensation, to such an extent that the company could not be allowed exercise of option of either paying the compensation or wholly abandoning the proceedings. This was decided against the objection of the company claiming that the judgment was erroneously entered with respect to its form and character under the provisions of the above statute—

the court saying that if the company's contention were just, it would practically result "in giving the company power to evade the constitutional prohibition against taking private property for public use, without just compensation first paid or secured, and to take, hold, and enjoy the property of a citizen in defiance of his rights so long as it can successfully be kept in litigation, and without any redress except in an action of trespass for damages, after the termination of the proceedings and their abandonment by the company."

Missouri.—The original rule in Missouri, *North Missouri R. Co. v. Lackland*, 25 Mo. 515, has been changed somewhat by statute. In *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126, 22 Am. & Eng. R. Cas. 106, it was decided under the Gen. Stat. 1865, p. 352, § 3, that when commissioners have been appointed, have made their report, and their award has been paid to the clerk, mutual rights are vested in the parties which cannot be divested except by consent, unless the company shall elect to abandon the proposed appropriation of the land in the manner prescribed by the statute, which must be by an instrument of writing to that effect filed with the clerk within ten days from the return of the assessment.

Nebraska.—The Nebraska statute provides that the company may deposit the amount of the award in the probate court and enter into possession of the property. Either party may appeal to the District Court, and the District Court proceedings are required to be transmitted to the county clerk for record. Under this statute, in *Drath v. Burlington, etc., R. Co.*, 15 Neb. 367, 20 Am. & Eng. R. Cas. 385, it has been held, where the defendant had caused a certain lot in the city of Lincoln to be condemned for its use, the value of the same being fixed at three hundred dollars, and the plaintiff had appealed to the District Court, where the verdict was returned in her favor for eight hundred dollars, and judgment had been rendered thereon, that the company

circumstances of the particular case,¹ and is generally a question of fact for the jury.²

Failure to Pay Award and Take Possession.—Where land is condemned for public use, the condition of the order must be complied with within a reasonable time by payment of the damages and taking possession; in default of this, the proceedings will be regarded as abandoned.³

could not avoid the payment of the judgment by abandoning the proceedings and paying the costs thereof. Maxwell, J., said: "The company must act in good faith. It cannot be permitted to condemn real estate for its use, and, after the condemnation is complete, the certificate filed with the county clerk, and the amount of the award deposited with the county judge, an appeal taken to the District Court, and judgment rendered against it on such appeal, be permitted to abandon the proceedings. The power of eminent domain is placed in its hands to enable it to take such real estate as it may require, at its fair value. This, if the case is appealed to the District Court, is to be ascertained by the verdict of a jury, based upon the evidence; * * * but the court will not permit a railroad company to use the sovereign power of the state—that of eminent domain—as a means to enable it to obtain property at its own price, or, failing to do so, refuse to take it." Citing with approval *Dietrichs v. Lincoln, etc., R. Co.*, 12 Neb. 225.

Pennsylvania.—Under the Pennsylvania statute the right to damages vests upon the location of the road, and the proceedings cannot be abandoned even before their confirmation on the part of the company by a change of location. *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509.

Washington.—The rule in this state, as decided under the Condemnation Acts of 1888, approving the doctrine as laid down in *Curtis v. Saint Paul, etc., R. Co.*, 21 Minn. 497, is practically in line with the Minnesota rule. The plaintiff took possession, and, without offering to surrender it, moved to dismiss the proceedings, which motion was denied in the lower court, and the denial affirmed on appeal. *Bellingham Bay, etc., R. Co. v. Strand* (Wash. 1896), 44 Pac. Rep. 140, 3 Am. & Eng. R. Cas. (N. S.) 171.

1. *Lewis on Eminent Domain*, § 657.
A railroad through its entire extent

must be regarded as a unit; and while there is an intention to complete the work there can be no abandonment. *Central Iowa R. Co. v. Moulton, etc., R. Co.*, 57 Iowa 249, 10 Am. & Eng. R. Cas. 138.

2. *Delaware River, etc., R. Co. v. Rowland* (Pa. 1887), 9 Atl. Rep. 929, 30 Am. & Eng. R. Cas. 524; *Tennessee, etc., R. Co. v. Taylor*, 102 Ala. 224; *Muhle v. New York, etc., R. Co.*, 86 Tex. 459, reversing *Muhle v. New York, etc., R. Co.* (Tex. Civ. App. 1893), 23 S. W. Rep. 809.

3. *Chicago v. Barbican*, 80 Ill. 486, where it is held, in answer to the suggestion of evil that might result from having such a judgment suspended indefinitely over property, that it is sufficient to say that no such result need follow. Unless the condition should be complied with within a reasonable time, by the payment of the damages, and the taking possession of the property condemned, the proceedings would be regarded as abandoned, and a court of equity would, if need be, stay by injunction any attempt to proceed under them.

Evidence of Abandonment—Nonuser.

—The mere averment in a bill to set aside condemnation proceedings that petitioners are in the actual possession of the land, and that the railroad company has never taken possession of or used the land, together with a small amount of corresponding evidence, does not properly bring before the court the question whether or not the company has lost title to the land by abandonment or nonuser. *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333.

Temporary Nonuser, or Use of Different Character.—Where land has been condemned for one purpose it cannot be appropriated to a different use; but a temporary use of a different character, or a failure to use it, will not forfeit the right acquired by condemnation, where there exists a definite intention to use the land for legitimate purposes

Constructing Road over Other Lands.—Where a railroad company fails either to pay or to secure the amount of damages awarded for a right of way, and constructs its road over other lands, this is conclusive evidence of abandonment.¹

Other Acts.—The foregoing are the principal acts and defaults from which an abandonment has been inferred. Other acts or omissions construed to mean an abandonment are given in the notes.²

at a fixed time in the future. *Muhle v. New York, etc., R. Co.*, 86 Tex. 459, 57 Am. & Eng. R. Cas. 591.

Failure to Pay within Four Years.—Thus a failure to pay or deposit the amount of damages assessed within four years from the date of the assessment has been held to be a failure to pay within a reasonable time, and to amount to a discontinuance of the proceedings. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 316.

Failure to Pay within One Year.—So a failure to pay to the owner of the land sought to be taken, either directly or constructively, the amount of the award within one year after the award became final, may constitute an abandonment of the proceedings. *Bartleson v. Minneapolis*, 33 Minn. 468, where proceedings for condemnation of land were instituted under section 4, chapter 10, of the charter of the city of Minneapolis, regulating the taking of private property for public use, and where the council neither caused the amount of the award to an owner to be paid to him, nor set it apart in the treasury for the owner, within one year after the award became final, it was held that the proceedings to appropriate the property were *ipso facto* abandoned.

1. Abandonment need Not Appear of Record.—In *State v. Cincinnati, etc., R. Co.*, 17 Ohio St. 108, before confirmation of the verdict the company gave notice, upon the record of the probate court, that they abandoned the proposed appropriation of the lands and would not exercise their right to pay the amount. The court entered a confirmation of the verdict, but refused to enter a judgment against the company for the amount of such verdict and an order that the company should pay the amount to the relators. The company had never taken possession of the land, and never entered upon it, except to make the preliminary survey, and, in accordance with

the notice given at the time the confirmation of the verdict was urged, abandoned the idea of taking that land, going elsewhere and actually locating and building their road on other grounds. They had always refused, and still refused, to enter upon and take possession of the land of the relators once sought to be appropriated, or to pay for the same. On this state of case the court was of the opinion that though there was no express abandonment of the claim to appropriate a right of way entered of record in the proceeding in the probate court, the fact that the corporation had constructed its road upon another line, not touching the lands of the relators, was conclusive evidence of such abandonment.

In like manner it is true that an abandonment of a right of way once taken possession of and occupied by virtue of condemnation proceedings and afterwards abandoned is usually and properly shown by acts which do not appear of record, for it is not necessary that an abandonment should appear of record in order to make it effectual. *Westcott v. New York, etc., R. Co.*, 152 Mass. 465.

2. Withdrawal of Deposit.—Where a company condemns private property to public use and deposits the condemnation money with the county judge of the proper county, in accordance with law, and takes possession of the condemned land, the subsequent withdrawal of the deposit from the county judge, for the reason that the proceedings were illegal, will be an abandonment of all right to claim the possession of the real estate under such proceedings. *Hull v. Chicago, etc., R. Co.*, 21 Neb. 372, Cobb, J., dissenting.

Failure to File Final Order Establishing Road.—Where, after the filing of the final order establishing a road by the highway commissioners with the town clerk, an appeal was taken to three supervisors of the county, and

they met and signed and left with a justice of the peace what purported to be a final order establishing the road, and he filed the same in his office, the failure on the part of the supervisors to file within ten days a final order establishing the road, with the town clerk, as required by statute, operates as an abandonment. *Breese v. Poole*, 16 Ill. App. 551; *Town v. Blackberry*, 29 Ill. 137; *Allison v. Highway Com'rs*, 54 Ill. 170; *Highway Com'rs v. Barry*, 66 Ill. 499.

Failure for Two Years to File a Remanding Order reversing a judgment confirming a special assessment does not, under section 84 of the Practice Act, constitute an abandonment of the condemnation, but only of the previous assessment; and the right to levy another assessment for the street extension survives without a new ordinance. *Philadelphia, etc., Coal, etc., Co. v. Chicago*, 158 Ill. 9.

Leasing Line to Another Company.—Where, after the commencement of proceedings by a railroad company to acquire title to lands, it leases its road to another company for a long term of years, the lease does not *per se* operate to abrogate the proceedings; the land sought to be condemned may be as necessary for the purposes of the corporation instituting the proceedings after as before the lease. *Kip v. New York, etc., R. Co.*, 67 N. Y. 227, 15 Am. Ry. Rep. 99.

Transferring Right of Way.—In *Crolley v. Minneapolis, etc., R. Co.*, 30 Minn. 541, 14 Am. & Eng. R. Cas. 47, the Minneapolis & N. R. Co., authorized to construct its road between two points, condemned, paid for, and took for its right of way, certain land, and afterwards, without constructing its road, transferred the right of way to the Minneapolis & St. L. R. Co., a corporation authorized to construct, maintain, and operate a road between the same two points. The latter company constructed and thereafter maintained and operated its road over the right of way so transferred to it. It was held that such transfer was not equivalent to an abandonment of the use of the right of way, though not expressly authorized by the statute, and that the landowner, whose interests were not affected by the transfer, could not call in question the right of one company to make and the other to receive the transfer.

In *Kansas City, etc., R. Co. v. Kansas City, etc., R. Co.*, 129 Mo. 62, it was held that the company had not abandoned the right of way so as to compel it to resort to new condemnation proceedings, where it appeared that the company against whom the abandonment was charged had obtained, by conveyance, the right of way from a grantor company in 1873, had surveyed and filed a profile line of a proposed railroad after having obtained a conveyance from the landowner and had constructed its roadbed and established its grade; that in 1881 the work was renewed and continued by the plaintiff until the bringing of the suit, and that plaintiff's right had never been questioned by the original grantor of the right of way, or by any subsequent owner of the land.

Rejection of Motion to Accept Land at a Certain Valuation.—The vote cast at a meeting of the board of freeholders, rejecting a motion to accept certain lands at a valuation reported by commissioners appointed under a special statute for that purpose, was held to have constituted an abandonment of the condemnation proceedings to such extent as to exhaust the power given under the act authorizing the condemnation. *O'Neill v. Chosen Freeholders*, 41 N. J. L. 173.

In *Mabon v. Halsted*, 39 N. J. L. 644, affirmed in 41 N. J. L. 173, *Dixon, J.*, in discussing this question, said: "The refusal of the board * * * to accept the purchase of the lands as condemned was, I think, substantially an election not to pursue the right of condemnation; or, at least, was a declaration that, unless the terms were modified, the purchase would not be completed; and when the power of legal modification was gone, through the expiration of the time to appeal, that declaration became an absolute and final refusal—a conclusive abandonment of the right to take under the proceedings that had been instituted."

Nonuser during Pendency of Proceedings.—A railroad company seeking to condemn land is entitled to a reasonable time in which to mature its plans. During the pendency of legal proceedings relating to the appropriation of the land the company cannot be expected to do anything. Therefore, until all question as to the title is at rest, and a reasonable time has elapsed, the company cannot be said to have

4. Effect of Abandonment¹—*a.* IN GENERAL—Distinguished from Nonsuit.—The abandonment or discontinuance of a proceeding to condemn land differs widely from a voluntary nonsuit in a civil action.²

Leaves Parties in Statu Quo.—The general result of an abandonment of condemnation proceedings, at the proper time, is to leave the parties in *statu quo*.³

b. SUBSEQUENT RIGHTS OF COMPANY—Cannot Retain Possession of the Land.—Having taken possession of land sought to be condemned, the company cannot, after verdict, abandon its condemnation proceedings and still retain possession of the property.⁴

abandoned the property by reason of nonuser. *Ross v. Pennsylvania R. Co.*, 17 Phila. (Pa.) 339, *affirmed*, 2 Cent. Rep. 314; *Kansas City, etc., R. Co. v. Kansas City, etc., R. Co.*, 129 Mo. 62.

Nonuser of Portion Held for Future Use.—A railroad company has a right in condemning land to regard and make provisions for its future as well as its present needs, and nonuser of a portion of the land for certain purposes cannot be held to be an abandonment. *Pittsburgh, etc., R. Co. v. Peet*, 152 Pa. St. 488.

Burden of Proof to Explain Nonuser.—Where property has been condemned for a special use by a railroad corporation, and has never been appropriated to such use, and where there are circumstances which tend to show that the intention to use it for the special purpose has been permanently abandoned, it devolves upon the corporation to explain the nonuser and to show that the abandonment is temporary, if in fact it be not permanent. The question whether the nonuser is temporary or permanent is for the jury to determine, and the owner is not obliged to show fee-simple title in order to recover possession. *Muhle v. New York, etc., R. Co.*, 86 Tex. 459, 57 Am. & Eng. R. Cas. 591.

1. This discussion, it should be observed, is confined to the effect of the discontinuance of condemnation proceedings, and will not touch upon the effect of the abandonment of property acquired or rights secured in the exercise of the right of eminent domain, when such abandonment has taken place subsequent to the consummation of the condemnation proceedings proper.

2. *Denver, etc., R. Co. v. Lamborn*,

8 Colo. 380, 23 Am. & Eng. R. Cas. 115, where the holding is to the effect that condemnation proceedings undertaken by a railroad company are special statutory proceedings, differing from ordinary civil actions, and governed by entirely dissimilar rules of pleading and practice, so that in no sense can an abandonment of condemnation proceedings be considered analogous to a nonsuit.

3. *Dayton, etc., R. Co. v. Marshall*, 11 Ohio St. 497; *State v. Cincinnati, etc., R. Co.*, 17 Ohio St. 103; *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Matter of Syracuse, etc., R. Co.*, 4 Hun (N. Y.) 311; *Rensselaer, etc., R. Co. v. Davis*, 55 N. Y. 145; *Neal v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 19; *State v. Hug*, 44 Mo. 116.

Right to Remove Improvements.—In case of the abandonment by a railroad of its purpose of completing its road, the fact that the landowner has been allowed to take possession of the land embraced in the right of way, and hold it for a term of years less than is required to extinguish the easement, does not of itself imply a relinquishment on the part of the railroad company of its right to enter and remove bridge piers erected thereon. *Wagner v. Cleveland, etc., R. Co.*, 22 Ohio St. 563.

4. *Wilcox v. St. Paul, etc., R. Co.*, 35 Minn. 439; *Witt v. St. Paul, etc., R. Co.*, 35 Minn. 404.

After abandonment all the company's interest in the land ceases, the abandonment having the effect of re-investing whatever title had been acquired by the company in the original owner. *Hastings v. Burlington, etc., R. Co.*, 38 Iowa 316; *Skillman v. Chicago, etc., R. Co.*, 78 Iowa 404; *Heard v. Brooklyn*, 60 N. Y. 242.

When Deemed a Trespasser *ab Initio*.—Where, pending proceedings for condemnation, the company has taken possession of the property, and thereafter abandons such proceedings, the possession so taken becomes a trespass *ab initio*, and damages may be recovered for any injury occasioned by the entry and possession.¹

Right to Select Another Route or Recondemn.—After having exercised its discretion in abandoning a proposed route, and dismissing the proceedings for its condemnation prior to their final consummation, a railroad company may select another route,² or it may even institute subsequent proceedings to condemn the same land,³ by commencing a condemnation *de novo*.⁴

Right to Withdraw Deposit or Recover Back Money Paid.—The abandonment of the proceedings gives the condemning party no claim to the damages which may have been awarded and paid to the sheriff.⁵ Where money has been paid into court for the value of

1. *Hullin v. New Orleans*, 11 Rob. (La.) 97. The right of a railroad company, under Ind. Rev. Stat. 1881, § 3907, to enter upon lands and remain in possession during the pendency of proceedings by it to condemn lands to public use is a license which is lost by its subsequent dismissal of the proceedings during the pendency of an appeal therein, and thereupon it becomes a trespasser *ab initio*. *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586.

When Estopped.—It has been held that the discontinuance of condemnation proceedings, coupled with the acceptance of a lease of the land from the owner, estopped the company from repudiating the lease and falling back upon its charter, and the proceedings instituted thereunder. *Green v. Missouri Pac. R. Co.*, 82 Mo. 653, the court basing its decision upon the ground that the discontinuance of the proceedings, and the acceptance of the lease, established between the company and the landowner the relation of tenant and landlord to such an extent that it created an estoppel.

2. *Chicago, etc., R. Co. v. Gates*, 120 Ill. 86, 30 Am. & Eng. R. Cas. 268.

3. *Corbin v. Cedar Rapids, etc., R. Co.*, 66 Iowa 73.

4. *State v. Cincinnati, etc., R. Co.*, 17 Ohio St. 103, holding in effect that where a railroad company has exercised its right of abandoning a claim to a right of way, it cannot thereafter acquire such right of way except by the commencement of new proceedings.

In *Cincinnati Southern R. Co. v. Haas*, 42 Ohio St. 239, under proceedings authorizing municipal corporations to appropriate private property (Ohio Rev. Stat., §§ 2232 to 2261), the failure of the corporation to pay for and take possession of the same within six months after the assessment of compensation shall have been made was held no bar to a new proceeding under the statute by the same corporation, after the expiration of the six months for the appropriation of the same property for the same public use (Ohio Rev. Stat., § 2260).

But where the right to abandon proceedings did not exist, as where the proceedings had so far advanced as to assume the nature of a binding adjudication, there could be no subsequent proceedings for the same purpose in order to procure a smaller award—good faith being the essence of subsequent proceedings for condemnation. *Hupert v. Anderson*, 35 Iowa 578.

In *Rogers v. St. Charles*, 3 Mo. App. 41, land was condemned for widening a street, and it was held that the first award fixed the value of the property, and unless there was a *bona fide* abandonment of the purpose of widening the street, no subsequent proceedings could be had to condemn the property for the same use in order to take the chances of a verdict of another jury.

5. Thus, where, prior to the abandonment, proceedings had been instituted to recover compensation for land taken, and, in pursuance of a valid order of condemnation, money had been

the land, the court will not, upon an *ex parte* motion, order it returned to the condemning party upon its abandoning the appropriation.¹

c. LANDHOLDER'S RIGHT TO DAMAGES.—When Company Liable in Damages.—Whether the condemning party is liable in damages when it sees fit to abandon the proceedings has not been clearly settled, the few cases touching on this question either being in conflict, or so affected by the circumstances surrounding each case that a fixed rule cannot be laid down. It seems, however, that upon a *bona fide* discontinuance, at a time and under circumstances warranting it, there can be no recovery, the landholder suffering merely *damnum absque injuria*.² But where the condemning party

actually paid by the company into the hands of the sheriff, it was held that the company had no right to recover back the sum so paid. *Hastings v. Burlington, etc., R. Co.*, 38 Iowa 316.

In *Brattleboro First Nat. Bank v. West River R. Co.*, 49 Vt. 167, the facts were these: A company commenced condemnation proceedings and deposited the damages with defendant bank. Third parties enjoined the company from proceeding with its work, on the ground that it had no right to construct its road over the projected route, and a preliminary injunction was awarded, whereupon the company abandoned the construction of the road over that route. The landowner filed a bill against the company and the bank to obtain the amount of the deposit, and the answer of both admitted the granting of the injunction on the grounds stated, that it had not been dissolved, and that the company had abandoned the route with no intention of resuming work thereon. The court decided that the evidence sufficiently established the fact that the company had no right to build its road over the plaintiff's land, and that its proceeding to condemn was therefore void, and left the right to the money deposited in the company, holding in effect that, notwithstanding the fact that a company has deposited the damages, its right to take and hold the land for the purpose of its road, and the right of the landowner to the money, are correlative and coincident, and vest simultaneously in the respective parties; and that no voluntary abandonment of the right to take and use the lands when once fully acquired will divest the landowner of the right to the money which has once vested in him. If the

company in such case, by the proceedings and deposit of the money, acquired no right to construct and maintain its road over the lands, then the landowner acquired no right to the money deposited, as these rights co-exist if either exists. To the same effect is *Ligare v. Chicago, etc., R. Co.*, 160 Ill. 530.

Compare *In re Ruthin, etc., R. Act*, 32 Ch. Div. 438, 27 Am. & Eng. R. Cas. 434, for a discussion as to the rights of the landowner in the parliamentary deposit upon the abandonment of the road by the company. See also *Reynolds v. Louisiana, etc., R. Co.*, 59 Ark. 171.

Owner Cannot Demand to be Paid Twice.—In *Chicago, etc., R. Co. v. Bean*, 69 Iowa 257, being a case where a right of way had been regularly condemned and the award paid to the sheriff, though the owner neither appealed nor took the award, and the company failed to use the right of way for such a time as to incur a forfeiture under the Iowa Code, §§ 1260, 1261, as amended, but afterwards built its road thereon, it was held that the owner could not maintain proceedings under the statute for a second award—for the reason that the first award was still in the hands of the sheriff for the benefit of the owner, and the statute plainly provided that, notwithstanding an abandonment, he should not be entitled to be paid twice for a right of way.

1. *In re Ontario, etc., R. Union Co.*, 4 Grant's Ch. (U. C.) 101.

2. *Damnum Absque Injuria*.—Where condemnation proceedings are discontinued in good faith prior to their consummation, such discontinuance gives no cause of action to the landowner, as the injury sustained must be regarded as *damnum absque injuria*. *Mallard*

abandons the proceedings in bad faith,¹ or at a time when it had no right to do so,² or after the landholder has been materially inconvenienced and his interests prejudiced, the condemning party should respond in damages at least to the extent of putting him in as good a position as that in which it found him.³

v. Lafayette, 5 La. Ann. 112; *Feiten v. Milwaukee*, 47 Wis. 494. Compare *Stewart v. County*, 2 Pa. St. 340.

In *Feiten v. Milwaukee*, 47 Wis. 494, it was held that where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover only damages resulting to him from wrongful acts done by the corporation in the course of such proceeding. And in the *Feiten* case the case of *Van Valkenburgh v. Milwaukee*, 43 Wis. 574, was commented upon and distinguished, the court saying that in *Van Valkenburgh v. Milwaukee*, 43 Wis. 574, "the city had condemned the plaintiff's land for the purposes of a public park, had taken possession thereof, and had done various acts thereon injurious to the freehold. Afterwards the legislature authorized the city to abandon the condemnation proceedings, and it abandoned them. It was held that the plaintiff could recover damages for such injuries, and for the loss of possession. When the city abandoned those proceedings and restored the land it had actually taken to the owner, the plainest principles of justice required that it should compensate him for the injuries which it had done to his possession and freehold. This case is essentially different, and demands the application of a very different principle. It is only the ordinary case of incipient proceedings to condemn property to the public use abandoned before consummation; and in all such cases, if the city does not exceed its lawful authority, to the injury of the owner, pending the proceedings, it cannot be held liable for damages which the owner may incidentally sustain by reason of the proceedings. Such is the tenure by which all property subject to be taken for public use is held."

A company having abandoned condemnation proceedings after award made, the landowner acquires no right whatever to compensation, having lost no rights or property thereby. *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395.

Abandonment in Part.—Where a railroad company had constructed a road, then abandoned it in part, and changed the location *pro tanto*, a plaintiff, through whose land the road originally passed, having sustained no damage or injury in fact by the alteration, cannot maintain an action for such change of location. *Baltimore, etc., R. Co. v. Compton*, 2 Gill (Md.) 20.

Damages on Appeal.—Upon the abandonment of land condemned for use as a right of way, the company loses all interest in the land, and the abandonment is a good defense to any claim for additional damages upon an appeal from the award under *ad quod damnum*. *Hastings v. Burlington, etc., R. Co.*, 38 Iowa 316.

1. *Rogers v. St. Charles*, 3 Mo. App. 41.

2. *Hupert v. Anderson*, 35 Iowa 578.

3. **Loss to Landowner.**—After a railroad company had constructed their road by authority of law through the plaintiff's land, condemned for that object, they were authorized to alter the location of their road between two given points. They reconstructed their road, and abandoned that part which had been made through the plaintiff's land. It was held that the authority derived from the legislature to alter the location did not exempt the company from liability to plaintiff for the loss sustained by him by reason of such abandonment. *Baltimore, etc., R. Co. v. Compton*, 2 Gill (Md.) 20.

Interference with Business.—Where the plaintiff's business of burning lime was greatly interfered with by reason of the defendant's proceedings to condemn a right of way over his premises, which proceedings were continued, after assessment of damages, for nearly two years, and then dismissed, he may recover damages for such interference. *Lohse v. Missouri Pac. R. Co.*, 44 Mo. App. 645.

Price Unsatisfactory.—A company having abandoned condemnation proceedings, after the value of the property was ascertained by inquest, for the reason that the price assessed is

For Unreasonable Delay.—Under the decisions of the courts of *Connecticut* and *Maryland*, where the landholder has suffered any peculiar loss consequent upon inexcusable and unreasonable delay in deciding to discontinue the proceedings, he may recover the damages thus occasioned.¹

After Entry upon Land under Bond.—Where a bond is given under the statute to obtain immediate possession during an appeal, the condemning party going into possession and doing work on the land, and the right of way is abandoned after the judgment is affirmed, the condemning party is liable to the landholder for all damages that may have been committed in taking and holding possession.² Nor will the temporary abandonment of a right of way taken possession of under such conditions defeat the right of the landholder to recovery of damages.³

unsatisfactory, is answerable to the owner for all damages occasioned by the proceedings. *Leisse v. St. Louis, etc., R. Co.*, 72 Mo. 561, *affirming* 2 Mo. App. 105.

Conditional Abandonment.—The owner of land included in the location of a railroad company petitioned for an assessment of damages. The company afterwards filed an abandonment of so much of the location as included the petitioner's land, and tendered him a deed releasing his land. Both the abandonment and deed contained a condition that they should respectively be void if the company could not make them without affecting their right to other lands taken under the location. The court held that the abandonment and tender were not a bar to the petition on the part of the landowner. *Pinkerton v. Boston, etc., R. Co.*, 109 Mass. 527.

1. *Carson v. Hartford*, 48 Conn. 68; *Stevens v. Danbury*, 53 Conn. 9; *Norris v. Baltimore*, 44 Md. 598; *Graff v. Baltimore*, 10 Md. 544. The recovery, however, in such cases is allowed, not for the abandonment itself, but is sanctioned and based upon the unreasonableness of the delay in abandoning the proceedings. *Baltimore v. Musgrave*, 48 Md. 272; *Black v. Baltimore*, 50 Md. 235, 56 Md. 333.

Question for Jury.—Whether there has been an unreasonable delay, and as such inexcusable, on the part of the company in abandoning the proceedings is a question which should be left to the jury to decide. *Black v. Baltimore*, 50 Md. 235, 56 Md. 333.

2. *Centralia, etc., R. Co. v. Henry*, 31 Ill. App. 456.

In *Nihan v. St. Catherines, etc., R. Co.*, 16 Ont. Rep. 459, the facts were these: The defendants, who were originally incorporated under an Ontario act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by the county judge, and possession was taken by them. Subsequently the act 51 Vict., c. 78 (D.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, except where inconsistent with the Ontario act, but ratifying all acts already done in that regard. Afterwards the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only. It was held that the notice of desistment served avoided the original bond, and the defendants should then have given security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Act, and unless they did so the plaintiff was entitled to an injunction restraining the defendants from using the land.

3. *Centralia, etc., R. Co. v. Henry*, 31 Ill. App. 456.

Notwithstanding Reinstitution of the Proceedings.—When the proceedings are dismissed, notwithstanding they may have been reinstituted, the party instituting them will be liable for damages occasioned by the first proceeding, unless such damages were adjudicated in the second; and whether they were so adjudicated is a question for the jury.¹

Rule as Affected by Special Statutory Provisions.—Where a statute provides that the owner shall be indemnified against trouble and expense, as well as for damage to his property on account of the abandonment, relief must be sought in a separate suit upon the indemnity, and cannot arise out of the condemnation proceeding proper.²

What Damages Recoverable Include.—Where the condemning party, with the permission of the court, dismisses proceedings and causes the dismissal to be entered on record, the plaintiff landholder cannot maintain an action to recover for his labor, loss of time, and expenses in conducting and attending to the proceedings on his part.³

1. *Gibbons v. Missouri Pac. R. Co.*, 40 Mo. App. 146.

Rights of Owner of Leased Land.—The *Michigan* general railroad law permits a railroad company to begin new proceedings for the condemnation of land where proceedings already taken have failed. It was held that where the land is meanwhile occupied by a tenant, the landlord's right of action against the company for injury done to the premises under the void proceedings goes with the land and attaches only to his reversionary interest, and it is condemned and appropriated therewith and disappears when subsequent valid proceedings are taken and compensation made. *Dunlap v. Toledo, etc., R. Co.*, 50 Mich. 470, 10 Am. & Eng. R. Cas. 185.

2. *Minneapolis, etc., R. Co. v. Woodworth*, 32 Minn. 452.

Illustrations.—A city having passed an order to take land for a street, the owner petitioned for a jury to assess damages for taking the land, but before the case was submitted to a jury the order became void, under the Mass. Stat. of 1862, by reason of the lapse of two years from its date without possession having been taken of the land for the construction of the street or damages awarded. It was held that the landowner could not recover under this petition the indemnity allowed by the Mass. Gen. Stat., c. 43, § 14, for trouble and expense occasioned by proceedings to take land in cases where no entry is

made thereon. *Drury v. Boston*, 101 Mass. 439.

Under the Mass. Gen. Stat., c. 43, § 73, a street was laid out by order of the city council of a city on September 27, 1871, but no possession was taken of any portion of the land over which the street was laid out within two years thereafter. In November, 1873, one whose land had been taken for the laying out petitioned the mayor and board of aldermen for indemnity, and the petition was referred in December, 1873, by the city council, to the next city government, which took no action upon it. In June, 1874, he filed another like petition, which was acted upon in December, 1874, and the indemnity refused. In April, 1875, he petitioned for a jury to assess the indemnity. In such a case the petition for a jury was seasonably filed. *Whitney v. Lynn*, 122 Mass. 338.

3. **Labor, Loss of Time, etc.**—In *Bergman v. St. Paul, etc., R. Co.*, 21 Minn. 533, which case was decided under the provisions of Minn. Gen. Stat., c. 34, the defendant instituted proceedings to condemn plaintiff's land, and both parties appealed from the award to the District Court. During the trial term, with the permission of the court, the defendant, plaintiff objecting, dismissed the proceedings for condemnation and entered a dismissal of record. All the proceedings, including the appeals, were duly had as provided by law. It was held that the plaintiff,

What may be Considered in Reduction of Damages.—The abandonment of its location and the tendering of a deed to the landholder by a railroad company, where it has already located its route, and proceedings have been instituted to assess the damages sustained in consequence of such location, may go in reduction of the damages, even though it does not actually exempt the company from liability.¹

d. RESTITUTION TO LANDHOLDER—Writ of Restitution.—A landholder is not entitled to a writ of restitution of land held by a railroad company for its right of way, after proceedings have been dismissed, where the company was not in possession by virtue of any process of the court, but under a deed from third parties.²

5. Costs on Discontinuance—Costs and Expenses.—In some jurisdictions it seems that upon the abandonment of condemnation proceedings before judgment the court may impose equitable terms, such as the payment of costs and the expenses incurred on the part of the owner;³ while in some states only legal costs can be allowed, and no other conditions can be imposed.⁴

the landowner, could not, upon this state of facts, maintain an action to recover for his labor, loss of time, and expenses in conducting and attending the proceedings on his part.

Only Damages Resulting from Unlawful Acts.—Where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover only damages resulting to him from wrongful acts done by the corporation in the course of such proceedings. *Feiten v. Milwaukee*, 47 Wis. 494.

Landowner Prevented from Making Improvements.—In *Stewart v. County*, 2 Pa. St. 340, where, under proceedings to open a street, the report of the viewers was confirmed, but the commissioners refused to pay except in a certain manner which the landowner refused to accept, the court held that, while it was true that the proceedings would not be vacated by the lapse of time until the expiration of a year, in case the public did not exercise its right to take the land thereunder, the landowner could not recover any damages occasioned by his being prevented by the uncertainty of the event from making improvements upon the land, this being an inconvenience for which the legislature did not intend to compensate.

1. So held where a company subsequently filed an abandonment of the condemned land and tendered a deed to the owner thereof, the abandonment

and the deed each containing a clause to the effect that each respectively should be void unless it should appear that the company could make them without prejudice to their claim to other land included in the same condemnation and location. *Pinkerton v. Boston*, etc., R. Co., 109 Mass. 527.

2. *Durham*, etc., R. Co. v. *North Carolina R. Co.*, 108 N. Car. 304.

3. *New York*, etc., R. Co. v. *Thorne*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 190; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *In re Jersey City Water Com'rs*, 31 N. J. L. 72; *Clarke v. Manchester*, 56 N. H. 502; *Stevens v. Duck River Nav. Co.*, 1 Sneed (Tenn.) 237.

4. *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Graff v. Baltimore*, 10 Md. 544.

In *Gear v. Dubuque*, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550, the company, upon abandoning condemnation proceedings, was held liable for costs and for any other expense incurred or work done at the instance of the company upon faith of its acceptance of the route and assessment.

In *Manion v. Louisville*, etc., R. Co., 90 Ky. 491, 47 Am. & Eng. R. Cas. 107, it was held that a company, having exercised its discretion of abandoning its purpose of taking property under the right of eminent domain where the county court has entered judgment, assessing damages against it under the Gen. Stat. Ky., c. 18b, § 7, was

Counsel Fees.—The costs and expenses recoverable include the counsel fees expended on the part of the landholder, the necessity of such expense having arisen by reason of the institution of the proceedings.¹

XVIII. REMEDIES OF THE LANDOWNER—1. In General—*a*. ELECTION OF REMEDIES.—A landowner loses none of his rights by permitting a railway company to take possession of his land without grant or condemnation.² The company, in such a case, is a trespasser, and the owner may maintain trespass or ejectment, or enjoin the construction of the road until compensation is ascertained and paid.³ Or he may sue for the value of the land

liable for the cost of the proceedings only.

In *North Missouri R. Co. v. Reynal*, 25 Mo. 534, and *North Missouri R. Co. v. Lackland*, 25 Mo. 515, it was decided that where a company exercises its right of dismissing condemnation proceedings before the judgment of the court upon the report of the viewers or commissioner is rendered, the company should pay the costs and expenses growing out of the suit.

In *New York*, where a company exercises its right of abandonment of condemnation proceedings, the court has power under the General Railroad Act to authorize the awarding of costs in proceedings against the company (*Matter of Syracuse, etc., R. Co.*, 4 Hun (N. Y.) 311, following *Rensselaer, etc., R. Co. v. Davis*, 55 N. Y. 145); and where a company moves to discontinue condemnation proceedings after a report of the commissioners and before confirmation, the court may grant the motion in its discretion on such terms as justice and fairness to the parties may require, such as the imposition of costs upon the company. *New York, etc., R. Co. v. Thorne*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 190.

Cannot Tax Costs for Unnecessary Witnesses.—In *Peoria, etc., R. Co. v. Bryant*, 15 Ill. 438, the court held that where proceedings are appealed to the Circuit Court, and there dismissed by the company, it is error to tax against the company costs for more than four witnesses, unless the court certify as provided by statute that a greater number were necessary.

1. *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *North Missouri R. Co. v. Reynal*, 25 Mo. 534; *Rensselaer, etc., R. Co. v. Davis*, 55 N. Y. 145; *Williams v. New Orleans, etc., R. Co.*,

60 Miss. 689, 20 Am. & Eng. R. Cas. 378; *Whitney v. Lynn*, 122 Mass. 338.

In *Whitney v. Lynn*, 122 Mass. 338, the words "trouble and expense," as used in the Mass. Gen. Stat., c. 43, § 14, allowing "full indemnity therefor" to the landowner where condemnation proceedings have been commenced against him, even though his land has not been entered upon, were held to include his trouble and expense in visiting the city where his land was situated, in consulting counsel, and in conferring with the mayor of the city in reference to the matter.

In *Gibbons v. Missouri Pac. R. Co.*, 40 Mo. App. 146, it was held that an attorney's fee in the first condemnation proceedings is a proper element of damages where the proceedings were dismissed and reinstituted and not readjudged in the second proceeding, provided the attorney's fee is a reasonable one.

But where the proceedings for the condemnation of land belonging to cotenants who, in resisting the proceedings, employed different counsel who severally attended to the management of the case, have been abandoned, it was held that it was error to permit them to sue jointly to recover damages for counsel fees. *Leisse v. St. Louis, etc., R. Co.*, 72 Mo. 561.

2. *Illinois Cent. R. Co. v. Indiana, etc., R. Co.*, 85 Ill. 211.

3. *Jones v. New Orleans, etc., R. Co.*, 70 Ala. 227, 14 Am. & Eng. R. Cas. 217; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538.

Special Proceedings in Ohio.—The owner of land unlawfully appropriated by a railroad having power to appropriate land may recover compensation and damages, by special proceedings, under Ohio Rev. Stat., §§ 6448-6450, or the land itself, as in other cases of

taken,¹ and damages for the injury inflicted by the taking.² In one case it is held that he may recover possession in an action of forcible entry and detainer.³ He is not bound to resort to mandamus to compel the company to have the land condemned,⁴ but may waive such proceedings, and elect to regard the act of the company as done under the right of eminent domain, and recover a just compensation.⁵

b. STATUTORY REMEDY—WHEN EXCLUSIVE—In General.—The statutory remedy given to landowners for land taken for public use is, in general, exclusive of all other remedies, and not merely cumulative.⁶ The act of the condemning party, being authorized

unlawful entry. *Atlantic, etc., R. Co. v. Robbins*, 35 Ohio St. 531, *reconciled* in *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309, 17 Am. & Eng. R. Cas. 200.

Waiver of Remedies by Owner.—If the owner of lands, by express or tacit consent, permits a railroad company to enter thereon, construct its roadbed and track, and occupy the same for the purposes of a railroad, he thereby waives his remedy by injunction or action for the trespass, and is relegated to proceedings to have his compensation and damages assessed. *Milwaukee, etc., R. Co. v. Strange*, 63 Wis. 178, 20 Am. & Eng. R. Cas. 413. In such case the landowner assumes to the company the relation of a vendor who sells real estate on a credit; and while he holds the title, equity will enforce his claim to compensation against the land, as it would a vendor's lien. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75.

1. *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480.

Recovery by Tenant by the Curtesy.—A railroad company entered upon land in which plaintiff's wife had a third interest, and occupied the same for the purpose of a station for some years without plaintiff's knowledge. His wife died, leaving him an estate of curtesy therein. It appeared that the company occupied the whole of the premises, that they were so situated that it was impossible to set off a third, and that there could be no joint occupancy, from the nature of the use. It was held that plaintiff was entitled to recover a third of the value of the use and occupation of the premises. *Muldowney v. Morris, etc., R. Co.*, 42 Hun (N. Y.) 444.

2. **Injury to Tenant.**—Where a company, in violation of a contract with

the landlord, enters upon land held by a tenant and destroys his crops, it is liable to the tenant for the damages he thus sustains. *Louisville, etc., R. Co. v. Faulkner*, 2 Head (Tenn.) 65.

Trover for Materials.—The Pa. Lateral Railroad Act of May 5, 1832, is not intended to give the petitioner more than a privilege to open, construct, complete, and use a railway through the land of another. He may use material from the right of way to construct the road, but coal displaced belongs to the owner of the fee, and he may maintain trover for its conversion. *Lyon v. Gormley*, 53 Pa. St. 261.

Such Action will Not Lie if Land Is Recoverable.—The owner of land unlawfully and wrongfully taken cannot maintain an action for the value of the land so taken and appropriated, and also damages accruing by reason of such taking and appropriation, if the circumstances are such that he may recover the land itself. *Atlantic, etc., R. Co. v. Robbins*, 35 Ohio St. 531, *distinguishing* *Dayton, etc., R. Co. v. Lewton*, 20 Ohio St. 401.

3. *Mitchell v. Illinois, etc., R., etc., Co.*, 68 Ill. 286, where the company forcibly took possession pending an appeal, without giving the bond required by statute.

4. *Allen v. Wabash, etc., R. Co.*, 84 Mo. 646; *Lewis v. Seattle*, 5 Wash. 741.

5. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *Cohen v. St. Louis, etc., R. Co.*, 34 Kan. 158, 22 Am. & Eng. R. Cas. 116; *Highland Ave., etc., R. Co. v. Matthews*, 99 Ala. 24.

6. See *supra*, II. 4. *Exclusiveness of*

by the statute, is not a tort, and, an appropriate remedy being provided by the statute, a common-law action will not lie.¹ This

Statutory Remedy. Colcough v. Nashville, etc., R. Co., 2 Head (Tenn.) 171.

Applications of the Rule—Arkansas.—Johnson v. St. Louis, etc., R. Co., 32 Ark. 758; Cairo, etc., R. Co. v. Turner, 31 Ark. 494.

Indiana.—Leviston v. Junction R. Co., 7 Ind. 597.

Iowa.—Birge v. Chicago, etc., R. Co., 14 Am. & Eng. R. Cas. 414, *overruled*, however, on a subsequent hearing, in 65 Iowa 440.

New Jersey.—Paret v. Bayonne, 40 N. J. L. 333.

New York.—Bruce v. Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371.

North Carolina.—Allen v. Wilmington, etc., R. Co., 102 N. Car. 381.

Ohio.—Hueston v. Eaton, etc., R. Co., 4 Ohio St. 685.

Pennsylvania.—Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23; Loble v. Philadelphia, 174 Pa. St. 111.

South Carolina.—McLauchlin v. Charlotte, etc., R. Co., 5 Rich. (S. Car.) 583.

Vermont.—Austin v. Rutland R. Co., 45 Vt. 215.

Extent of the Rule—Infancy.—This rule is applicable in all cases where the incorporating act is not a private statute, and the infancy of the landowner will not excuse him from the necessity of pursuing the statutory remedy. Indiana Cent. R. Co. v. Oakes, 20 Ind. 9, *overruled* in Pittsburgh, etc., R. Co. v. Swinney, 97 Ind. 586, *reconciled* in Terre Haute, etc., R. Co. v. Scott, 74 Ind. 29, 3 Am. & Eng. R. Cas. 208.

Appeal the Proper Remedy.—An irregularity in the award of damages which may be redressed on appeal cannot be urged against the laying out, in ejectment by the landowner for an entry upon the land. Tuller v. Detroit, 97 Mich. 597; Clement v. Burns, 43 N. H. 609.

Owner Refusing Award.—In such case the bar is equally effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him and deposited for his use. Hueston v. Eaton, etc., R. Co., 4 Ohio St. 685.

Possession Protected by Charter.—The defendant, a railroad corporation, entered upon the lands of a petitioner

and constructed its road without adopting any of the means provided in its charter for acquiring title. No time was prescribed in the charter within which the owner was to be barred of his right of entry or compensation. It was held that the possession of the defendant being protected by its charter from any action of trespass or of any other character, the plaintiff was confined to his remedy of having his damages assessed, as allowed by the charter. Land v. Wilmington, etc., R. Co., 107 N. Car. 72, 47 Am. & Eng. R. Cas. 161.

1. Little Miami R. Co. v. Whitacre, 8 Ohio St. 590; Smith v. Chicago, etc., R. Co., 67 Ill. 191; Tennessee, etc., R. Co. v. Adams, 3 Head (Tenn.) 596.

Illustrations.—The remedy of an owner of land for injury done to his land by the city in making an excavation in a public street, thus turning the water accumulated thereon into a private drain running through his land, is by petition under Mass. Rev. Stat., c. 25, § 6, and not by action of tort. Flag v. Worcester, 13 Gray (Mass.) 601.

Sections 20 and 27 of the charter of the Morris Canal & Banking Co. secure to persons injured in their property rights a remedy in conformity with the ordinary rules regulating actions at law, according to the nature and extent of the injury sustained. If the injury be one that is temporary and recurrent, successive actions for damages sustained from time to time may be the proper remedy. But when the company has effected a complete appropriation of property by the location of its canal on lands, or the appropriation of water rights to its use by the construction of works designed to effect a constant and continuous diversion or flooding back of waters, such lands or water rights are taken, the injury is then done, and the damages consist in the entire value of the property, and are recoverable in one action; the taking and appropriation being lawful, the occupation or use of the property cannot be considered a continuing wrong for which successive actions will lie. Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 11 Am. & Eng. R. Cas. 509.

rule applies not only to the fixing of the value of the property taken, but also to the ascertainment of the damages to property not taken.¹

When Not Exclusive.—In states whose constitutions forbid the taking possession of property sought to be condemned until the compensation has been ascertained and paid, where possession is taken without payment, the owner's common-law remedy is not, and cannot be, taken away by statute.² Where such entry into possession is not forbidden by the constitution, and a statutory remedy is given, it must be strictly followed, but where, in such a case, no statutory remedy is provided for the aggrieved party,³ the right to resort to such remedy being confined by the statute to the condemning party, who fails to initiate proceedings, the owner's common-law remedy is not cut off.⁴ So where the damages claimed are not covered by the statute or by the proceedings taken under it,⁵ or where the proceedings had were without jurisdiction, the owner may sue at common law,⁶ and so where the owner consents to the entry and appropriation of his land, he is

1. Ohio, etc., *R. Co. v. Thillman*, 143 Ill. 127; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161.

So Long as the Condemning Party Keeps within Its Charter it cannot be sued at common law, unless it be for injuries inflicted wantonly, or for neglecting to use reasonable care and diligence. Tennessee, etc., *R. Co. v. Adams*, 3 Head (Tenn.) 596.

2. *Blanchard v. Kansas City*, 16 Fed. Rep. 444; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. Rep. 273; *Cullen v. New York, etc., R. Co.*, 66 Conn. 211.

In *Republican Valley R. Co. v. Fink*, 18 Neb. 86, the court said: "Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, 'If you want compensation for this property institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you.'"

3. *Indiana Cent. R. Co. v. Boden*, 10 Ind. 96; *Montgomery County v. Miller*, 82 Ind. 572; *Soulard v. St. Louis*, 36 Mo. 546; *Johnson v. Parkersburg*, 16 W. Va. 402; *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393, 10 Am. & Eng. R. Cas. 260.

4. *Corwith v. Hyde Park*, 14 Ill. App. 635; *Indiana Cent. R. Co. v. Boden*, 10 Ind. 96; *International, etc., R. Co. v. Benitos*, 59 Tex. 326, 10 Am. & Eng. R. Cas. 122.

Where the owner of land has allowed a railroad company to build and operate a road over it, with the understanding that the rights of parties as to damages should be adjusted thereafter, and the company takes statutory proceedings to fix the damages, the owner should present all his claims for settlement in these proceedings; he cannot split his demand and reserve part of it for future litigation. But if such proceedings are not resorted to, he would have a suitable remedy for the enforcement of his rights otherwise. *Harlow v. Marquette, etc., R. Co.*, 41 Mich. 336.

5. *Manhattan R. Co. v. Taber*, 78 Hun (N. Y.) 434; *Drady v. Des Moines, etc., R. Co.*, 57 Iowa 393, 14 Am. & Eng. R. Cas. 130.

The fact that the owner of a farm received an award in condemnation proceedings instituted by the corporation owning the railroad running through his land does not preclude him from maintaining an action against such corporation to compel it to construct an undergrade crossing upon his farm, although upon the trial of such action two of the three commissioners who made the award in the condemnation proceedings testify that they awarded damages on the assumption that there was to be no undergrade crossing. *Van Wagner v. Central New England, etc., R. Co.*, 80 Hun (N. Y.) 278.

6. *Overmann v. St. Paul*, 39 Minn. 120.

not bound to resort to the statutory assessment, but may recover in an independent action for the injury sustained by the breach of the agreement pursuant to which such consent was given.¹ In such cases the statutory remedy is cumulative only.²

2. Action for Damages—*a. RIGHTS OF ACTION AND DEFENSES—Rights of Action, Generally.*—An action for damages will lie against a corporation for an injury done to private property in the exercise of the right of eminent domain,³ whether such injury be direct, as when caused by a trespass or physical invasion of the property, or consequential, as in a diminution of its market value.⁴

1. Pittsburgh, etc., *R. Co. v. Harper*, 11 Ind. App. 481; Chicago, etc., *R. Co. v. Hall*, 135 Ind. 91.

Illustration.—Where a landowner consents that a railroad company shall take possession of a right of way on and through his lands, under a written agreement conditioned that the company shall, within a given time, construct a side track, depot, and station buildings on the premises, furnish hedge plants to fence the railroad, and pay the landowner for growing the hedge, and where such railroad company takes possession under the agreement, obtains the right of way thereby, continues to use and occupy the premises for such purpose, but fails and refuses to comply with the terms of the agreement upon which it made entry, took possession, and acquired the right of way, the landowner can at once, upon breach of the contract, bring his action at law for his damages, and need not resort to the tribunal prescribed by the statute to have his damages assessed. *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494.

2. Chicago, etc., *R. Co. v. Hall*, 135 Ind. 91.

Where the charter of a municipal corporation permits one whose land has been appropriated without condemnation for the construction of a sewer to give notice, and to have his damages assessed according to a method provided by the charter, such remedy is merely cumulative, and the landowner, certainly in the absence of an express statutory provision to the contrary, may have his election either to adopt the statutory remedy of assessment or to prosecute his action at law for the recovery of damages; the mere failure of such owner to give notice of his claim for compensation will not amount to a waiver of his right, even though he may have known that his

land was being so appropriated. *Atlanta v. Hunnicutt*, 95 Ga. 138.

3. *Alabama.*—*Highland Ave., etc., R. Co. v. Matthews*, 99 Ala. 24.

Illinois.—*Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35.

Iowa.—*Phillips v. Council Bluffs*, 63 Iowa 576.

Massachusetts.—*Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107.

Missouri.—*Leisse v. St. Louis, etc., R. Co.*, 72 Mo. 561, *affirming* 2 Mo. App. 105; *Childs v. Kansas City, etc., R. Co.* (Mo. 1891), 17 S. W. Rep. 954; *Griswold v. St. Louis, etc., R. Co.*, 8 Mo. App. 582.

Nebraska.—*Donisthorpe v. Fremont, etc., R. Co.*, 30 Neb. 142, 43 Am. & Eng. R. Cas. 583.

New Jersey.—*Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

North Carolina.—*Bridgers v. Dill*, 97 N. Car. 222.

Pennsylvania.—*Pusey v. Wright*, 31 Pa. St. 387; *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354.

4. *Chicago v. Taylor*, 125 U. S. 161; *Chicago, etc., R. Co. v. Cogswell*, 44 Ill. App. 388; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 511, 14 Am. & Eng. R. Cas. 153; *Reading v. Althouse*, 93 Pa. St. 400.

The above rules have been applied to cases of obstruction of navigation or of access to navigable water. *Rogers v. Kennebec, etc., R. Co.*, 35 Me. 319; *White v. South Shore R. Co.*, 6 Cush. (Mass.) 412; *Matter of New York, etc., R. Co.*, 101 N. Y. 685, 25 Am. & Eng. R. Cas. 198; *Rumsey v. New York, etc., R. Co.*, 136 N. Y. 543, *reversing* 63 Hun (N. Y.) 200, former appeal 133 N. Y. 79; *Delaplaine v. Chicago, etc., R. Co.*, 42 Wis. 214, 15 Am. Ry. Rep. 28. Obstruction of private way. *Presbrey v. Old Colony, etc., R. Co.*, 103 Mass. 1; *Greenwood*

Defenses.—Among the matters which may be set up in defense of such an action are, payment or tender of the damages awarded;¹ facts raising a presumption that the injuries sued for were passed upon by the tribunal to assess damages;² the acquiescence or consent of the landowner;³ his agreement to submit the matter to arbitration,⁴ or laches on his part in failing to sue promptly.⁵

b. PARTIES—Proper Parties Plaintiff.—Ordinarily the owner of the property at the time the injury is inflicted is the proper plaintiff, and the right of action does not descend to his heirs,⁶ nor pass to his grantee.⁷

v. Wilton R. Co., 23 N. H. 261. Obstruction of streets or highways. *Atchison, etc., R. Co. v. Boerner*, 34 Neb. 240; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Baltimore, etc., R. Co. v. Fitzgerald*, 2 App. Cas. (D. C.) 501. Improper or negligent construction or operation of the road. *Ohio, etc., R. Co. v. Wachter*, 123 Ill. 440, 34 Am. & Eng. R. Cas. 194, *affirming* 23 Ill. App. 415; *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127; *Roushange v. Chicago, etc., R. Co.*, 115 Ind. 106, 33 Am. & Eng. R. Cas. 142; *Delaware, etc., Canal Co. v. Lee*, 22 N. J. L. 243; *Morris Canal, etc., Co. v. Ryerson*, 27 N. J. L. 457; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226; *Houston, etc., R. Co. v. Adams*, 58 Tex. 476; *Waterman v. Connecticut, etc., R. Co.*, 30 Vt. 610; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344. Departure from proposed plan of construction. *Peoria, etc., R. Co. v. Birkett*, 62 Ill. 332, 7 Am. Ry. Rep. 334; *Chicago, etc., R. Co. v. Cogswell*, 44 Ill. App. 388; *Maltman v. Chicago, etc., R. Co.*, 41 Ill. App. 229; *Hoggatt v. Vicksburg, etc., R. Co.*, 34 La. Ann. 624; *New Orleans, etc., R. Co. v. Brown*, 64 Miss. 479. Creation of nuisances. *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82; *Chicago, etc., R. Co. v. Hildebrand*, 136 Ill. 467, 47 Am. & Eng. R. Cas. 145; *Chicago, etc., R. Co. v. Darke*, 148 Ill. 226; *Chicago, etc., R. Co. v. Cogswell*, 44 Ill. App. 388; *Shaubut v. St. Paul, etc., R. Co.*, 21 Minn. 502; *Barnum v. Minnesota Transfer R. Co.*, 33 Minn. 365. Cutting timber. *Toledo, etc., R. Co. v. Loop*, 139 Ind. 543. Diversion of streams. *Stodghill v. Chicago, etc., R. Co.*, 43 Iowa 26, 14 Am. Ry. Rep. 398. Flooding lands. *North Vernon*

v. Voegler, 89 Ind. 77; *Estabrooks v. Peterborough, etc., R. Co.*, 12 Cush. (Mass.) 224; *Ryan v. Mississippi Valley, etc., R. Co.*, 62 Miss. 162; *Moss v. St. Louis, etc., R. Co.*, 85 Mo. 86; *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504, 1 Am. Ry. Rep. 44; *Morris Canal, etc., Co. v. Seward*, 23 N. J. L. 219; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. St. 415.

In Massachusetts, in cases of misappropriation of property by a railroad company, the owner may maintain a writ of entry to establish his right in the land, and may recover damages or mesne profits for the unauthorized use of it. *Merrimack River Locks, etc. v. Nashua, etc., R. Co.*, 104 Mass. 1; *Peirce v. Boston, etc., R. Corp.*, 141 Mass. 481.

1. *Grigsby v. Burnett*, 31 Cal. 406; *Fitzgerald v. Chicago, etc., R. Co.*, 48 Kan. 537; *Ragan v. Kansas City, etc., R. Co.*, 111 Mo. 456.

2. *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Clark v. Boston, etc., R. Co.*, 24 N. H. 114.

3. *Capers v. Augusta, etc., R. Co.*, 76 Ga. 90; *Lawrence v. Morgan's Louisiana, etc., R., etc., Co.*, 39 La. Ann. 427, 30 Am. & Eng. R. Cas. 309; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290.

4. *Terre Haute, etc., R. Co. v. Harris*, 126 Ind. 7, 46 Am. & Eng. R. Cas. 582; *Hynes v. Sabula, etc., R. Co.*, 38 Iowa 258; *Jones v. Pennsylvania R. Co.*, 143 Pa. St. 374.

5. *Bell v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 105; *Dietrich v. Murdock*, 42 Mo. 279.

6. *Harshbarger v. Midland R. Co.*, 131 Ind. 177.

7. *Ortwine v. Baltimore*, 16 Md. 387; *Dunlap v. Toledo, etc., R. Co.*, 50 Mich. 470, 10 Am. & Eng. R. Cas. 185.

Illustration.—Where a judgment is

Tenant.—As respects injuries to crops, the tenant is the proper party to sue, although, as between him and the landlord, the latter is, by statute, deemed to be the owner of the crops.¹

Husband and Wife.—In *Indiana* a married woman, being the owner of the property injured, is the proper plaintiff.² In *Washington* she is a necessary party plaintiff with the husband where the property injured is community property.³

Joinder of Plaintiffs.—In *Pennsylvania* the owners of the legal and equitable estates in the property injured may join as plaintiffs, though their interest be in unequal proportions;⁴ and in *Arkansas* partners in property situated on an unperfected homestead of one of them may sue jointly for an injury to such property.⁵

Parties Defendant.—The rule is that the party whose act produces the injury complained of is the proper party defendant in an action for the damages occasioned thereby.⁶

rendered by consent of the parties, investing the company with title to the strip of land sought to be condemned, upon condition that the company pay a certain sum in money, make certain improvements on the land, and afterward keep them in repair, but the company fails to make the improvements, a claim that the landowner may have against the company for damages is not so far assignable as to pass to a subsequent purchaser of the land by virtue of the purchase, so as to allow him to demand the forfeiture or bring ejectment for the land. *Piper v. Union Pac. R. Co.*, 14 Kan. 574, following *Union Pac. R. Co. v. McCarty*, 8 Kan. 125.

When Grantee may Sue.—When one holds real estate under a contract of purchase made with the holder of the legal title, and upon which all payments have been made, so as to entitle him to a deed, he may maintain an action for damages to the land by reason of the location and construction of a railroad near the same. The holder of the legal title should be joined; but if no objection is made on that ground the equitable owner may recover his actual damages. *Fremont, etc., R. Co. v. Setright*, 34 Neb. 253, following *Hastings, etc., R. Co. v. Ingalls*, 15 Neb. 123.

Mortgagee.—Nor can a mortgagee, holding as trustee, maintain an action for injury to the mortgaged premises, if they remain of greater value than the amount due on the mortgage, and for which such trustee is liable to account. *Knoll v. New York, etc., R.*

Co., 121 Pa. St. 467, 36 Am. & Eng. R. Cas. 250.

1. *Bridgers v. Dill*, 97 N. Car. 222.

2. Even though her husband is the general manager of the property. *Leeds v. Richmond*, 102 Ind. 372.

3. *Parke v. Seattle*, 8 Wash. 78.

4. *Schuykill Nav. Co. v. Farr*, 4 W. & S. (Pa.) 362.

5. *Hot Springs R. Co. v. Tyler*, 36 Ark. 205, 10 Am. & Eng. R. Cas. 145.

6. A Lessee of a railroad is not liable for an injury caused by the original construction of the road, and not by its operation under the lease. *Kearney v. Central R. Co.*, 167 Pa. St. 362.

But a railroad company which appropriates land without right cannot transfer its corporate privileges to another so as to justify a continuance of the wrong by its vendee as if the latter were an innocent purchaser. *Stickley v. Chesapeake, etc., R. Co.*, 93 Ky. 323. In *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455, it is held that a railroad company purchasing another railroad company at a foreclosure sale is liable to the landowner for damages to land taken, though the company foreclosed had acquired by contract the right of way through the land in question.

President of Company.—Where the injury is occasioned by the act of the president of a corporation, acting for it, the president and the corporation are both guilty, and either or both may be sued. *Bates v. Van Pelt*, 1 Tex. Civ. App. 185.

Company or Contractor.—Where a railroad company authorizes its con-

c. **PLEADING—Sufficiency of Plaintiff's Pleading, Generally.**—A complaint which describes the lands taken, alleges a fee-simple title thereto in the plaintiff, avers specific and lasting injuries to the plaintiff and his real estate, and prays damages for the injury so inflicted, is good on demurrer.¹

Describing the Land and Locality of the Improvement.—The land taken should be identified by metes and bounds,² and the improvement should be alleged to be wholly or partly within the county where the suit is brought.³

Averment of Ownership.—The complaint must show ownership of the land in question in the plaintiff, or such an interest therein as will entitle him to sue.⁴

Allegation that Acts Complained of Were Unlawful.—The petition states no cause of action unless it alleges that the entry, or the occupation or injury complained of, was wrongful,⁵ and that it was in

tractors, employed by it to construct its railroad, to procure the right of way for it, which they are to do at their own expense, and the contractors, through their agent, in the name of the railroad company, procure a right of way through the plaintiff's premises by contract, afterward, by reason of such contract, procuring the assessment of merely nominal damages by the condemnation commissioners for such right of way, this assessment of damages being without the knowledge or consent of the owner, and where the railroad is constructed by the contractors and afterward operated by the railroad company, but fails to fulfil the contract, the owner may recover substantial damages from the railroad company if it elects to retain the right of way. *Leroy, etc., Air-Line R. Co. v. Small*, 46 Kan. 300, 46 Am. & Eng. R. Cas. 554.

A City is not a necessary party defendant to an action by an abutting owner for damage caused by the grading of a street by a railroad company under authority of the city. *Kaufman v. Tacoma, etc., R. Co.*, 11 Wash. 632.

1. *Anderson, etc., R. Co. v. Kernodle*, 54 Ind. 314.

2. *Central R. Co. v. Merkel*, 32 Tex. 723.

3. *East Georgia, etc., R. Co. v. King*, 91 Ga. 519.

4. *Schechter v. Denver, etc., R. Co.* (Colo. 1896), 44 Pac. Rep. 761.

Illustrations.—In an action for an entry upon lands claimed by plaintiff by inheritance since such entry, a failure to allege in the complaint that the ancestor was the owner at the time of

the entry is fatal, as is also a failure to refer in the complaint to the law authorizing the entry. *Church v. Grand Rapids, etc., R. Co.*, 70 Ind. 161, 3 Am. & Eng. R. Cas. 198.

Where a complaint, in an action to recover damages awarded in a condemnation proceeding, alleged that by the report of the city commissioners the real estate so taken was reported to belong to plaintiff and her husband, who had been dead for over eighteen years, which fact was well known to said city commissioners and said city council, and that plaintiff was then, and for over twenty years prior thereto had been, in the open, notorious, and exclusive possession of said real estate, as the owner thereof, which facts were fully known to the city commissioners, the allegations show such an interest in the property appropriated as to entitle plaintiff to recover damages therefor. *Busenbark v. Crawfordsville*, 9 Ind. App. 578.

A complaint alleging that the plaintiffs own the property, describing it, and have owned it since a specified date; that they own and hold it by virtue of a trust deed made by the former owner to the plaintiffs in trust for certain beneficiaries named; that the defendant, without right or title, entered into possession of a described portion of it, ousted and ejected the plaintiffs therefrom, and does now unlawfully withhold the same, to the plaintiffs' damage, etc., states a good cause of action. *Lewis v. St. Paul, etc., R. Co.*, 5 S. Dak. 148.

5. *Robertson v. Springfield, etc., R. Co.*, 18 Mo. App. 185.

excess of the lawful authority of the condemning party.¹

Setting out the Character of the Injury.—The character of the injury must be particularly alleged so that the court may determine whether it is different from that sustained by the public generally;² and for the further reason that no injury can be proved other than that particularly pleaded, or necessarily incident thereto.³

A declaration alleging that a city council, "contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him in the possession, use, occupation, and enjoyment of" his property, dug away his sidewalk, destroyed his shade trees, and created a nuisance in front of his premises, shows a cause of action at common law, the acts thus charged being in violation of law, and is not demurrable under the city charter which authorizes the grading and improvement of streets. *Dorman v. Jacksonville*, 13 Fla. 538.

1. *City Council v. Townsend*, 84 Ala. 478; *Hill v. St. Louis*, 59 Mo. 412.

Against Owner's Consent.—Under a statute requiring the owner of land, within thirty days after receipt of notice in writing that a railroad company requires a right of way over his land, to give notice in writing of his refusal of consent to the construction of such railroad upon his land, or else consent "shall be presumed," a complaint which alleges that the owner, when he ascertained that the railroad would probably extend across his lands, formally notified the officers of the company that entry by it was objected to, and the company thereafter constructed its road without any proceedings to condemn, does not state facts sufficient to constitute a cause of action. *Tompkins v. Augusta, etc.*, R. Co., 37 S. Car. 382.

2. *Thelan v. Farmer*, 36 Minn. 225; *Peel v. Atlanta*, 85 Ga. 138.

A complaint alleging that a railroad company has wrongfully and unlawfully used and occupied the street opposite plaintiff's lot, in such a way as completely to obstruct all travel with teams thereon and entirely to destroy its use as a public highway, and has thereby prevented plaintiff's former customers, and other persons who would otherwise have done business with him at his warehouse and elevator on said lot, from having access to or

egress from the same, and has thereby destroyed plaintiff's business and the value of his said premises, shows that plaintiff has suffered such special and peculiar damage as to enable him to maintain an action therefor, both at common law and under section 3180, Rev. Stat. *Evans v. Chicago, etc.*, R. Co., 86 Wis. 597.

3. *Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; *Schuylkill Nav. Co. v. Farr*, 4 W. & S. (Pa.) 362.

Illustrations.—In order to recover for an injury done to a reversionary interest in land, the declaration must either state an injury of such a nature as necessarily to be injurious to the reversion, or must allege explicitly that the facts complained of were injurious to the reversion. If, however, it sets up an injury of such a permanent nature as necessarily to be injurious to the reversion, it will be sufficient. *Chicago v. McDonough*, 112 Ill. 85.

The appropriation of plaintiff's land in the bed of a stream to support the pier of a bridge is not an injury for which recovery can be had under a declaration complaining of the bridge only as a hindrance to the profitable use of plaintiff's dock and warehouse. *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

Alder by Verdict.—The declaration, which contained but one count, alleged that the plaintiff's land contiguous to a canal had been overflowed and damaged by reason of the water leaking through the sides or banks of the canal, in consequence of the neglect of the defendants, and in consequence of the stopping up, by the canal, of the natural drain and watercourses for carrying off the water. After a verdict for the plaintiff, it was held that the defendants, having proceeded according to the directions of the act of the legislature in opening the canal, were not liable for any damages occasioned by cutting the canal through plaintiff's land, but only for such damage as resulted from their neglect in

The Claim of Damages.—Where damages for both temporary and permanent injuries are claimed, the declaration should show this by proper averments;¹ and this, it seems, may be done in one count.²

Answer.—Where the answer seeks to justify the acts done on plaintiff's land by the defendant, it will be bad on demurrer, unless it alleges that the acts it avers were the same acts complained of in the complaint.³

d. JUDGMENT, AND ITS EFFECT TO PASS TITLE.—Where the landowner sues for the damages sustained by reason of the defendant's unauthorized entry upon and occupation of his land, a judgment in his favor does not affect his title to the land, nor deprive him of his right to demand compensation for the land itself, if the defendant, or its successor, continues to use it.⁴

keeping the canal and embankments in repair; but that after verdict the court will intend that the jury gave damages only for the actionable part of the declaration. *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. (N. Y.) 283.

1. *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306, holding, however, that if the declaration does not contain such averments of permanent injury to the property, it will not for that cause alone be bad on demurrer; and that if the plaintiff offers to the jury, without objection by the defendant, evidence of such permanent injury, the plaintiff may recover therefor on such declaration, and such recovery will be a bar to any future action for such injury.

2. *Jacksonville, etc., R. Co. v. Griffin*, 33 Fla. 602.

Joinder of Claims in One Count.—In an action of damages against a municipal corporation for an injury to property caused by a change of grade of a street, when the plaintiff owns the fee of one lot, and a leasehold with rent of the adjoining lot, he may sue in one count for the damage to both. *Stickford v. St. Louis*, 75 Mo. 309, 7 Mo. App. 217.

Unwarranted Damages Claimed.—The fact that damages are claimed which plaintiff is not entitled to recover does not render the complaint demurrable, where some of the damages claimed are recoverable. *Highland Ave., etc., R. Co. v. Matthews*, 99 Ala. 24, and cases cited.

3. *Turner v. Rising Sun, etc., Turnpike Co.*, 71 Ind. 547.

Justification must be Pleaded.—If the acts were committed in the exercise of

lawful authority, that fact should be set up by answer. *Hill v. St. Louis*, 59 Mo. 412.

Replication.—Where the statute is silent as to the time when an improvement should be made, and the defendants justify their acts under the statute, a replication alleging that defendants had never completed the improvement in manner and form as prescribed by the statute, is bad, on general demurrer, for want of an allegation that reasonable time for the purpose had elapsed. *Spring v. Russell*, 7 Me. 273.

4. *Rio Grande, etc., R. Co. v. Ortiz*, 75 Tex. 602, 44 Am. & Eng. R. Cas. 67. In this case it is held that no waiver of ownership of land, with its incidental rights, which has been wrongfully taken for right of way by a railroad company, without payment or tender thereof, can be implied as against the rightful owner, from the mere fact that he elects to sue for the damage done instead of seeking a recovery of the land. In such a suit the judgment rendered in the plaintiff's favor should be regarded as an assessment of the amount due him and a demand therefor until paid. It in no regard affects his title until the railroad company, by payment of the sum due, acquires the legal right to use the land or the right of way.

Such judgment should include compensation for the trespass, and any exemplary damages to which the landowner may be entitled, but as it cannot pass the title, the value of the land should not be included. *Anderson, etc., R. Co. v. Kernodle*, 54 Ind. 314.

3. Ejectment—*a*. WHEN IT LIES.—Ejectment is a proper remedy where the condemning party enters upon the plaintiff's land without his consent, and without instituting proceedings to condemn the same or assess damages therefor.¹ In such a case the condemning party is a trespasser, and the owner may bring ejectment, or trespass, or both, and recover the land and the damages sustained by the unlawful act.² So, also, ejectment will lie where possession of the land has been obtained under void condemnation proceedings, as the title in such a case remains in the landowner;³ and where, the entry being lawful, the condemning party fails or refuses to pay the compensation assessed,⁴ or

But where the Owner Sues for the Value of the Land Taken and damages to the residue, a judgment in his favor, and satisfaction thereof, will vest in the defendant the same title or easement that could have been obtained in condemnation proceedings regularly instituted and conducted, *Doyle v. Kansas City, etc., R. Co.*, 113 Mo. 280; *East Dallas v. Barksdale*, 83 Tex. 117; and the judgment should so provide, *Central R. Co. v. Merkel*, 32 Tex. 723.

1. *Highland Ave., etc., R. Co. v. Matthews*, 99 Ala. 24; *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191; *Graham v. Columbus, etc., R. Co.*, 27 Ind. 260; *Shoemaker v. Cedar Rapids, etc., R. Co.*, 45 Minn. 366; *Philadelphia, etc., R. Co. v. Cooper*, 105 Pa. St. 239.

Sufficiency of Complaint.—In an action against a company to recover land upon which the company has built its road, the complaint fails to state facts sufficient to constitute a cause of action where it omits to allege that the defendant entered upon the land without taking the necessary steps preliminary to such entry. An allegation of entry without the owner's consent is not sufficient, as such consent is not required by law, and allegations of unlawful possession are mere statements of legal conclusions, and not of traversable facts. *Tompkins v. Augusta, etc., R. Co.*, 33 S. Car. 216, 43 Am. & Eng. R. Cas. 127, followed in *Tompkins v. Augusta, etc., R. Co.*, 37 S. Car. 382.

2. *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48, 2 Am. & Eng. R. Cas. 425; *Chicago, etc., R. Co. v. Gates*, 120 Ill. 86, 30 Am. & Eng. R. Cas. 268. Compare *Hooper v. Columbus, etc., R. Co.*, 78 Ala. 213, 29 Am. & Eng. R. Cas. 540. The statutory remedy is not exclusive of ejectment

in such a case. *Daniels v. Chicago, etc., R. Co.*, 35 Iowa 129; *Jackson v. Centerville, etc., R. Co.*, 64 Iowa 292, 17 Am. & Eng. R. Cas. 181. And the owner may also enjoin the use of his land by the railroad company until his damages are assessed and tendered. *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178, overruling *New Albany, etc., R. Co. v. O'Daily*, 13 Ind. 353.

If the entry by the railroad company is unlawful, it is a trespasser, and an action for trespass may be maintained; or if the entry is without right, and possession is wrongfully withheld, ejectment will lie, unless, by some act or omission, the landowner has precluded himself from asserting his right to possession. *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 460, 33 Am. & Eng. R. Cas. 81.

The use by a railroad for a right of way of farming land owned by it jointly with plaintiff, of necessity excludes the latter from possession and constitutes an ouster. *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414.

3. *Ewing v. St. Louis*, 5 Wall. (U. S.) 413; *Hull v. Chicago, etc., R. Co.*, 21 Neb. 371; *Madden v. Louisville, etc., R. Co.*, 66 Miss. 258, 39 Am. & Eng. R. Cas. 95; *McCarty v. Clark County*, 101 Mo. 179.

The Bare Pendency of Proceedings for the condemnation of land is not a valid defense in ejectment. *Coburn v. Pacific Lumber, etc., Co.*, 46 Cal. 32.

Even a Decree in condemnation proceedings awarding the land to defendant for right of way is no defense, when it appears that plaintiff was the owner of the land and had not been made a party to the condemnation proceedings. *Owen v. St. Paul, etc., R. Co.*, 12 Wash. 313.

4. *Corwith v. Hyde Park*, 14 Ill. App. 635; *Cory v. Chicago, etc., R.*

fails to perform an agreement with the landowner pursuant to which the entry was made.¹ Again, the owner of land dedicated as a street or highway may maintain ejectment against a company that unlawfully occupies it for the purpose of a railroad,² even

Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Dusenbury v. Mutual Union Tel. Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 206; *McClinton v. Pittsburg, etc.*, R. Co., 66 Pa. St. 404.

Payment to Sheriff.—Payment by a company to the sheriff of the damages awarded by the commissioners under the statute for the right of way over another's land is not payment to the landowner; and where the sheriff fails to pay the amount to the landowner, the failure must be imputed to the company, since he is their agent rather than the agent of the landowner; in such a case, the landowner may recover the possession of the land for nonpayment. *White v. Wabash, etc.*, R. Co., 64 Iowa 281, 17 Am. & Eng. R. Cas. 82.

Payment to Clerk.—A company proceeded to condemn a right of way under the statute, and, having paid to the clerk the damages assessed, took possession. The owner appealed to the Circuit Court, where the damages were greatly increased, and judgment rendered therefor. After six months, the judgment being unpaid, he brought ejectment. It was held that he had a right to recover. In such case payment of the damages to the clerk did not vest title, but operated only to give the company a license to take possession, subject to the result of future litigation, and determinable upon failure to pay the compensation adjudged on final trial. *Lake Erie, etc.*, R. Co. v. *Kinsey*, 87 Ind. 514, 14 Am. & Eng. R. Cas. 309, *distinguishing Chicago, etc.*, R. Co. v. *Jones*, 103 Ind. 386, *explained in Jacksonville, etc.*, R. Co. v. *Adams*, 28 Fla. 631.

Deposit with County Treasurer.—Where condemnation proceedings have been conducted in strict conformity with the requirements of the law, and compensation for the land appropriated as right of way has been secured by the deposit of money with the county treasurer of the county where the land is situated, the owner of the land failing to appeal or take any legal action in the matter until the completion and operation of the railroad, the owner is

then estopped from maintaining an action in ejectment to evict the railroad company from the right thus acquired. *Chicago, etc.*, R. Co. v. *Selders* (Kan. App. 1896), 44 Pac. Rep. 1012.

Deposit in Bank.—The Troy Turnpike & R. Co., having laid out their road through the lands belonging to the plaintiff, caused his damages to be appraised by commissioners, deposited the amount in a bank to his credit, gave him notice thereof, and then took possession. The plaintiff afterwards appealed to the chancellor, who reversed the appraisal and ordered the company to pay a larger sum than that awarded by the commissioners. The company, however, without paying the money thus ordered, proceeded to work their road, and used the lands of the plaintiff for that purpose. It was held, in ejectment against the company for the lands thus possessed, that the plaintiff was entitled to recover; and this, though the act incorporating the defendants declared that, on depositing the amount awarded by the commissioners and giving notice thereof, the defendants should be deemed seized of the land in fee simple. *Dater v. Troy Turnpike, etc., Co.*, 2 Hill (N. Y.) 629.

Entry Pending Appeal.—Where a judgment for damages is not paid, and it appears that pending the appeal the railroad company entered upon the land and constructed its road, and it does not appear that the landowner had any actual knowledge of such entry and occupation, or in any manner consented thereto, a judgment in favor of the landowner, in an action of ejectment for the recovery of possession, will not be reversed. *St. Joseph, etc.*, R. Co. v. *Callender*, 13 Kan. 496. In such a case the owner may recover in ejectment or trespass. *Childs v. Kansas City, etc.*, R. Co., 117 Mo. 414.

1. *Hooper v. Columbus, etc.*, R. Co., 78 Ala. 213; *Pittsburg, etc.*, R. Co. v. *Jones*, 59 Pa. St. 433.

2. *Weisbrod v. Chicago, etc.*, R. Co., 21 Wis. 602; *Green v. Tacoma*, 51 Fed. Rep. 622.

though, pursuant to statutory authority, the company provides a new road in place of the one so occupied.¹

Owner—When Estopped to Sue.—If the landowner, with knowledge of the facts, expressly or impliedly consents to the otherwise unauthorized entry upon and occupation of his land,² or acquiesces therein,³ or stands by and fails to object to or forbid such entry and occupation, until the railroad is in operation and public interests are involved,⁴ and large amounts of money have been expended,⁵ he will be estopped from maintaining ejectment for the land.⁶

But mere inaction or delay on the part of the landowner with-

1. *Phillips v. Dunkirk, etc., R. Co.*, 78 Pa. St. 177, holding that in such a case the old road is legally vacated, and the owner's right to the occupancy of the land is vested *eo instante*.

But the Mere Failure of a Company to Complete Its Railroad within the time limited by statute, while a ground for forfeiture of its charter by the state, does not entitle a landowner to bring ejectment after the road has been constructed. *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 460.

2. *Taylor v. Chicago, etc., R. Co.*, 63 Wis. 327, 22 Am. & Eng. R. Cas. 123.

3. *South, etc., Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581; *Bravard v. Cincinnati, etc., R. Co.*, 115 Ind. 1; *Louisville, etc., R. Co. v. Soltwedde*, 116 Ind. 257, 36 Am. & Eng. R. Cas. 577; *Pryzbylowicz v. Missouri River R. Co.*, 3 McCrary (U. S.) 586, 17 Fed. Rep. 492, followed in *St. Louis, etc., R. Co. v. Foltz*, 52 Fed. Rep. 627.

Minnesota Rule.—In Minnesota an owner upon whose land a railroad company has, without making compensation or acquiring the right in any other way, constructed its railroad, whether it did so with or without his acquiescence, and whether it did so before or after the passage of Gen. Stat. 1878, c. 34, § 33, may bring ejectment to recover the land. *Watson v. Chicago, etc., R. Co.*, 46 Minn. 321, 46 Am. & Eng. R. Cas. 543; *Minneapolis Mill Co. v. Minneapolis, etc., R. Co.*, 51 Minn. 304. In such a case the statute allows the company to convert the ejectment suit into a proceeding to condemn the land. *Watson v. Chicago, etc., R. Co.*, 46 Minn. 321, 46 Am. & Eng. R. Cas. 543.

4. *Louisville, etc., R. Co. v. Beck*, 119 Ind. 124; *Scarritt v. Kansas City, etc., R. Co.*, 127 Mo. 298.

5. *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48, 2 Am. & Eng. R. Cas. 425; *South, etc., Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1. But this does not leave the landowner remediless. A court of equity would undoubtedly interfere, place the property in the hands of a receiver, and compel payment out of the earnings. *Provolt v. Chicago, etc., R. Co.*, 57 Mo. 256.

6. *St. Julien v. Morgan, etc., R. Co.*, 35 La. Ann. 924, holding that in such a case the owner waives the right to resume possession, but he is not deprived of his action for damages for the value of the land, or for injuries done him by the construction or operation of the road.

The only relief the court will afford is to give him compensation for his land, and remuneration for all damages; and these may be ascertained either by reference to a master or the intervention of a jury. *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471.

Plaintiff under Guardianship.—When it is shown that the agents of the railroad company entered on plaintiff's land without resorting to the statutory proceedings for condemnation, which it alone could exercise, and without the consent of any one authorized to give it, but against the protest of her guardian (plaintiff being a minor); that when she became of age the road was constructed and no improvements were made on the land afterwards, the plaintiff had a right to rely on the dissent of her guardian, the defendant was not prejudiced by her silence, and the statutory real action is clearly maintainable. *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48, 2 Am. & Eng. R. Cas. 425.

out proof of knowledge of, or acquiescence in, the acts of the company, will not estop the landowner from maintaining the action,¹ *a fortiori*, if the company refuses to make compensation.²

Entry or Possession under License from or Contract with Owner.—Where the condemning party enters under a license from the owner, not revoked until the road is built,³ or under a valid agreement to convey a right of way, ejectment will not lie.⁴

Waiver by Owner of Prepayment of Damages.—The landowner may waive prepayment of the damages, and if, when doing so, he permits the condemning party to enter and construct the improvement, he

1. *Bothe v. Dayton, etc., R. Co.*, 37 Ohio St. 147, 10 Am. & Eng. R. Cas. 396. In one case it is held that mere inaction on the part of a landowner, though he is informed of the fact that a company has entered or constructed its road upon his land, will not deprive him of his remedies of ejectment or trespass. *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414.

2. *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 66, 11 Am. & Eng. R. Cas. 373.

As to Effect of Owner's Appearance in prior condemnation proceedings and endeavors to increase the award, coupled with failure to forbid or to endeavor to prevent the construction of the road, see *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126, 22 Am. & Eng. R. Cas. 106; *Lewis v. St. Paul, etc., R. Co.*, 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612; *McAulay v. Western Vermont R. Co.*, 33 Vt. 311.

3. *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183.

License Subsequent to Entry.—Where a company enters upon land without the consent of the owner, but under a subsequent parol license continues to occupy and use it; completes its road over the same, operates it for many years, and continues to operate it, an action in ejectment to recover the land will not lie, although no compensation has been paid, the proper remedy being an action for compensation by way of damages. *Evansville, etc., R. Co. v. Nye*, 113 Ind. 223.

Revocation of License.—Where a railroad company enters and constructs railway tracks on land under a mere license from the owner, it acquires no easement in the land. The landowner may revoke the license and bring ejectment, which the railroad company

may, under the statute, convert into condemnation proceedings. *Minneapolis Western R. Co. v. Minneapolis, etc., R. Co.*, 58 Minn. 128.

4. *Baker v. Chicago, etc., R. Co.*, 57 Mo. 265, holding, however, that an action for specific performance, or for damages, will lie.

Exceptions.—Where land was taken by a railroad without first paying or securing compensation, and the private owner subsequently agreed with the corporation to accept a specific sum for the right of way, to be paid within twenty days after the issuance of certain bonds contemplated by said corporation, but the agreement was never executed by the payment of the said purchase-money, it was held, in an action of ejectment by the owner against the corporation, that the unexecuted agreement could not be set up to defeat plaintiff's right of recovery. *Philadelphia, etc., R. Co. v. Cooper*, 105 Pa. St. 239.

When a company enters upon land to construct its road without acquiring the land under the right of eminent domain, but relying upon the grant of the right of way from an alleged owner, a subsequent grantee of the real owner may afterwards maintain ejectment against the company. The action is not personal to one who owned the land when it was so taken. If the agent of the company, at the time he procured the grant for the right of way, knew that another than the grantor had title to the land, the real owner, though by his words or silence he may have encouraged the execution of the grant and allowed the company to construct and operate its road for years without objection, is not estopped from subsequently asserting title. *Richards v. Buffalo, etc., R. Co.*, 137 Pa. St. 524.

cannot treat it as a wrongdoer and maintain ejectment or trespass.¹

b. DEMAND OF POSSESSION—NOTICE TO QUIT.—Where the entry of the defendant company was rightful, ejectment cannot be maintained without a demand of possession and notice to quit;² but where the condemnation proceedings were void, and the company is aware of the landowner's claim and the grounds thereof, and informs him that he will have to sue if he gets anything, this will obviate the necessity of any formal demand for possession.³

c. ASSESSMENT OF DAMAGES IN EJECTMENT SUIT.—In some jurisdictions a company, sued in ejectment for land taken without making compensation, may ask, in its answer, that the compensation be ascertained and judgment rendered entitling it to the land on payment thereof. In such a case the question of amount must be tried in the same manner as in an original condemnation proceeding,⁴ and the damages are to be assessed as of the time of the trial.⁵ The fact that the answer asks that such assessment of damages be made will not defeat the defendant's right to a second trial, where plaintiff's right to recover is in issue.⁶

d. RIGHT TO CONDEMN NOTWITHSTANDING THE EJECTMENT SUIT.—The defendant in ejectment, if possessing the power of eminent domain, may condemn the property illegally entered upon, whether it has or has not been ousted from its illegal possession. A judgment in favor of the landowner is not a bar, in such a case, to the proceeding to condemn.⁷

e. STAYING EXECUTION UNTIL ASSESSMENT AND PAYMENT OF DAMAGES.—In *Iowa* and *Pennsylvania* the practice is to stay the execution of the judgment for the plaintiff in ejectment for a sufficient time to enable the defendant to condemn the property, if it desires to do so.⁸ And, in *Florida*, the appellate court,

1. Childs v. Kansas City, etc., R. Co., 117 Mo. 414; McAulay v. Western Vermont R. Co., 33 Vt. 311.

2. Chicago, etc., R. Co. v. Knox College, 34 Ill. 195.

3. Chicago, etc., R. Co. v. Smith, 78 Ill. 96.

4. Adolph v. Minneapolis, etc., R. Co., 42 Minn. 170.

5. Morin v. St. Paul, etc., R. Co., 30 Minn. 100, 10 Am. & Eng. R. Cas. 223.

Nominal Damages for Withholding the Land.—A landowner brought an action against a railroad company to eject it from land occupied for the purpose of a highway, and pending the action the company had the damages assessed in a condemnation proceeding. It was held that the plaintiff was entitled to recover only nominal damages for the withholding of the land between

the time of the original entry and the assessment of the damages. Judge v. New York Cent., etc., R. Co., 56 Hun (N. Y.) 60.

6. Kremer v. Chicago, etc., R. Co., 54 Minn. 157.

7. Jacksonville, etc., R. Co. v. Adams, 28 Fla. 631, 51 Am. & Eng. R. Cas. 544.

The defendant in the ejectment may save its improvements, in such a case, by instituting proceedings to condemn. Pittsburgh, etc., R. Co. v. Bruce, 102 Pa. St. 23, 10 Am. & Eng. R. Cas. 1.

8. *Iowa*.—Conger v. Burlington, etc., R. Co., 41 Iowa 419, distinguished in Wilson v. Des Moines, etc., R. Co., 67 Iowa 509.

Pennsylvania.—O'Hara v. Pennsylvania R. Co., 2 Grant's Cas. (Pa.) 241; Pittsburg, etc., R. Co. v. Jones,

on affirmance of such a judgment, will, in a proper case, withhold its mandate for possession, with the same end in view.¹

In New York the contrary view obtains in cases where the original entry was clearly unlawful and in defiance of the will of the owner, the plea of public necessity being deemed to afford no justification for preventing the owner from seeking redress for such an unlawful entry on his lands.²

4. Injunction—*a*. WHEN PROPER REMEDY—In General.—An injunction is the proper remedy to restrain the continuous unlawful use of the plaintiff's land by a railroad company,³ or the erection thereon of structures not authorized by its charter,⁴ which structures will destroy plaintiff's access to and from his land, and greatly impair his business facilities.⁵ Any attempt by a corporation to avail itself unlawfully of the statute authorizing condemnation proceedings will be enjoined, on complaint of the landowner, as an abuse of the law,⁶ where irreparable injury will

59 Pa. St. 433; *McClinton v. Pittsburgh, etc.*, R. Co., 66 Pa. St. 404; *Pittsburgh, etc.*, R. Co. *v. Bruce*, 102 Pa. St. 23; *Oliver v. Pittsburgh, etc.*, R. Co., 131 Pa. St. 408, 44 Am. & Eng. R. Cas. 175; *Richards v. Buffalo, etc.*, R. Co., 137 Pa. St. 524; *Allegheny Valley R. Co. v. Colwell* (Pa. 1888), 15 Atl. Rep. 927.

1. *Jacksonville, etc.*, R. Co. *v. Adams*, 28 Fla. 631, 51 Am. & Eng. R. Cas. 544, holding, however, that this will be done only upon the express condition that its action shall not interfere with the landowner's right to sue for mesne profits for the use or retention of the land by the company.

2. *Matter of St. Lawrence, etc.*, R. Co., 133 N. Y. 270; *Strong v. Brooklyn*, 12 Hun (N. Y.) 453.

Illustration.—Where a railroad company has unlawfully entered upon land, under no claim or pretense of right, in defiance of the will of the owner, under no mistake or misapprehension, and without color of authority, and thereafter commences proceedings to acquire title by condemnation, it is not "in possession of the property sought to be condemned," within the meaning of the provision of Code Civ. Pro., § 3379 (added by c. 95, Laws of 1890), which empowers the court in condemnation proceedings to authorize the plaintiff, if so in possession, to continue in possession, and provides that the court "may stay all actions and proceedings on account thereof;" and where such a case is presented the court is not authorized to grant such a

stay. As to whether the legislature has power to deprive the owner of his legal right to seek redress, and to authorize a railroad company, having no title, and whose entry and possession is that of a trespasser, to continue in possession of lands pending condemnation proceedings, *quære*. *Matter of St. Lawrence, etc.*, R. Co., 133 N. Y. 270.

3. *Murdock v. Prospect Park, etc.*, R. Co., 73 N. Y. 579, reversing 10 Hun (N. Y.) 598; *Organ v. Memphis, etc.*, R. Co., 51 Ark. 235, 39 Am. & Eng. R. Cas. 75.

Condemnation Proceedings in Violation of Contract with Owner.—Where a railroad company institutes proceedings to condemn land, and such proceedings are in clear violation of a prior contract between the railroad company and the landowner, the landowner has a standing in equity to enjoin the proceedings until the covenants of the contract are performed, or the contract is rescinded. *Semple v. Cleveland, etc.*, R. Co., 172 Pa. St. 369.

4. *Enfield Toll Bridge Co. v. Hartford, etc.*, R. Co., 17 Conn. 40; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514; *Bird v. Wilmington, etc.*, R. Co., 8 Rich. Eq. (S. Car.) 46, followed in *Payne v. Kansas, etc.*, R. Co., 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 228.

5. *Crocker v. New York City*, 15 Fed. Rep. 405; *Denver, etc.*, R. Co. *v. Denver City R. Co.*, 2 Colo. 673; *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376.

6. *Central R. Co. v. Pennsylvania R.*

result from a denial of the writ,¹ and an action at law will not afford an adequate and complete remedy.² So a bill for an injunction will lie where the defendants, being insolvent, threaten, by excavations and embankments on plaintiff's land, diverting springs and streams, etc., to despoil the land of the substance of the inheritance and cast a cloud on plaintiff's title.³

The fact that the owner applies for compensation in the condemnation proceedings, will not deprive him, pending the proceedings and before the assessment of the damages, of the right to test the validity of the taking by applying for an injunction.⁴

Appropriation without Condemnation.—Injunction is the proper remedy in case of an attempt or threat to enter on plaintiff's land, and take permanent possession thereof, for public use, without plaintiff's consent, and without recourse to a proceeding for the assessment of damages.⁵

Co., 31 N. J. Eq. 475, *reversed* on another point in 32 N. J. Eq. 755; Moorhead v. Little Miami R. Co., 17 Ohio 340; Bonaparte v. Camden, etc., R. Co., 1 Baldw. (U. S.) 205.

1. Newell v. Staffordville Gravel Co. (N. J. 1887), 11 Atl. Rep. 495.

2. Sterling's Appeal, 111 Pa. St. 35.

3. Bensley v. Mountain Lake Water Co., 13 Cal. 306.

Illustration.—The complainant is in possession of a farm on the river Delaware. The house stands on the bank, not far from the commencement of the declivity. The bank, along which the water sweeps when the river is full, is a green bank; the upper part of which, through the whole extent of the farm, is covered with a grove of trees. The lower part, from the water's edge to the height of ordinary freshets, and to the roots of the trees, has been secured by covering it with stones, by means of which, in connection with the trees, the bank is at present effectually secured. In constructing the raceway of the Trenton Delaware Falls Company, to create their water power, as located, this green bank, part of which is immediately in front of the dwelling house, must be cut down, and the trees destroyed, which will greatly expose the property to the encroachments of the river. This will be a lasting injury to the inheritance; it forms a clear case of waste, over all which cases the court has an undoubted jurisdiction. The company seek to take entire possession of this part of the property; appropriate it permanently to their own use,

and place it beyond the power or control of the complainant. This would be a complete severance of this part of the estate from the residue, and destruction of it in the character in which he now enjoys it; the court has authority to interpose its arm to prevent such an act. Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694.

4. Moore v. Sanford, 151 Mass. 285.

5. *Alabama.*—Thornton v. Sheffield, etc., R. Co., 84 Ala. 109, 33 Am. & Eng. R. Cas. 226.

Indiana.—Sidener v. Norristown, etc., Turnpike Co., 23 Ind. 623; Midland R. Co. v. Smith, 113 Ind. 233; Indiana, etc., R. Co. v. Allen, 113 Ind. 581; Lake Erie, etc., R. Co. v. Michener, 117 Ind. 465.

Maryland.—Piedmont, etc., R. Co. v. Speelman, 67 Md. 260.

New Jersey.—Matthiessen, etc., Sugar Refining Co. v. Jersey City, 26 N. J. Eq. 247; Pratt v. Roseland R. Co., 50 N. J. Eq. 150.

Ohio.—Wagner v. Railway Co., 38 Ohio St. 32; Warner v. Columbus, etc., R. Co., 39 Ohio St. 70.

Tennessee.—Parker v. East Tennessee, etc., R. Co., 13 Lea (Tenn.) 669.

Virginia.—Hodges v. Seaboard, etc., R. Co., 88 Va. 653.

West Virginia.—Pierpoint v. Harrisville, 9 W. Va. 215; Boughner v. Clarksburg, 15 W. Va. 394; Mason City Salt, etc., Co. v. Mason, 23 W. Va. 211.

Wisconsin.—Lumsden v. Milwaukee, 8 Wis. 485; Bohlman v. Green Bay, etc., R. Co., 30 Wis. 105; Church

Nonpayment of Damages.—Where the condemning party neglects or refuses to pay or tender the damages adjudged to be due the landowner for the property taken or injured, it may be restrained by injunction from using the property taken,¹ especially when the condemning party has become insolvent.² And this rule applies where the entry is made pending an appeal by the condemning party from the award of damages;³ but whether it applies where the landowner takes the appeal, is unsettled.⁴

Fraud or Irregularity.—While the owner cannot, in many jurisdictions, question the legality of the incorporation of the condemning party, or its right to condemn, yet, where the proposed action in taking his land is unauthorized and the result of fraud, he may have an injunction to restrain it.⁵ And the rule is the same where the condemnation proceedings have been grossly irregular, oppressive, and not in accord with the statute.⁶

Unlawful Acts during Condemnation Proceedings.—So, also, trespasses and other unlawful acts, committed by the condemning party during the proceedings for condemnation, may be enjoined.⁷

v. Joint School Dist. No. 12, 55 Wis. 399; *Uren v. Walsh*, 57 Wis. 98.

United States.—*Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U.S.) 205.

1. *Arkansas.*—*Organ v. Memphis*, etc., R. Co., 51 Ark. 235, 39 Am. & Eng. R. Cas. 75.

Georgia.—*Chattanooga*, etc., R. Co. *v. Jones*, 80 Ga. 264; *Georgia*, etc., R. Co. *v. Archer*, 87 Ga. 237.

Iowa.—*Richards v. Des Moines Valley R. Co.*, 18 Iowa 259; *Holbert v. St. Louis*, etc., R. Co., 45 Iowa 23; *Hanson v. Chicago*, etc., R. Co., 61 Iowa 588.

Maryland.—*Western Maryland R. Co. v. Owings*, 15 Md. 199.

Mississippi.—*Stewart v. Raymond R. Co.*, 7 Smed. & M. (Miss.) 568.

Missouri.—*Kansas City*, etc., R. Co. *v. St. Joseph Terminal R. Co.*, 97 Mo. 457.

New Jersey.—*Ross v. Elizabeth-Town*, etc., R. Co., 2 N. J. Eq. 422; *Folley v. Passaic*, 26 N. J. Eq. 216.

Vermont.—*Kendall v. Missisquoi*, etc., R. Co., 55 Vt. 438, 14 Am. & Eng. R. Cas. 423.

West Virginia.—*Spencer v. Point Pleasant*, etc., R. Co., 23 W. Va. 406.

Wisconsin.—*Gilman v. Sheboygan*, etc., R. Co., 40 Wis. 653.

United States.—*Eidemiller v. Wyandotte City*, 2 Dill. (U.S.) 376; *Payne v. Kansas*, etc., R. Co., 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 228.

Notice.—In such cases it is proper to

require notice of application for the injunction to be given, whenever it can be done, and save the complainant from the injury which he seeks to avert. *Ross v. Elizabeth-Town*, etc., R. Co., 2 N. J. Eq. 422.

2. *Gammage v. Georgia Southern R. Co.*, 65 Ga. 614, 10 Am. & Eng. R. Cas. 371; *Provolt v. Chicago*, etc., R. Co., 69 Mo. 633.

3. *Chambers v. Cincinnati*, etc., R. Co., 69 Ga. 320, 10 Am. & Eng. R. Cas. 376; *Irish v. Burlington*, etc., R. Co., 44 Iowa 380; *Ray v. Atchison*, etc., R. Co., 4 Neb. 439.

4. That it does apply, see *Eidemiller v. Wyandotte City*, 2 Dill. (U.S.) 376. That it does not apply, see *Reisner v. Strong*, 24 Kan. 410, 10 Am. & Eng. R. Cas. 335.

5. *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark. 111, 20 Am. & Eng. R. Cas. 174; *Cincinnati*, etc., R. Co. *v. Danville*, etc., R. Co., 75 Ill. 113; *Forbes v. Delashmutt*, 68 Iowa 164.

6. *Williams v. Hartford*, etc., R. Co., 13 Conn. 397; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Carpenter v. Easton*, etc., R. Co., 24 N. J. Eq. 249; *Milbau v. Sharp*, 15 Barb. (N. Y.) 193; *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396; *Roberts v. Easton*, 19 Ohio St. 78.

7. *Cobb v. Illinois*, etc., R., etc., Co., 68 Ill. 233; *Lake Erie*, etc., R. Co. *v. Young*, 135 Ind. 426, 58 Am. & Eng. R. Cas. 665; *New Central Coal Co. v.*

b. WHEN NOT PROPER REMEDY—In General.—Where the undertaking is of a public nature, or (if of a private nature) where great expense has been incurred,¹ or where the condemning party makes a *bona fide* claim as owner or licensee of the property entered on, an injunction will not, ordinarily, be granted.²

Adequate Remedy at Law.—An injunction will not be granted to restrain the occupation of land sought to be taken for public use, where the owner has a plain and adequate remedy at law, either in the condemnation proceeding,³ or by an independent action for damages,⁴ or for the recovery of the land.⁵

Where the Writ would be Unavailing to the complainant, only delaying and not preventing the taking of the land, it will not be granted.⁶

George's Creek Coal, etc., Co., 37 Md. 537; Althen v. Kelly, 32 Minn. 280; Wheeler v. Rochester, etc., R. Co., 12 Barb. (N. Y.) 227.

1. *Ex p.* Martin, 13 Ark. 198; Delaware, etc., Canal, etc., R. Co. v. Raritan, etc., R. Co., 14 N. J. Eq. 445; Long Island R. Co. v. Silverstone, 64 Hun (N. Y.) 634, 46 N. Y. St. Rep. 141. Where it is sought to restrain the prosecution of an enterprise of a *quasi* public nature, the court may also consider how far public interests may be affected by a suspension of the undertaking. Even where it has been finally determined that a railroad has been wrongfully constructed on the plaintiff's premises, an injunction has been withheld in order that the company may proceed to effect a legal condemnation of the land. Harrington v. St. Paul, etc., R. Co., 17 Minn. 215; Lohman v. St. Paul, etc., R. Co., 18 Minn. 174; Myers v. Duluth Transfer R. Co., 53 Minn. 335.

2. Davis v. Covington, etc., R. Co., 77 Ga. 322; Roake v. American Telephone, etc., Co., 41 N. J. Eq. 35.

Complainant must Show Title.—In Gleason v. Jefferson, 78 Ill. 399, it is held that to entitle a party to a perpetual injunction to restrain the grading and improving of land as a street, he must show that he is the owner of such land; proof merely that he is in possession will not be sufficient. So in Patterson's Appeal, 129 Pa. St. 109, 40 Am. & Eng. R. Cas. 507, it is held that where plaintiff's title is not established at law, or is not clear, but is questioned on the very ground on which he puts it, and he has never been in the possession of the lands, a preliminary injunction restraining the construction of a railroad across the lands will be dissolved.

After Grant of Right of Way.—In Rainey v. Baltimore, etc., R. Co., 15 Fed. Rep. 767, 10 Am. & Eng. R. Cas. 368, a landowner granted a right of way, but a dispute arose between him and the company as to the true location of the right of way. It was held that the construction of the road would not be arrested by a preliminary injunction, where the determination of the dispute depended upon parol testimony, and where no injury was likely to result that was not capable of pecuniary compensation; the court would reserve the question until final hearing, but would require the company to give ample security for all damages that might result.

3. Chicago, etc., R. Co. v. Chicago, 151 Ill. 348; Phillips v. Watson, 63 Iowa 28; Detroit, etc., R. Co. v. Detroit, 91 Mich. 444; Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129; Trimmer v. Pennsylvania, etc., R. Co. (N. J. 1889), 17 Atl. Rep. 967, 39 Am. & Eng. R. Cas. 124; Wallace v. New Castle Northern R. Co., 138 Pa. St. 168, 47 Am. & Eng. R. Cas. 111.

4. Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 520, 39 Am. & Eng. R. Cas. 117; Corcoran v. Chicago, etc., R. Co., 149 Ill. 291; Chicago, etc., R. Co. v. West Chicago St. R. Co., 156 Ill. 255; Pusey v. Wright, 31 Pa. St. 387; Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh (Va.) 43; Johnson v. Baltimore, etc., R. Co., 4 App. Cas. (D. C.) 491.

5. Jersey City v. Gardner, 33 N. J. Eq. 622.

6. **Illustration.**—A railroad company had, in good faith, obtained an assessment of damages, by a jury, on land which was necessary for their road, long before they wanted the use of it; afterwards, when any delay would have

No Sufficient Injury or Damage Shown.—Where no appreciable injury will be done by the acts of defendants that are threatened to be continued, and the defendants are solvent and able to respond in damages, an injunction will not be granted, although the title of plaintiff is undisputed. To justify the issuance of an injunction there must be cause to fear irreparable damage for which courts of law furnish no adequate remedy.¹

Owner's Consent, Acquiescence, or Laches.—An injunction will not be granted to restrain the use of land taken without condemnation proceedings, where the owner has conveyed the right of way,² or has entered into an agreement to convey it,³ or has in some other way consented to, or acquiesced in, the taking of the land by the

been injurious to them, and while the confirmation of the inquisition was still pending in the Supreme Court, to which it had been reserved, they tendered the damages assessed, and proceeded to use the land. The court, under the circumstances, refused to enjoin them from constructing the road upon it, although the inquisition was not valid until confirmed, inasmuch as they could only be delayed, and could not be prevented from finally obtaining the land. *Mercer v. Williams*, Walk. (Mich.) 85.

1. *Thorn v. Sweeney*, 12 Nev. 251; *O'Reilly v. New York El. R. Co.*, 76 Hun (N. Y.) 283; *Philadelphia, etc., R. Co. v. Philadelphia*, 9 Phila. (Pa.) 563; *Heth v. Fond du Lac*, 63 Wis. 228; *Louisville Southern R. Co. v. Hooe* (Ky. 1896), 35 S. W. Rep. 266; *Colby v. Spokane*, 12 Wash. 690.

Illustrations.—The findings of fact showed that from the manner of constructing the road in a cut, and the distance that it would be from a university building, the operation of the road would not occasion more inconvenience than the passing of loaded wagons over an ordinary street in a city. There was nothing to show how far a railroad should be removed in order to avoid all interference with astronomical instruments or observations, but it was found that for all practical purposes for instruction in the university no substantial inconvenience would result, nor in the practical use of an observatory upon the university campus. The injury was held not sufficient to authorize an injunction against the building and operation of the road. *Minnesota University v. St. Paul, etc., R. Co.*, 36 Minn. 447.

A preliminary injunction to restrain a railroad company from taking a portion of a lot in a borough will not be awarded where it appears that the proposed appropriation will not pass through a dwelling-house on the lot, nor interfere with its use, or the use of any outbuilding or outbuildings, nor interfere with access to the house or outbuildings, and that the strip proposed to be taken will be cut entirely off one side of the lot, leaving no waste strip between it and the railroad. *Stahl v. Pennsylvania R. Co.*, 155 Pa. St. 309, *affirming* 2 Pa. Dist. Rep. 286; *Rudolph v. Pennsylvania Schuylkill Valley R. Co.*, 166 Pa. St. 430.

2. *Cook v. North, etc., R. Co.*, 46 Ga. 618; *Holbert v. St. Louis, etc., R. Co.*, 38 Iowa 315; *Vilas v. Milwaukee, etc., R. Co.*, 15 Wis. 233.

3. *Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443; *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16.

Agreement by Husband of Owner.—In *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316, a railroad company entered into a written agreement for a right of way with a husband who was the ostensible owner, and also the owner of record. The company went into possession and was proceeding to lay the track, when the wife applied for an injunction, claiming to be the real owner by an unrecorded deed, and that the agreement on the part of her husband was without authority; though it appeared that she was cognizant of the entry by the company, and gave no notice of her ownership, nor that she repudiated the agreement entered into by her husband. It was held that the injunction was properly refused.

condemning party, when the latter has expended large sums of money in constructing the improvement, and the public interests have become involved.¹ The laches of the owner in such a case is a good defense to the application for the writ.²

1. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; *Griffin v. Augusta, etc., R. Co.*, 70 Ga. 164; *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401; *Baltimore, etc., R. Co. v. Strauss*, 37 Md. 237; *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

Illustration.—Where a railroad company, with the consent of the devisee for life and the trustee in possession of the property, having made compensation to them for their interest, had entered upon lands for the construction of their road, and had almost completed it, an injunction sought by certain persons claiming to be remaindermen, but whose claim was disputed, was denied, it appearing that the conduct of the railroad company had been *bona fide* and with due regard to the interest of all the parties. *Lanterman v. Blairstown R. Co.*, 28 N. J. Eq. 1.

Owner—When Not Estopped.—Where an action is brought to enjoin a railroad company from continuing to occupy plaintiffs' lands without making compensation, and pending the action the track is moved back from the bank of a river to avoid the caving in of the bank, the plaintiffs are entitled to an injunction restraining the company from occupying the newly occupied lands without compensation, the pendency of the action overcoming any presumption of acquiescence in the occupation of the lands upon which the road was originally constructed. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75.

Where the taking for public use of an easement in a street was with the knowledge of and without objection by the abutting property owner, but was under representations that such taking was intended as temporary, and the property was put to a considerable public use, an injunction to restrain its further use should not be made mandatory until after a reasonable time in which the easements of the private owners may be acquired. *Willamette Iron Works v. Oregon R., etc., Co.*, 26 Oregon 224.

A charter provided that on tender or deposit of the amount of damages found due a landowner, the company might go on and complete the road. Plaintiff, a landowner, filed exceptions to the report of the viewers, and the court set aside the report and referred the matter to other commissioners, whose report assessing damages was confirmed; but meanwhile the railroad had been completed through his lands and for a distance beyond, and the company was insolvent. An execution was issued and returned *nulla bona*. It was held that his failure to ask for the appointment of a receiver, or to apply for an injunction while the road was being constructed over his land, was not an acquiescence in the construction; that he was still entitled to the payment of the damages awarded him, and in default thereof to an order restraining the further operation of the road over his lands. *Evans v. Missouri, etc., R. Co.*, 64 Mo. 453.

2. *Keys v. Marin County*, 42 Cal. 252; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Reckner v. Warner*, 22 Ohio St. 275; *Andrews v. Farmers' L. & T. Co.*, 22 Wis. 288.

Exceptions.—In *Coombs v. Salt Lake, etc., R. Co.*, 9 Utah 322, it was held that the owner of land who stands by and makes no objection to the entry of a railroad company upon his land, and to the construction of a railroad track thereon, does not by his mere silence and inaction lose the right to obtain an injunction restraining the operation of such railroad, unless damages are paid for the land. And in *Westhaeffer v. Lebanon, etc., Street R. Co.*, 163 Pa. St. 54, it was held that where a bill in equity against a street railroad company charges the company with constructing an embankment in front of plaintiff's premises, thus obstructing the approach to his house, and prays an injunction to restrain the operation of the road, and that the embankment be removed, and for general relief, the bill cannot be dismissed on demurrer because it discloses delay on part of plaintiff in seeking relief. If it be conceded that upon final hearing he might be denied the

c. JURISDICTION—*In General*.—Equity has not jurisdiction to restrain the exercise of the right of eminent domain, unless there is an abuse of the power conferred by law, or an attempt is made to take and appropriate property without authority of law, or in a manner and to an extent not authorized by law.¹ Where the proceedings in the law court for the condemnation of land have resulted in a judgment adverse to the landowner, such judgment is final, and a court of equity will not entertain a bill for an injunction by the landowner, founded upon the same objections urged by him in the court of law.² Nor will such a bill be entertained pending the condemnation proceedings.³

Federal Courts.—A federal court will not restrain a railroad company from entering upon land which it is proceeding to condemn in a state court.⁴

d. PLEADING—*Parties to the Bill*.—It would seem that several distinct landowners cannot join in a bill to restrain the occupation of

injunction because of laches, he might yet be entitled to relief against the mode of construction adopted by defendant, and to such restoration of the former grade as might be necessary to restore to him safe and convenient access to his own home.

1. *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528. In *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, it is held that equity has jurisdiction to restrain the taking or damaging of private property for public use without just compensation, even though an action at law will lie for the recovery of damages in such cases, after the property has been so taken or damaged.

Grade Crossing.—In *Iowa* a court of equity has jurisdiction to prevent a crossing at grade by injunction. The condemnation proceeding authorized by statute (Code, §§ 1244, 1245, 1255) cannot determine the propriety of allowing the crossing. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16.

2. *Brown v. Philadelphia, etc., R. Co.*, 58 Md. 539, 10 Am. & Eng. R. Cas. 424. In *Clark v. Teller*, 50 Mich. 618, it is held that equity jurisprudence does not include the exercise of eminent domain. The necessity of taking property and the ascertainment of damages are not cognizable by bill in equity brought to annul the proceedings of the proper tribunal. In *Baltimore, etc., Turnpike Road v. Baltimore, etc., Mills Pass. R. Co.*, 81 Md. 247, it is held that where the law

under which condemnation is sought is constitutional, a court of equity has no power to arrest the proceedings by injunction, since a special tribunal is empowered to determine all the questions arising under the inquisition.

3. *Ney v. Swinney*, 36 Ind. 454. See, however, *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430. In *Chicago, etc., R. Co. v. Jones*, 103 Ind. 386, it is held that on appeal from the award of damages made by the appraisers in a proceeding to appropriate land for a right of way, the Circuit Court can only render judgment for the amount of compensation found due the owner; a judgment enjoining the railroad company, on its failure to pay such amount within a certain time, from going upon or using such land until the same is paid, is erroneous.

4. *Dillon v. Kansas City Suburban Belt R. Co.*, 43 Fed. Rep. 109, holding that this results from the fact that U. S. Rev. Stat., § 720, forbidding federal courts to stay proceedings in state courts, except in bankruptcy cases, applies to a condemnation proceeding in a state court. In *Works v. Junction R. Co.*, 5 McLean (U. S.) 425, however, it is held that where the owner of land about to be taken is a citizen of another state, the United States Circuit Court will entertain his bill for an injunction filed in the state where the land lies, if it appears that the entry would work irreparable injury to the land.

their lands until compensation be paid, but that each should file a separate bill, unless there is some grievance common to all.¹

Sufficiency of the Bill, Complaint, or Petition.—An application for an injunction to restrain further proceedings for the appropriation of lands for railroad purposes must be based upon a complaint making a proper case for such relief.² Facts, not conclusions of law, must be alleged.³ Some injury must be averred as the probable result of the act sought to be restrained,⁴ but the damage complained of need not be averred to be irreparable, if the bill is otherwise sufficient;⁵ alleging a threatened trespass is enough.⁶ The anticipated injury must be plainly described as well as the manner in which it will be inflicted,⁷ and it should be shown that it will be of a serious character,⁸ in which case it will not be necessary to aver in addition that the defendant is insolvent.⁹

1. So held as to several lot owners on a street taken for another public use. *Moran v. Lydecker*, 27 Hun (N. Y.) 582, 11 Abb. N. Cas. (N. Y.) 298; *Nieman v. Detroit Suburban St. R. Co.*, 103 Mich. 256.

2. *Chicago, etc., R. Co. v. Jones*, 103 Ind. 386.

3. *Lynch v. Forbes*, 161 Mass. 302; *Blakeslee v. Missouri Pac. R. Co.*, 43 Neb. 61.

Illustration.—General allegations "that the building and conducting of said railroad upon the roadbed of said public highway will work irreparable injury" to complainant and his property, and that the necessary grading and excavations and "the setting of poles in the sidewalks," etc., will work "irreparable injury," are insufficient to support an application for preliminary injunction. *Borden v. Atlantic Highlands, etc., Electric R. Co.* (N. J. 1895), 33 Atl. Rep. 276.

If the objection is that the use proposed is not a public one, such facts must be set out as will plainly show the private character of such use. *Dunham v. Hyde Park*, 75 Ill. 371.

4. *State v. Eau Claire*, 40 Wis. 533, holding that the erection of a dam cannot be enjoined on the ground that the act authorizing it does not provide compensation for lands which may be thereby overflowed, where it is not averred in the information that any lands will be overflowed.

5. *Western Maryland R. Co. v. Owings*, 15 Md. 199.

6. *Lewis v. North Kingstown*, 16 R. I. 15. In *Church v. Joint School Dist. No. 12*, 55 Wis. 399, an allega-

tion in the complaint that the defendant threatens to take possession of the plaintiff's land "without first having acquired any right or title thereto, or any leave or license to enter upon the same," was construed as substantially stating that the defendant threatens to take the land without first having paid, tendered, or deposited the compensation therefor, as required by the statute as a condition precedent to acquiring any right or title thereto.

7. *Dinwiddie v. Roberts*, 1 Greene (Iowa) 363; *Blakeslee v. Missouri Pac. R. Co.*, 43 Neb. 61.

Illustration.—In an action by way of injunction to restrain a railroad company from constructing a stone arch culvert over a certain watercourse along its right of way, and from constructing banks of earth on each side of such culvert, leaving no other means for the escape of water flowing in said stream save through such culvert, the complaint is sufficient which shows that the culvert would be insufficient as a passageway of the water in said stream during ordinary or heavy rainfalls, causing the water to be dammed up, and to overflow lands, destroying crops and fences; that such damage will be continuous from year to year, and that if such culvert and embankment should be so constructed, plaintiffs would be compelled, in order to recover from defendant compensation for the damage thus sustained, to bring numerous suits against the company. *Lake Erie, etc., R. Co. v. Young*, 135 Ind. 426.

8. *Kokomo v. Mahan*, 100 Ind. 242.

9. *McPike v. West*, 71 Mo. 199, where

Matters of Defense.—Where one of several heirs asks an injunction for want of compensation to him for his interest, an answer alleging payment to another of the heirs, who made distribution, is good.¹ Where the plaintiff relies on a trespass in the original entry, an answer alleging the commencement, since the taking, of proceedings to ascertain the compensation to be paid, and that the commissioners are proceeding with all convenient speed, is bad; it shows no atonement for the trespass.² Where the alleged trespass is sought to be justified by alleging a conditional license to enter from the owner, the burden is on the defendant to allege and prove a full compliance with such condition.³

e. **DISSOLVING.**—A motion to dissolve the injunction on the coming in of the answer will be denied where the answer is not fully responsive to the bill.⁴

The Vacation of the injunction, under a stipulation that if the issues be finally determined in favor of the plaintiff the defendant shall, within thirty days from such final determination, institute condemnation proceedings, does preclude an appeal being taken.⁵

f. **DECREE—DAMAGES.**—Where the entry was illegal and without proceedings to condemn, on the perpetuation of the injunction, plaintiff is entitled to a money judgment for the value of the property illegally taken.⁶ Damages are recoverable, though the plaintiff fails to establish his right to the equitable relief demanded.⁷

the complaint showed that the defendants were about to open a road through plaintiff's premises, and for that purpose were about to cut plaintiff's timber and hedges and remove his fences, thereby exposing his crops and fruit trees, and his meadow and pasture lands, to the depredations of stock.

1. *Whittlesey v. Hartford, etc.*, R. Co., 23 Conn. 421, followed in *Hitchcock v. Danbury, etc.*, R. Co., 25 Conn. 516.

2. *Hursh v. First Div. St. Paul, etc.*, R. Co., 17 Minn. 439, holding that a supplemental answer in such case, alleging that since the original answer the commissioners have made their award of the value of the land when entered on by defendant, and that the company is ready and willing and thereby offers to pay the same to plaintiff, or bring the same into court, states no facts material to the case occurring since the original answer.

3. *Unangst's Appeal*, 55 Pa. St. 128, holding that a corporation obtaining a concession to enter on condition of refraining from a particular injury, irreparable in its nature, and not readily estimated in damages, forfeits its li-

cense when it violates the condition, and should be restrained till it does equity.

4. *Northern Pac. R. Co. v. Burlington, etc.*, R. Co., 2 McCrary (U. S.) 203, 4 Fed. Rep. 298, 1 Am. & Eng. R. Cas. 8, where the answer did not deny that the company had attempted to take the land, and in that respect did not fully meet the allegations of the bill.

5. *Laney v. Rochester R. Co.*, 24 Civ. Pro. Rep. (N. Y. Supreme Ct.) 156.

Bond.—Where there is no taking or invasion of plaintiff's property, but only an alleged consequential damage to its value, which is conjectural and not measurable until after the construction of the road, the injunction may be properly bonded and the work allowed to go on. So held notwithstanding the provision of the La. Constitution, art. 156, providing that private property shall not be taken or damaged for public use until compensation is made. *McMahon v. St. Louis, etc.*, R. Co., 41 La. Ann. 827.

6. *Gay v. New Orleans Pac. R. Co.*, 32 La. Ann. 277.

7. So held where an injunction had been prayed against further interfer-

Issue of Quantum Damificatus.—Where the company is restrained until compensation be made, but is afterwards permitted to do the threatened injury on securing indemnity, the amount of damages is a matter of equitable consideration only. In such a case an issue of *quantum damificatus* will be sent to a jury.¹ Upon such an issue it is error so to frame the decree that execution can be issued upon it.²

Future Damages cannot be allowed, and it is therefore error to insert in the judgment a provision releasing defendant from such damages.³

5. Mandamus.—Where a company, whose charter specifies that the damages shall be assessed in a prescribed manner, unlawfully takes and occupies land, and refuses the owner's demand to proceed as the charter directs, the owner is entitled to a mandamus to compel the performance of such charter duty;⁴ or he may treat such company as a trespasser and sue in ejectment;⁵ or may bring an action for the value of the land.⁶

6. Prohibition.—Where the statute under which the proceedings are instituted does not make adequate provision for compensation for lands taken, prohibition lies to the commissioners to prevent them from proceeding with the assessment of damages.⁷ And where a judge exceeds his powers in granting an order for possession upon payment of compensation into court, without excepting dwelling-houses on the land, prohibition will lie.⁸ But where the court has jurisdiction of the proceedings to condemn, prohibition will not lie to prevent its exercise because of the

ence with an easement in land on which was a spring, etc. *Matthews v. Delaware, etc., Canal Co.*, 20 Hun (N. Y.) 427.

1. *Carpenter v. Easton, etc., R. Co.*, 26 N. J. Eq. 168, holding that the object of the issue is merely to inform the conscience of the court as to the amount of compensation which, in equity, should be required to be made; the verdict will be disregarded, if deemed unwarranted, and the amount of compensation determined by the court, in its discretion.

2. *Ward v. Ohio River R. Co.*, 35 W. Va. 481, where it is held that the order should be that when the company pays to the owner, or deposits in court, as the case may be, the sum found by the jury, the injunction shall be wholly dissolved; but that until that time it is continued in full force and effect.

3. *Hedges v. West Shore R. Co.*, 80 Hun (N. Y.) 310.

Provision Coercing Payment.—The judgment may properly provide that

upon payment of the damages within thirty days after service of a copy of the judgment, the plaintiffs shall convey to the defendant the land occupied by it by deed to be approved by the court, and that in case the damages are not paid in that time, the plaintiffs shall have leave to maintain an action of ejectment to recover the land. *Storm v. New York, etc., R. Co.*, 83 Hun (N. Y.) 86.

4. *McDowell v. Asheville*, 112 N. Car. 747. As to the use of the writ to compel the appointment of commissioners to assess damages, see *supra*, IX. 5. *d. Order of Appointment—Compelling Appointment.*

5. *McDowell v. Asheville*, 112 N. Car. 747.

6. *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191, holding that he is not driven to proceedings by mandamus to compel a condemnation.

7. *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50.

8. *McConiha v. Guthrie*, 21 W. Va. 134, 17 Am. & Eng. R. Cas. 1.

incapacity of a petitioner to maintain the proceeding.¹

7. Trespass²—a. RIGHT OF ACTION—When Trespass will Lie.—Trespass on the case is the appropriate common-law remedy for the recovery of consequential damages for an injury caused by the exercise of the right of eminent domain.³ Trespass *quare clausum fregit* lies to recover damages for the continuance of an unlawful occupation, unless within a reasonable time after its commencement compensation be made or tendered.⁴

Notwithstanding Statutory Remedy.—If the taking is unlawful and without compensation, trespass will lie in many jurisdictions, regardless of the remedy given by statute.⁵

b. PARTIES—Who may Sue.—Where a railroad company appropriates and uses a right of way over land without consent or condemnation, the owner of the land at the time may sue for all damages then sustained, even though he has conveyed the land before suit brought;⁶ but the purchaser is the proper party to sue

1. *State v. Southern R. Co.*, 100 Mo. 59; *State v. Baker*, 20 Fla. 616, 17 Am. & Eng. R. Cas. 15; *State v. Columbia*, etc., R. Co., 1 S. Car. 46.

2. As to What Constitutes Actionable Trespass in such cases, and the defenses which may be raised, see Am. and Eng. Encyc. of Law, title Eminent Domain.

3. *Patent v. Philadelphia*, etc., R. Co., 17 Phila. (Pa.) 291; *Louisville*, etc., R. Co. v. *Ryan*, 64 Miss. 399; *Ring v. Mississippi River Bridge Co.*, 57 Mo. 496; *Brink v. Dunmore Borough*, 174 Pa. St. 395.

4. *Cushman v. Smith*, 34 Me. 247; *Dimmick v. Brodhead*, 75 Pa. St. 464; *Hall v. Pickering*, 40 Me. 548, holding that where a company takes exclusive possession of land under the right of eminent domain it is allowed a reasonable time to make compensation; but where the company enters, wrongfully claiming title in fee under a conveyance from the owner which in fact does not exist, no time is allowed to make compensation, but the company is liable immediately in an action of trespass.

5. *Georgia*.—*Selma*, etc., R. Co. v. *Keith*, 53 Ga. 178.

Illinois.—*Illinois*, etc., R. Co. v. *Cobb*, 82 Ill. 183; *Ligare v. Chicago*, etc., R. Co., 160 Ill. 530.

Indiana.—*Pittsburgh*, etc., R. Co. v. *Swinney*, 97 Ind. 586, overruling *Victory v. Fitzpatrick*, 8 Ind. 281; *McCormack v. Terre Haute*, etc., R. Co., 9 Ind. 283; *Indiana Cent. R. Co. v. Oakes*, 20 Ind. 9.

Iowa.—*Henry v. Dubuque*, etc., R. Co., 10 Iowa 540; *Birge v. Chicago*, etc., R. Co., 65 Iowa 440, 20 Am. & Eng. R. Cas. 291.

Kansas.—*Atchison*, etc., R. Co. v. *Weaver*, 10 Kan. 344.

Maine.—*Hall v. Pickering*, 40 Me. 548. But see *Davis v. Russell*, 47 Me. 443.

Minnesota.—*Adams v. Hastings*, etc., R. Co., 18 Minn. 260.

New York.—*Blodgett v. Utica*, etc., R. Co., 64 Barb. (N. Y.) 580.

North Carolina.—*Fore v. Western North Carolina R. Co.*, 101 N. Car. 526. But see *McIntire v. Western North Carolina R. Co.*, 67 N. Car. 278; *Holloway v. University R. Co.*, 85 N. Car. 452.

Pennsylvania.—*Bethlehem South Gas*, etc., Co. v. *Yoder*, 112 Pa. St. 136; *Keil v. Chartiers Valley Gas Co.*, 131 Pa. St. 466.

Tennessee.—*Duck River Valley Narrow Gauge R. Co. v. Cochrane*, 3 Lea (Tenn.) 478.

Washington.—*Bellingham Bay R.*, etc., Co. v. *Loose*, 2 Wash. 500; *Downs v. Seattle*, etc., R. Co., 5 Wash. 778.

Wisconsin.—*Loop v. Chamberlain*, 17 Wis. 504; *Rusch v. Milwaukee*, etc., R. Co., 54 Wis. 136.

6. *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436, 50 Am. & Eng. R. Cas. 260, affirming 59 N. Y. Super. Ct. 576; *Fordyce v. Wolfe*, 82 Tex. 239; *Carl v. Sheboygan*, etc., R. Co., 46 Wis. 625.

for damages sustained subsequent to the sale.¹ A tenant for years may also sue for an injury to his estate by reason of such unlawful entry.²

Title or Possession Necessary in Plaintiff.—Where a permanent injury to the freehold is claimed, the plaintiff must show an absolute freehold title in himself, and not merely possession, as in the case of trespass to a possessory right.³ Plaintiff need not be in possession when he brings his suit if he was in possession at the time of the unlawful entry.⁴

Parties Defendant.—Ordinarily the condemning party is the sole defendant, but when contractors commit the trespass under authority of the condemning party, the landowner is not confined to his remedy against the latter; he may sue the contractors alone,⁵ or join both in one suit.⁶

c. PLEADING.—**Plaintiff's Pleadings** need not allege that the entry by defendant was *vi et armis*, or contrary to plaintiff's wishes, or unlawful,⁷ or that the acts complained of were negligently done;⁸ but if special damages are claimed the facts upon which such claim is based must be specially pleaded.⁹

1. Pappenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 50 Am. & Eng. R. Cas. 260, *affirming* 59 N. Y. Super. Ct. 576; Fordyce *v.* Wolfe, 82 Tex. 239. In Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411, it is held that a purchaser after the entry may recover the value of the land appropriated as well as the damages occasioned by the trespass since his purchase, the court declining to pass upon the vendor's right of action in such a case, as not being involved in the issue before it. But in Galt *v.* Chicago, etc., R. Co., 157 Ill. 125, it is held that a purchaser has no right of action that occurred before his purchase.

2. Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166.

3. Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 30 Am. & Eng. R. Cas. 384; Hanlon *v.* Union Pac. R. Co., 40 Neb. 52.

But possession under a claim of title founded on a deed purporting to convey the premises to plaintiff is sufficient *prima facie* evidence of title in the absence of evidence of a better title in some other person. Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625.

4. Natchez, etc., R. Co. *v.* Currie, 62 Miss. 506. In Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, it is held that where the alleged trespass is one constituting a permanent and necessary injury to the market value of

plaintiff's fee in the land trespassed on, the failure of the declaration to allege that the plaintiff was in possession of the land at the time of the trespass does not render the declaration demurrable. See also Gillison *v.* Charleston, 16 W. Va. 282.

5. Loop *v.* Chamberlain, 17 Wis. 504.

6. McFadden *v.* Schill, 84 Tex. 77.

7. Pomeroy *v.* Milwaukee, etc., R. Co., 16 Wis. 640.

8. McCord *v.* Doniphan Branch R. Co., 21 Mo. App. 92.

9. Cleveland, etc., R. Co. *v.* Stackhouse, 10 Ohio St. 567; Wampach *v.* St. Paul, etc., R. Co., 21 Minn. 364, holding that in an action against a railroad company for trespass in constructing and operating its railroad for six years upon a public street in front of plaintiff's lots, where the complaint does not allege the existence of any buildings on the lots, or injury to the use of the lots, or any special damage whatever, plaintiff cannot recover for loss of the use of the lots, loss of rent of shops, or loss of custom in business.

To set forth a cause of action the gist of which is trespass it is sufficient to charge the defendant with a wrongful entry, without leave or license, and then to set forth the specific acts done by defendant causing injury to plaintiff's property, such as tearing down fences, digging up and removing

Plea or Answer.—A plea of justification under proceedings to condemn must aver notice to the owner,¹ and the presentation of a petition for an assessment of damages.² An answer denying that defendant entered the plaintiff's close, as described in plaintiff's writ, puts the plaintiff's title in issue.³

d. JUDGMENT.—The judgment in trespass, on a recovery by the plaintiff, should be for the damages sustained by reason of the trespass up to the time of the suit; it should not include the value of the property, inasmuch as no title will pass to the defendant by virtue of the judgment.⁴

XIX. QUESTIONING THE PROCEEDINGS COLLATERALLY—General Rule.

—The rule is well settled that if the court had jurisdiction of the parties and the subject-matter, the validity of the condemnation of land to public use cannot be called in question in a collateral proceeding.⁵ These proceedings, when questioned collaterally,

the soil, making excavations and embankments, building a roadbed for a railroad thereon, and fencing out a strip across the land and excluding the plaintiff from the possession thereof. *Wood v. Michigan Air Line R. Co.*, 81 Mich. 358; *Loop v. Chamberlain*, 17 Wis. 504.

But a declaration charging such an entry, and the construction and operation of a railway on the land without making compensation, and praying an injunction against the running of cars until the damages may be assessed and paid, does not set forth a cause of action in trespass *quare clausum fregit*, nor can damages be assessed under it, as they could be in that form of action. *Davis v. La Crosse, etc.*, R. Co., 12 Wis. 16.

1. *Peoria, etc., R. Co. v. Warner*, 61 Ill. 52; *Canton, etc., R. Co. v. French*, 68 Miss. 22, following *Louisville, etc., R. Co. v. Dickson*, 63 Miss. 380.

2. In *Polly v. Saratoga, etc., R. Co.*, 9 Barb. (N. Y.) 449, it was held that an averment in the plea that there was a disagreement between the plaintiff and defendants as to the price of the land, and that while such disagreement existed, J M, first judge, on the petition of the defendants in writing, duly issued and delivered his warrant, etc., was a sufficient averment of the presenting of a petition; also, that it is not necessary in a plea to set out the names and places of abode of the twelve jurors drawn for the purpose of appraising the value of land taken for a railroad. It is sufficient to mention

the names of those who were actually sworn.

In *Logan v. Vernon, etc., R. Co.*, 90 Ind. 552, 14 Am. & Eng. R. Cas. 43, it was held that an answer averring that another company had duly condemned the land for its right of way, and subsequently mortgaged all its franchises and property to secure bonds issued by it, and that at a foreclosure sale under said mortgage the defendant had purchased all the property and franchises of defendant in foreclosure, and in consequence entered upon the land in question and constructed its road thereon, was good on demurrer.

3. *Bennett v. Clemence*, 6 Allen (Mass.) 10.

4. *Anderson, etc., R. Co. v. Kernodle*, 54 Ind. 314; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Hartz v. St. Paul, etc., R. Co.*, 21 Minn. 358; *Fore v. Western North Carolina R. Co.*, 101 N. Car. 526; *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16.

Exception.—In *Griffin v. Jacksonville, etc., R. Co.*, 33 Fla. 606, it was held that an action of trespass by the owner of abutting lots or blocks, his title extending to the center of the street, to recover damages for the construction of a railroad on the street between the center thereof and such lots or blocks, has, to the extent of being inconsistent with the right to maintain a possessory action against the company, the effect of acting as a consent to the use of the street in operating the railroad in a proper manner or with due care.

5. *Cauldwell v. Curry*, 93 Ind. 363;

are protected by the same presumptions of regularity as are ordinary judgments in civil actions.¹

Exceptions.—In some jurisdictions, however, the proceedings may be attacked collaterally on the grounds of fraud, mistake,² want of notice,³ irregularities connected with the commissioners,⁴ or the invalidity of the verdict.⁵ Want of jurisdiction may always be shown collaterally, for such a defect renders the proceedings wholly void.⁶

Indiana Oolitic Limestone Co. v. Louisville, etc., R. Co., 107 Ind. 301; Baltimore, etc., R. Co. v. Compton, 2 Gill (Md.) 20; Hamilton v. Annapolis, etc., R. Co., 1 Md. Ch. 107, affirmed in 1 Md. 553; Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378; Cory v. Chicago, etc., R. Co., 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; People v. Fitch, 78 Hun (N. Y.) 321; Weinckie v. New York Cent., etc., R. Co. (Supreme Ct.), 15 N. Y. Supp. 689; Nolensville Turnpike Co. v. Quinby, 8 Humph. (Tenn.) 476.

Applications of the Rule.—The rule has been so applied as to overrule objections raised collaterally on the following grounds: That the corporation had no power to exercise the right of eminent domain. Foltz v. St. Louis, etc., R. Co., 60 Fed. Rep. 316, 57 Am. & Eng. R. Cas. 582. That the landowner was not personally notified of the proceedings. Howard v. State, 47 Ark. 431; Galena, etc., R. Co. v. Pound, 22 Ill. 399. That there was a misjoinder of parties defendant. Thompson v. Chicago, etc., R. Co., 110 Mo. 147. That the name of the owner was not stated in the petition. McIntyre v. Marine, 93 Ind. 193. That a copy of the petition was not served on the landowner. Thompson v. Chicago, etc., R. Co., 110 Mo. 147. That the order appointing commissioners did not recite that they were disinterested. Thompson v. Chicago, etc., R. Co., 110 Mo. 147. That one of the commissioners was not qualified to act. Huling v. Kaw Valley R., etc., Co., 130 U. S. 559, 39 Am. & Eng. R. Cas.

52; Chicago, etc., R. Co. v. Griesser, 48 Kan. 663. That notice of a motion to confirm the commissioners' report was not given. Allen v. Utica, etc., R. Co., 15 Hun (N. Y.) 80.

1. Chicago, etc., R. Co. v. Springfield, etc., R. Co., 67 Ill. 142; Indiana Oolitic Limestone Co. v. Louisville, etc., R. Co., 107 Ind. 301; Henkel v. Detroit, 49 Mich. 249; Leonard v. Sparks, 117 Mo. 103; Sedalia v. Missouri, etc., R. Co., 17 Mo. App. 105. But it is held in Williams v. Monroe, 125 Mo. 574, that where the whole record of condemnation proceedings is before the court in a collateral action, and it embraces a return of service, the court cannot presume that there is other evidence of service.

2. Swan v. Chicago, etc., R. Co., 38 Mo. App. 588.

3. McCollum v. Uhl, 128 Ind. 304; Kanne v. Minneapolis, etc., R. Co., 33 Minn. 419, 23 Am. & Eng. R. Cas. 127.

4. Kanne v. Minneapolis, etc., R. Co., 33 Minn. 419, 23 Am. & Eng. R. Cas. 127; Lewis v. St. Paul, etc., R. Co., 5 S. Dak. 148, 57 Am. & Eng. R. Cas. 612.

5. West v. West, etc., R. Co., 61 Miss. 536, holding that a replication alleging facts which, if proven, would show that the verdict of condemnation under which a railroad claims to have entered land was in fact no verdict at all, but merely a void act of unauthorized individuals, is not an attempt to attack the verdict collaterally.

6. Embury v. Conner, 3 N. Y. 511; Visscher v. Hudson River R. Co., 15 Barb. (N. Y.) 37.

EMPANELING JURY

See article *JURIES*.

EMPLOYEES.

See article *MASTER AND SERVANT*.

ENGLISH LANGUAGE.

I. DEVELOPMENT OF THE OLD PRACTICE, 720.

II. PRACTICE IN THE UNITED STATES, 721.

CROSS-REFERENCE.

As to Use of Abbreviations, see article *ABBREVIATIONS*, vol. 1, p. 42.

I. DEVELOPMENT OF THE OLD PRACTICE.—At some time in the early period of English pleading and practice, records and pleadings were written and preserved in the Latin language; but whether this was the first language used for that purpose, or whether the English language originally prevailed, has given rise to a difference of opinion.¹ However this may be, the Latin language was in use for some time before the Norman Conquest, after which, whether as a natural result of the influx of a conquering people or by express operation of superior force, law-Latin or Norman-French became the prevailing language of the courts, in which records and pleadings were made and preserved,² and this practice was not disturbed until the reign of Edward III., when a statute was passed requiring pleadings to be in the English language, though they were to be entered and enrolled in Latin.³

1. Blackstone indicates that the original language was English. Bl. Com., bk. 3, p. 318. For the other view see Stephens on Pl. (Tyler's ed.), app., note 14; Anderson's Law Dict., p. 599, title Latin; Abbott's Law Dict., vol. 2, p. 10, title Latin.

2. Blackstone says that it was a "shameful badge * * * of tyranny or foreign servitude." Bl. Com., bk. 3, p. 318.

3. Bl. Com., bk. 3, p. 318; 36 Edw. III., c. 15.

After the restoration of Charles II. the Latin language was adopted for pleadings as well as for the record, and this continued until the reign of George II., when another statute was passed requiring the proceedings to be written in English.¹

II. PRACTICE IN THE UNITED STATES.—Several of the United States have expressly provided by statute that the records, process, and pleadings shall be in the English language.² Words of foreign origin which by long usage have come to be commonly understood as a part of the English language,³ or technical expres-

1. 4 Geo. II., c. 26; Stephens Pl. (Tyler's ed.), app., note 14; Anderson's Law Dict., p. 599; Abbott's Law Dict., vol. 2, p. 10; 1 Bishop Cr. Proc. 343.

Technical Terms Preserved.—This statute was soon followed by another permitting the use of technical Latin terms, as they often had peculiar legal meaning which could not be translated with accuracy and clearness. 6 Geo. II., c. 14.

Conviction for Forgery—Instrument in Foreign Language.—A judgment under conviction of forgery of an instrument in a foreign language was arrested for the reason that the indictment contained no English translation of the paper. *Rex v. Goldstein*, 3 Brod. & B. 201, 7 E. C. L. 411.

2. *California*.—Code Civ. Pro., § 185.

Idaho.—Code Civ. Pro. (1887), § 3923.

Michigan.—How. Ann. Stat., § 7251.

Missouri.—1 Mo. Stat. (1889), § 3240.

New Hampshire.—Pub. Stat. (1891), p. 218, § 1.

New York.—1 Bliss Annot. Code (4th ed.), § 22.

Utah.—Comp. Laws, vol. 2 (1888), § 3058.

Vermont.—Rev. Law (1880), § 691.

Wisconsin.—San. & Ber. Annot. Stat., § 2578.

Independent of Statutes.—It is also said that, independent of statutory regulation, the general American rule is that pleadings should be in the English language. 1 Bishop Crim. Proc., § 342.

Document Set Out in Chinese.—A Chinaman was convicted of perjury for false swearing with regard to a paper written in the Chinese language. The information gave no translation of the paper into the English language, but instead contained a photographic copy thereof without any allegation of

its meaning or tenor in English; and it was held that as an indictment or information must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of any understanding to know what is intended (Penal Code, § 950), and as the Constitution of California requires judicial proceedings to be conducted, preserved, and published in no other than the English language, the information was bad. *People v. Ah Sum*, 92 Cal. 650.

Partly in English and Partly in Chinese.—An information partly in English and partly in Chinese is not in *ordinary* language contemplated by the statute (Penal Code, § 950). *People v. Ah Sum*, 92 Cal. 650.

Inadvertent Use of Foreign Language.

—Where a foreign expression is carelessly or inadvertently used, as in the use of the words *actio non*, instead of the usual introduction of special pleading in bar "that the plaintiff his action aforesaid thereof against the defendant ought not to have and maintain," this will not vitiate the pleading where it requires no skill to see the mistake and where the case is correctly understood by the court, notwithstanding the unauthorized use of the language; and the court may order such a pleading to be amended. *Berry v. Osborn*, 28 N. H. 288.

3. "**Vs.**" and "**Versus**" for "**Against**."

—Under a statute providing that all pleadings and writs must be in the English language, the use of the abbreviation *vs.* and the word *versus* for the English word "against" is not improper. *Smith v. Butler*, 25 N. H. 521.

"**&c.**" for "**And so Forth**."—The abbreviation "&c." is Latin, but its meaning "and so forth," like many of the best words of the language, has been naturalized in English, and its use is proper under a statute requiring

sions applicable to peculiar kinds of business, are permitted to be used.¹

Technical Legal Expressions.—In some of the states it is also provided that technical legal expressions are excepted from the provisions of the acts restraining the use of any other than the English language.²

Numerical Figures are a part of the English language,³ and some of the states make statutory provision for the expression of numbers by Roman and Arabic numerals and of words by commonly known abbreviations.⁴

pleadings and writs to be in the latter language. *Berry v. Osborn*, 28 N. H. 488. See also article ABBREVIATIONS, vol. 1, p. 42.

A.D. and Anno Domini.—"A.D." may be used for "Anno Domini" or for the English meaning, "In the year of our Lord." *Brown v. State*, 16 Tex. App. 245; *Com. v. Clark*, 4 Cush. (Mass.) 596. So also the words *Anno Domini* have become incorporated into the English language. *State v. Gilbert*, 13 Vt. 650.

"Alias" in Indictment.—"The word *alias* has become familiar as equivalent to 'otherwise called' or 'otherwise known as,' and may properly be treated as having in use in pleadings in English acquired that import." *Kennedy v. People*, 39 N. Y. 251.

1. In an action for a breach of a contract, the complaint alleged that the plaintiff had paid to the defendant a certain sum of money for the right and privilege of delivering to the defendant a certain amount of wheat; continuing, the complaint alleged: "said contract is in the following words and figures: to wit, * * * Received of A. Gerberding \$100.00, for which I allow him the privilege of delivering me at any time within 30 days from date, 500 tons S-87 wheat, etc." Upon special demurrer on the ground that the complaint was ambiguous, unintelligible, and uncertain, the court held that the words or abbreviation S-87

were descriptive of the wheat, requiring oral evidence of their meaning in the business of dealing in wheat, and that such oral evidence need not be stated in the pleading in which the written agreement was set out *in hæc verba*, but that the meaning might be proved on the trial for the purpose of enabling the court to interpret the words. *Berry v. Kowalsky* (Cal. 1891), 27 Pac. Rep. 286. See also *Calahan v. Stanley*, 57 Cal. 476.

2. *Michigan*.—How. Annot. Stat., § 7251.

Missouri.—Stat. (1889), § 3240.

Vermont.—Rev. Law (1880), § 691.

3. *Kelly v. State*, 3 Smed. & M. (Miss.) 525; *State v. Hodgeden*, 3 Vt. 485; *State v. Seamons*, 1 Greene (Iowa) 419; *Com. v. Smith*, 153 Mass. 102. See also article INDICTMENTS.

Statutory in England.—A rule in England restraining the expression of numbers by figures was not a regulation of the common law, but was a statutory regulation which has since been repealed. *Kelly v. State*, 3 Smed. & M. (Miss.) 525.

4. *California*.—Code Civ. Pro., § 185.

Michigan.—How. Ann. Stat., § 7251.

Missouri.—Stat. (1889), § 3240.

New York.—1 Bliss. Annot. Code (4th ed.), § 22.

Wisconsin.—San. & Ber. Annot. Stat., § 2578.

See also article ABBREVIATIONS, vol. 1, p. 42.

ENGROSSING.

See article *MONOPOLIES*.

ENLARGEMENT OF TIME.

See article *TIME TO PLEAD*.

ENTERING APPEARANCE.

See article *APPEARANCES*, vol. 2, p. 588.

ENTRIES.

As to Entering Judgments, Orders, and Decrees, see articles *DECREES*, vol. 5, p. 946; *JUDGMENTS; ORDERS*.
Entry in Records, see article *RECORDS*.
Entry of Default, see article *DEFAULTS*, vol. 6, p. 1.

ENTRY AND DETAINER.

See article *FORCIBLE ENTRY AND DETAINER*.

ENTRY, WRIT OF.

By S. B. FISHER.

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- II. WHEN THE WRIT LIES, 724.
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1. *Nontenure*, 727.
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VII. AMENDMENTS, 728.

VIII. WRITS OF ENTRY TO FORECLOSE MORTGAGES, 728.

1. *Generally*, 728.
2. *Nature of Writ*, 729.
3. *Notice*, 729.
4. *Parties*, 729.

I. DEFINITION.—A writ of entry is a writ used in a form of real action brought to recover the possession of lands from one who wrongfully withholds the same from the demandant.¹ Writs of entry are now abolished in England,² but are still in use in a modified form in several of the United States.³

II. WHEN THE WRIT LIES.—Where a party has possession under claim of title he may maintain this action as against one who has entered under no legal claim.⁴ A merely equitable estate is not sufficient to maintain the action,⁵ nor is a mere claim of ease-

1. Black's Law Dict.; Bouv. Law Dict.; Rapalje & Lawrence's Law Dict.

The object of the writ was to regain the possession of lands of which the demandant, or his ancestors, had been unjustly deprived by the tenant of the freehold, or those under whom he claimed, and hence it belonged to the possessory division of real actions. It decided nothing with respect to the right of property, but only restored the demandant to that situation in which he was (or by law ought to have been) before the dispossession committed. 3 Bl. Com. 180; Black's Law Dict. 425.

2. On account of its dilatoriness and the niceties required in the pleadings, the writ of entry fell into disuse in England long before it was expressly abolished. It was succeeded by the writ of assize invented by Glanvil, chief justice to Henry II., which was also abolished by Stat. 3 & 4 Wm. IV., c. 27, § 36. The remedy now is generally by ejectment.

3. See statutes of *Maine*, *New Hampshire*, and *Massachusetts*. See also *Potter v. Baker*, 19 N. H. 166; *Hodgkins v. Price*, 137 Mass. 13; *Sherman v. Galbraith*, 141 Mass. 440.

4. *Massachusetts*.—*Provident Sav. Inst. v. Burnham*, 128 Mass. 458; *Hubbard v. Little*, 9 Cush. (Mass.) 475; *Wolcott v. Ely*, 2 Allen (Mass.) 338;

Tilson v. Thompson, 10 Pick. (Mass.) 359; *Nichols v. Todd*, 2 Gray (Mass.) 568; *Porter v. Perkins*, 5 Mass. 234; *Brewer v. Stevens*, 13 Allen (Mass.) 346.

New Hampshire.—*Aldrich v. Parsons*, 6 N. H. 555; *Bean v. Moulton*, 5 N. H. 450; *Bailey v. March*, 3 N. H. 274; *Mills v. Peirce*, 2 N. H. 9; *Edmunds v. Griffin*, 41 N. H. 529; *Melcher v. Flanders*, 40 N. H. 139.

There may Be a Possessory Title, the holder of which may be treated by the true owner as a tortfeasor, but which will avail such holder in maintaining an action of trespass or a writ of entry against a stranger. *Perry v. Weeks*, 137 Mass. 587. See also *Currier v. Gale*, 9 Allen (Mass.) 522; *Jackson v. Boston, etc., R. Corp.*, 1 Cush. (Mass.) 575; *Litchfield v. Scituate*, 136 Mass. 39.

5. *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 580; *Wilson v. Black*, 104 Mass. 406; *Eastman v. Fletcher*, 45 Me. 302; *Dyer v. Toothaker*, 51 Me. 380; *Sawyer v. Skowhegan*, 57 Me. 500; *Ela v. Pennock*, 38 N. H. 154. See also *Poignard v. Smith*, 6 Pick. (Mass.) 172; *Hill v. Payson*, 3 Mass. 559; *Russell v. Lewis*, 2 Pick. (Mass.) 508; *Shaw v. Wise*, 10 Me. 113; *Pritchard v. Brown*, 4 N. H. 397; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, 7 T. R. 47; *Doe v. Wharton*, 8 T. R. 2.

In *Massachusetts*, however, an equitable defense to a writ of entry is held

ment.¹ A purchase under a void judgment will not confer a right of entry,² nor will a mere entry upon land under a defectively executed deed, not followed by acts of ownership or continued possession.³

III. PARTIES.—As a rule the action will not lie in favor of one who claims less than a freehold estate,⁴ nor against one claiming less than a freehold estate,⁵ unless the one in possession has ousted the demandant,⁶ but it is provided by statute in some jurisdictions that one or more tenants in common, joint tenants, or copartners, may bring a writ of entry for the particular estate to which they are entitled.⁷

One Entitled to an Estate in Remainder only, subject to an existing life estate in another, cannot maintain a writ of entry against one rightfully in possession under the life estate.⁸

IV. FORM OF WRIT.—A writ of entry must be in the form of an attachment and summons, or of an original summons, and must be served in a manner appropriate to the form used.⁹

good by statute. *Nott v. Sampson Mfg. Co.*, 142 Mass. 479.

1. *Provident Sav. Inst. v. Burnham*, 128 Mass. 458; *Morgan v. Moore*, 3 Gray (Mass.) 319; *Cole v. Eastham*, 124 Mass. 307; *Merrimack River Locks, etc. v. Nashua, etc.*, R. Co., 104 Mass. 1; *Kenniston v. Hannaford*, 58 N. H. 28; *Elliot v. Heath*, 6 N. H. 426; *Woodman v. Lane*, 7 N. H. 241; *Ayer v. Phillips*, 69 Me. 50.

2. *Shaefer v. Gates*, 2 B. Mon. (Ky.) 458.

3. *Nichols v. Todd*, 2 Gray (Mass.) 563.

4. *Fay v. Taft*, 12 Cush. (Mass.) 448. See also *Merrill v. Bullock*, 105 Mass. 486; *Webster v. Gilman*, 1 Story (U. S.) 499.

5. *Matthews v. Demeritt*, 22 Me. 312; *Kerley v. Kerley*, 13 Allen (Mass.) 286; *Creighton v. Proctor*, 12 Cush. (Mass.) 438.

6. *Wyman v. Brown*, 50 Me. 139; *Gregory v. Tozier*, 24 Me. 308.

In Massachusetts this was formerly the rule as to a tenant at will, but by statute the writ now lies against such tenant. *Dolby v. Miller*, 2 Gray (Mass.) 135.

7. *Butrick v. Tilton*, 141 Mass. 93; *Oxnard v. Kennebeck Purchase*, 10 Mass. 179; *Chandler v. Simmons*, 97 Mass. 508.

A Tenant in Common may bring the writ without joining his cotenants, but he is entitled to recover only the undivided portion to which he proves a sufficient title. Pub. Stat. Mass., c.

173, §§ 7, 10; *Butrick v. Tilton*, 141 Mass. 93; *Dewey v. Brown*, 2 Pick. (Mass.) 387; *Chandler v. Simmons*, 97 Mass. 508; *Swan v. Stephens*, 99 Mass. 7; *Backus v. Chapman*, 111 Mass. 386.

Contra.—As to tenants in common, *Hills v. Doe*, 6 N. H. 328.

8. To sustain such an action the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ he had a right of entry into the demanded premises. *Sylvester v. Sylvester*, 83 Me. 46.

In Case of Death of a demandant in a writ of entry, pending the suit, his executor or administrator may be admitted under the statute to prosecute the action for the benefit of those interested in the estate. *Ladd v. Sanborn*, 5 N. H. 337.

9. *Richardson v. Rich*, 66 Me. 249.

Thus a writ of entry in the form of a writ of summons and attachment, on which an attachment is actually made, must by statute be served by delivering to the defendant or leaving at his last and usual place of abode an original summons, and a service by copy will not support a judgment against him on default. *Wilbur v. Ripley*, 124 Mass. 468.

Defect in Form — How Taken Advantage Of.—A defect in form or service of a writ which is amendable, or which may be waived by the party suffering, is a matter of abatement, and can be taken advantage of by a plea or motion

V. DECLARATION.—Four things are essential to a good declaration in a writ of entry: *a.* The premises demanded must be clearly described.¹ *b.* The estate which the demandant claims in the premises must be stated, whether it be a fee simple, a fee tail, for life, or for years; and if for life, then whether for his own life or that of another.² *c.* An allegation that the demandant was seised of the estate claimed within twenty years.³ *d.* A

in abatement—not by motion to dismiss. *Richardson v. Rich*, 66 Me. 249.

1. *Wyman v. Brown*, 50 Me. 139.

As to descriptions of demanded premises, see *Willey v. Nichols*, 59 Me. 253; *Baker v. Bessey*, 73 Me. 472; *Woodman v. Lane*, 7 N. H. 241; *Lyman v. Dodge*, 13 N. H. 197; *Howard v. Holy Cross College*, 116 Mass. 117; *Silloway v. Hale*, 8 Allen (Mass.) 61. And see *Adams v. Frothingham*, 3 Mass. 352.

"When lands are demanded, the description of them must be so certain that seisin may be delivered by the sheriff without reference to any description *dehors* the writ." *Atwood v. Atwood*, 22 Pick. (Mass.) 287. See also *Riley v. Smith*, 9 Allen (Mass.) 370; *Howard v. Holy Cross College*, 116 Mass. 117; *Cleaveland v. Flagg*, 4 Cush. (Mass.) 76; *Cornell v. Jackson*, 9 Met. (Mass.) 150; *Sparhawk v. Bagg*, 16 Gray (Mass.) 583; *Elliot v. Heath*, 6 N. H. 427.

Illustrations.—The description in a writ of entry of the demanded premises as "a certain parcel of land, with the buildings thereon, situate in Boston, and bounded southerly by Eliot street, twenty feet; westerly on a passageway six feet and nine inches in width, sixty-one feet eleven inches; northerly on a passageway three feet wide, nineteen feet nine inches; and easterly by a line through the center of the brick partition wall, sixty-one feet two inches; with the appurtenances thereto belonging," is sufficiently certain. *Riley v. Smith*, 9 Allen (Mass.) 370.

It is no ground for demurrer that in a writ of entry it is not alleged that the land demanded is in the county in which the action is brought; it is sufficient if the land is described as being in a town which is within the county. *Martin v. Martin*, 51 Me. 366.

In a writ of entry the plaintiff demanded lot number twenty, in the third range, being the lot upon which the defendant resided. The summons

which was delivered to the defendant set forth that the action was brought to recover lot number twenty-one, in the third range. Upon a demurrer to a plea in abatement, this was held to be a fatal variance. *Lyman v. Dodge*, 13 N. H. 197.

A General Description of the land demanded may be restricted and restrained by a particular description. *Woodman v. Lane*, 7 N. H. 241.

2. Rev. Stat. Mass. 1882, c. 173, § 2; Rev. Stat. Me. 1883, c. 104, § 3; *Wyman v. Brown*, 50 Me. 139.

Inception of Title.—The demandant need not, however, show the inception of his title. Pub. Stat. Mass. (1882), c. 173, § 2; Rev. Stat. Me. (1883), c. 104, § 3.

The Word "Fee," without any adjunct or limitation, describes the same quantity of estate as the term "fee simple." When the plaintiff in a real action demands possession of a parcel of land, with the buildings thereon, giving a proper description by metes and bounds, and duly alleges that he was seised thereof in his demesne as of fee and mortgage within twenty years last past, and was disseised by defendant, his declaration is not bad on demurrer under the statute requiring him to "set forth the estate he claims in the premises, whether in fee simple, fee tail, for life, or for years." *Jordan v. Record*, 70 Me. 529.

A Trustee Holding the Legal Title to land need not set forth in a writ of entry that he is trustee. *Simpson v. Dix*, 131 Mass. 179.

3. Pub. Stat. Mass. (1882), § 2; Rev. Stat. Me. (1883), c. 104, §§ 2, 4; *Sedgw. & Wait on Tr. Tit. to Land*, § 430; *Wyman v. Brown*, 50 Me. 139; *Hewes v. Coombs*, 84 Me. 435; *Bussey v. Grant*, 20 Me. 281; *Morse v. Sleeper*, 58 Me. 335; *Jordan v. Record*, 70 Me. 529; *Stanley v. Perley*, 5 Me. 369. See also *Wolcott v. Knight*, 6 Mass. 418; *Barber v. Root*, 10 Mass. 260; *Tappan v. Tappan*, 36 N. H. 98; *Mc-*

disseisin by the tenant.¹

VI. PLEAS—1. **Nontenure**.—A party in possession as tenant at will, or for a term of years only, may, in a writ of entry, plead nontenure and defeat the writ.² The effect of the plea of nontenure to a writ of entry differs in the several states; in some it is regarded as being of the nature of a plea in abatement,³ while in others it is considered a good plea either in bar or abatement.⁴

2. **Nul Disseisin**.—If, on a writ of entry, the tenant pleads the general issue or nul disseisin only, he is thereby estopped to deny his possession under claim of freehold,⁵ unless he files a disclaimer.⁶ The plea of nul disseisin puts the whole title in

Daniel *v.* Cater, 21 N. H. 227; Wendell *v.* Moulton, 14 N. H. 573; Waldo *v.* Mitchell, 24 N. H. 229.

Want of Such Averment, How Cured.—The want of an averment in a writ of entry of seisin within twenty years is cured by a verdict that the demandant was disseised within that time. Elliot *v.* Heath, 6 N. H. 426.

Where the Demandant Counts upon His Own Seisin, without stating his title, the tenant cannot plead that he claims by a particular title, setting it out, and then allege matter in estoppel. Potter *v.* Baker, 19 N. H. 166.

1. Rev. Stat. Me. (1883), c. 104, § 2; Pub. Stat. Mass. (1883), c. 173, § 2; Wyman *v.* Brown, 50 Me. 139; Jordan *v.* Record, 70 Me. 529; Barber *v.* Root, 10 Mass. 260; Tappan *v.* Tappan, 36 N. H. 98; Rowell *v.* Small, 30 Me. 30; Porter *v.* Cole, 4 Me. 20.

2. Gibson *v.* Bailey, 9 N. H. 174; Mills *v.* Peirce, 2 N. H. 10; Sperry *v.* Sperry, 8 N. H. 480; Whidden *v.* Proctor, 17 N. H. 90.

3. Stark *v.* Brown, 40 N. H. 345; Mills *v.* Peirce, 2 N. H. 10; Tappan *v.* Tappan, 31 N. H. 41; Brown *v.* Miltimore, 2 N. H. 442; Wheeler *v.* Bates, 21 N. H. 460; Newbegin *v.* Langley, 39 Me. 200; Hatch *v.* Brier, 71 Me. 542.

4. Fiedler *v.* Carpenter, 2 Woodb. & M. (U. S.) 211; Fales *v.* Gibbs, 5 Mason (U. S.) 465; Porter *v.* Rumery, 10 Mass. 64. *Contra*, Keith *v.* Swan, 11 Mass. 216.

Ouster Pending Writ.—If, pending a writ of entry, the tenant is ousted by a stranger having a better title, or if the land is recovered against him by a stranger, this will abate the writ, but in both cases the fact must be specially pleaded as having occurred pending the writ, or after the last continuance. It resembles the common plea of non-

tenure and cannot be given in evidence under the general issue. Walcutt *v.* Spencer, 14 Mass. 409. See also Burnham *v.* Howard, 31 Me. 569; Bailey *v.* March, 3 N. H. 274; Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Eldridge *v.* Acocks, 2 Pick. (Mass.) 319.

5. **Maine**.—Bennoch *v.* Whipple, 12 Me. 346; Blake *v.* Dennett, 49 Me. 102; Colburn *v.* Grover, 44 Me. 48; Stewart *v.* Davis, 63 Me. 539; Hatch *v.* Brier, 71 Me. 542; Perkins *v.* Raitt, 43 Me. 280; Gammon *v.* Huff, 67 Me. 184.

Massachusetts.—Devens *v.* Bower, 6 Gray (Mass.) 126; Swan *v.* Stephens, 99 Mass. 7; Higbee *v.* Rice, 5 Mass. 344; Washington Bank *v.* Brown, 2 Met. (Mass.) 293; Tyler *v.* Hammond, 11 Pick. (Mass.) 193; Stevens *v.* Winship, 1 Pick. (Mass.) 318; Russell *v.* Lewis, 2 Pick. (Mass.) 510.

New Hampshire.—Melcher *v.* Flanners, 40 N. H. 139; Gibson *v.* Bailey, 9 N. H. 168; Tappan *v.* Tappan, 36 N. H. 98; Wiggin *v.* Smith, 54 N. H. 213.

Since special pleading was abolished by Mass. Stat. 1836, c. 273, a tenant in a writ of entry may rely on the defense of nontenure, etc., under the general issue of nul disseisin, on filing a specification of such defense. Wheelwright *v.* Freeman, 12 Met. (Mass.) 154.

6. Blake *v.* Dennett, 49 Me. 102; Perkins *v.* Raitt, 43 Me. 280.

Where, on writ of entry, defendant disclaims as to part and pleads the general issue as to the residue, and a verdict is rendered in favor of demandant, for the whole, the verdict is not invalid, but he may have judgment for the parcel intended to be found, if material for a sufficient description exists, upon entering a remittitur as to the residue. Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773.

issue.¹ And the tenant can maintain the issue either upon the failure of the demandant to show title in himself, or by evidence of title in the tenant.²

VII. AMENDMENTS.—The declaration in a writ of entry for land in fee may be so amended as to claim merely a life estate either in the whole or in a part of the land.³ If the declaration omits to allege seisin of demandant, and disseisin by tenant, the defect may be supplied by amendment,⁴ and it is held by the decisions in one state that where some of the demandants who have joined in the writ are not entitled to recover, such writ may be amended by striking out the names of those parties.⁵ In other states, however, the right to such amendment is denied.⁶

Alternative Command.—A writ erroneous by reason of its command to attach the defendant's property, and for want thereof to take the body, may be amended by striking out the alternative command.⁷

VIII. WRITS OF ENTRY TO FORECLOSE MORTGAGES—1. Generally.—As between the mortgagor and mortgagee the fee of the estate passed at common law to the mortgagee at the time of the execution of the deed, and he might maintain a writ of entry, unless there was an agreement to the contrary, before or after condition broken, against the mortgagor,⁸ or against the mortgagor's

A mortgage of real estate is a good defense to a writ of entry, without a disclaimer of absolute title in fee simple. *Hoxie v. Finney*, 11 Gray (Mass.) 511.

1. *Croacher v. Oesting*, 143 Mass. 195; *Russell v. Lewis*, 2 Pick. (Mass.) 510.

2. *Croacher v. Oesting*, 143 Mass. 195; *Swan v. Stephens*, 99 Mass. 7. And see *Hall v. Dodge*, 38 N. H. 346; *Tuttle v. Brown*, 14 Pick. (Mass.) 516.

Under the plea of nul disseisin, the defendant cannot defeat the action by showing title in a stranger under whom he does not show title in himself, unless such title proves that the plaintiff was not seised within twenty years. *Hewes v. Coombs*, 84 Me. 434; *King v. Barns*, 13 Pick. (Mass.) 24; *Kenniston v. Hannaford*, 55 N. H. 268; *Brinley v. Whiting*, 5 Pick. (Mass.) 348. See also *Gammon v. Huff*, 67 Me. 184; *Clark v. Pratt*, 55 Me. 546; *Wiggin v. Smith*, 54 N. H. 213; *Enfield v. Permit*, 8 N. H. 512.

Under the general issue, it is not competent for the tenant to give in evidence a deed from the demandant or his ancestor, made after the disseisin committed to a stranger. *Wolcott v. Knight*, 6 Mass. 418. He may,

however, plead a subsequently acquired title. *Bailey v. March*, 3 N. H. 274; *Parlin v. Haynes*, 5 Me. 178.

In Massachusetts the tenant may, by statute, show any defense under the plea of nul disseisin by filing a specification thereof. *Wheelwright v. Freeman*, 12 Met. (Mass.) 154.

3. *Howe v. Wildes*, 34 Me. 566.

4. *Rowell v. Small*, 30 Me. 30.

5. *Thayer v. Hollis*, 3 Met. (Mass.) 369; *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

6. *Treat v. McMahon*, 2 Me. 120; *Pickett v. King*, 4 N. H. 212.

Where One of Two Demandants Dies pending the writ, the court may permit the striking out of the name of the deceased and otherwise so amending that the action may stand as if commenced by the survivor. *Treat v. Strickland*, 23 Me. 234. See also *Hancock v. Wentworth*, 5 Met. (Mass.) 446.

Tenant Purchasing Right of One Demandant.—If, pending a writ of entry by several demandants, the tenant purchase the right of one of them, the writ may be amended by striking out that one. *Chadbourn v. Rackliff*, 30 Me. 354.

7. *Clement v. Clement*, 18 N. H. 611.

8. *Hobart v. Sanborn*, 13 N. H. 226;

alienees.¹

2. Nature of Writ.—The writ in such cases differs from an ordinary writ of entry, being in the nature of a bill in equity, and is governed in general by the same rules as to parties and relief.²

3. Notice.—The mortgagor in possession is not entitled to notice to quit as a prerequisite to a writ of entry to foreclose.³

4. Parties.—The demandant must be the holder of the legal estate at the time the action is commenced,⁴ but the writ may be maintained on a mortgage against the tenant in possession, even though he is not the holder of the equity of redemption.⁵

A writ of entry to foreclose a mortgage cannot be maintained against a tenant at will or for years if he is willing to give up possession.⁶

One Joint Tenant cannot maintain alone a writ of entry to foreclose a mortgage.⁷

Hartshorn v. Hubbard, 2 N. H. 453; *Blaney v. Bearce*, 2 Me. 132. See also *Groton v. Boxborough*, 6 Mass. 50; *Gould v. Newman*, 6 Mass. 239.

"A mortgagee in fee may enter immediately after the execution of the mortgage, put out the mortgagor, and receive the profits, if there be no agreement to the contrary; and if the mortgagor refuse to quit, the mortgagee may have trespass, or a writ of entry, to recover against him as a disseisor." *Hobart v. Sanborn*, 13 N. H. 226. See also *Newall v. Wright*, 3 Mass. 138.

1. *Stewart v. Davis*, 63 Me. 539.

The mortgagee will not be prevented from bringing a writ of entry by the fact that he has already entered upon the premises for the purpose of foreclosure. *Smith Charities v. Connolly*, 157 Mass. 272.

2. *Cochran v. Goodell*, 131 Mass. 464; *Webster v. Vandeventer*, 6 Gray (Mass.) 428; *Holbrook v. Bliss*, 9 Allen (Mass.) 69; *Treat v. Pierce*, 53 Me. 71.

A writ of entry may be used to enforce a foreclosure, and when so used, it is held to be "for the most part governed by the same rules of pleading and practice as when the title of the demandant is absolute." *Green v. Cross*, 45 N. H. 581. See also *Bickford v. Daniels*, 2 N. H. 71.

3. *Smith Charities v. Connolly*, 157 Mass. 272; *Hobart v. Sanborn*, 13 N. H. 226. See also *Tuttle v. Lane*, 17 Me. 437.

4. *Boone*, Law of Mortg., § 206; *Somes v. Skinner*, 16 Mass. 348; *Adams*

v. Parker, 12 Gray (Mass.) 53; *Young v. Miller*, 6 Gray (Mass.) 152.

A Second Mortgagee may bring a writ of entry against the first mortgagee, and owner of the equity of redemption, to foreclose. *Cochran v. Goodell*, 131 Mass. 464; *Kilborn v. Robbins*, 8 Allen (Mass.) 466. See also *Cronin v. Hazletine*, 3 Allen (Mass.) 324.

5. *Tuttle v. Lane*, 17 Me. 437.

6. *Wheelwright v. Freeman*, 12 Met. (Mass.) 154; *Raynham v. Snow*, 12 Met. (Mass.) 157, note.

If, however, such tenant denies the mortgagee's right and refuses to give possession, a writ of entry may be maintained against him as tenant of the freehold by disseisin. *Wheelwright v. Freeman*, 12 Met. (Mass.) 154; *Johnson v. Phillips*, 13 Gray (Mass.) 198.

7. *Webster v. Vandeventer*, 6 Gray (Mass.) 428; *Blake v. Sanborn*, 8 Gray (Mass.) 154.

Two mortgagees holding several mortgages given at the same time are tenants in common and may join in a writ of entry to foreclose. *Cochran v. Goodell*, 131 Mass. 464.

Separate Enforcement of Rights.—Each mortgagee is entitled to enforce his rights in his own name. *Gilson v. Gilson*, 2 Allen (Mass.) 115; *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

Contra.—In *New Hampshire*, where two or more are interested as mortgagees all must join. *Johnson v. Brown*, 31 N. H. 405; *Noyes v. Barnet*, 57 N. H. 605.

EQUITABLE ASSIGNMENTS.

BY JAMES B. CLARK.

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Other Topics Related to this Subject, see articles *CREDITORS' BILLS AND FRAUDULENT CONVEYANCES*, vol. 5, p. 388; *EXECUTIONS; FORECLOSURE; INSURANCE; JUDGMENTS; LIS PENDENS; FUNDS AND DEPOSIT IN COURT; NEGOTIABLE INSTRUMENTS; PARTIES; PATENTS; SET-OFF AND COUNTERCLAIM*.

I. SCOPE OF ARTICLE.—This article will treat of the effect of the assignment of a right or thing in action on proceedings at law and in equity, the equitable or statutory rights of the assignee to sue in his own name or in that of the assignor, and, generally, of the pleading and practice in suits or actions to enforce the right assigned when different from procedure in other cases.

II. RIGHTS OF ASSIGNEES IN COURTS OF LAW—1. **Recognition and Protection of Equitable Rights.**—Choses in action or things incapable

of manual delivery, except in a few special cases, were not assignable at common law, nor were the rights of assignees recognized in the law courts, though equity would afford relief. At an early day, however, courts of law began to recognize the equitable rights of the assignee, and at present, though assignees may be afforded no aid by legislation, these courts will take notice of assignments of choses in action, and for every substantial purpose will protect the assignee.¹

1. For a treatment of this subject substantively, see the American and English Encyclopædia of Law (2d ed.), vol. 2, p. 1007, title ASSIGNMENTS.

In support of the text above, see the following cases:

Connecticut.—*Lyon v. Summers*, 7 Conn. 399; *Colbourn v. Rossiter*, 2 Conn. 503; *Bishop v. Holcomb*, 10 Conn. 444; *Camp v. Tompkins*, 9 Conn. 552.

Georgia.—*Sheftall v. Clay*, R. M. Charl. (Ga.) 7.

Illinois.—*Morris v. Cheney*, 51 Ill. 451; *Mansfield v. Hoagland*, 46 Ill. 359; *Chapman v. Shattuck*, 8 Ill. 49; *Hodson v. McConnel*, 12 Ill. 170; *Creighton v. Hyde Park*, 6 Ill. App. 272.

Kentucky.—*Schooling v. M'Gee*, 1 T. B. Mon. (Ky.) 232; *Robbins v. Holley*, 1 T. B. Mon. (Ky.) 191; *Talbot v. Cook*, 7 T. B. Mon. (Ky.) 438; *Clark v. Boyd*, 6 T. B. Mon. (Ky.) 294; *Rawlins v. Timberlake*, 6 T. B. Mon. (Ky.) 234; *Sharps v. Eccles*, 5 T. B. Mon. (Ky.) 72; *Harrison v. Burgess*, 5 T. B. Mon. (Ky.) 420; *Armstrong v. Flora*, 3 T. B. Mon. (Ky.) 46; *McCormac v. Smith*, 3 T. B. Mon. (Ky.) 432.

Louisiana.—*Carlin v. Dumartrait*, 8 Martin N. S. (La.) 212.

Maine.—*Dunning v. Sayward*, 1 Me. 366; *Clark v. Rogers*, 2 Me. 143; *Robbins v. Bacon*, 3 Me. 346; *Swett v. Green*, 4 Me. 385; *Moody v. Towle*, 5 Me. 415.

Maryland.—*Green v. Johnson*, 3 Gill & J. (Md.) 393; *Owings v. Low*, 5 Gill & J. (Md.) 145; *Wallis v. Dillery*, 7 Md. 250.

Massachusetts.—*Perkins v. Parker*, 1 Mass. 117; *Andrews v. Herring*, 5 Mass. 210; *Gould v. Newman*, 6 Mass. 239; *Boylston v. Greene*, 8 Mass. 465; *Dawes v. Boylston*, 9 Mass. 337; *Crocker v. Whitney*, 10 Mass. 316; *Cutts v. Perkins*, 12 Mass. 206; *Osborne v. Jordan*, 3 Gray (Mass.) 277;

Jones v. Witter, 13 Mass. 304; *Skinner v. Somes*, 14 Mass. 107; *Sprague v. Baker*, 17 Mass. 589; *Sargent v. Essex Marine R. Corp.*, 9 Pick. (Mass.) 202; *Palmer v. Merrill*, 6 Cush. (Mass.) 286; *Jenkins v. Brewster*, 14 Mass. 291.

Mississippi.—*Tombigby R. Co. v. Bell*, 7 How. (Miss.) 216; *Fitch v. Stamps*, 6 How. (Miss.) 487; *Tully v. Herrin*, 44 Miss. 626.

New Hampshire.—*Sumner v. Steward*, 2 N. H. 39; *Sanborn v. Little*, 3 N. H. 539; *Barrett v. Barron*, 13 N. H. 151; *Gordon v. Drury*, 20 N. H. 354; *Farnsworth v. Sweet*, 5 N. H. 267; *Duncklee v. Greenfield Steam Mill Co.*, 23 N. H. 245; *Thompson v. Emery*, 27 N. H. 269; *Conway v. Cutting*, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 509.

New Jersey.—*Barrow v. Bispham*, 11 N. J. L. 110; *Belton v. Gibbon*, 12 N. J. L. 77; *Sloan v. Sommers*, 14 N. J. L. 509; *Parsons v. Woodward*, 22 N. J. L. 196.

New York.—*Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411; *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51; *Tuttle v. Bebee*, 8 Johns. (N. Y.) 152; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 344; *Martin v. Hawks*, 15 Johns. (N. Y.) 405; *Dawson v. Coles*, 16 Johns. (N. Y.) 51; *Briggs v. Dorr*, 19 Johns. (N. Y.) 95; *Henry v. Brown*, 19 Johns. (N. Y.) 49; *Thalimer v. Brinkerhoff*, 20 Johns. (N. Y.) 386; *Wardell v. Eden*, Col. & C. Cas. (N. Y.) 137.

Ohio.—*Numlin v. Westlake*, 2 Ohio 24; *Clark v. Boyd*, 2 Ohio 60; *M'Cutchen v. Keith*, 2 Ohio 262.

Pennsylvania.—*Bury v. Hartman*, 4 S. & R. (Pa.) 177; *Morgan v. Bank of North America*, 8 S. & R. (Pa.) 73; *Brindle v. McIlvaine*, 9 S. & R. (Pa.) 74; *Aldricks v. Higgins*, 16 S. & R. (Pa.) 212; *Boulden v. Hebel*, 17 S. & R. (Pa.) 312; *Rundle v. Ettwein*, 2 Yeates (Pa.) 23; *Metzgar v. Metzgar*,

2. Suit by Assignee in Name of Assignor—*a.* IN GENERAL.—The recognition and protection of these equitable rights, unless otherwise provided by statute, or by the settled law of the jurisdiction wherein the suit is brought, in so far as the right to institute actions in courts at law is concerned, will extend no further than to permit the assignee to sue in the name of the assignor and to recover a judgment for his own benefit. That this may be done, however, is firmly established.¹

1 Rawle (Pa.) 227; Ramsey's Appeal, 2 Watts (Pa.) 228; Stevens v. Stevens, 1 Ashm. (Pa.) 190; Wistar v. Walker, 2 Browne (Pa.) 166; Buchanan v. Taylor, Add. (Pa.) 155; McCullum v. Coxe, 1 Dall. (Pa.) 139; Wheeler v. Hughes, 1 Dall. (Pa.) 23; Field v. Biddle, 2 Dall. (Pa.) 172; Inglis v. Inglis, 2 Dall. (Pa.) 49; Steele v. Phoenix Ins. Co., 3 Binn. (Pa.) 306; Canby v. Ridgway, 1 Binn. (Pa.) 496; Solomon v. Kimmel, 5 Binn. (Pa.) 232; Kountz v. Kirkpatrick, 72 Pa. St. 385.

South Carolina.—Farr v. Hemmingway, 2 Treadw. (S. Car.) 753; Ware v. Key, 2 McCord (S. Car.) 373; Wadsworth v. Griswold, Harp. (S. Car.) 17; Stoney v. McNeill, Harp. (S. Car.) 156; Smith v. Lyons, Harp. (S. Car.) 334.

Vermont.—Lampson v. Fletcher, 1 Vt. 168; Tichout v. Cilley, 3 Vt. 415; Stiles v. Farrar, 18 Vt. 444; Strong v. Strong, 2 Aik. (Vt.) 373.

Virginia.—Stebbins v. Bruce, 80 Va. 389.

West Virginia.—Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555.

United States.—Welch v. Mandeville, 1 Wheat. (U. S.) 233; Mandeville v. Welch, 5 Wheat. (U. S.) 277; Platt v. Jerome, 19 How. (U. S.) 384; Corser v. Craig, 1 Wash. (U. S.) 424; Campbell v. Hamilton, 4 Wash. (U. S.) 92; Bholen v. Cleveland, 5 Mason (U. S.) 174; Greene v. Darling, 5 Mason (U. S.) 201; Winchester v. Hackley, 2 Cranch (U. S.) 342.

England.—Master v. Miller, 4 T. R. 340.

Nature of Assignee's Right.—A court of law, in the exercise of *quasi* equitable jurisdiction, will recognize and protect the rights of *cestuis que use*, where an appeal is made to justice and the discretion of the court by way of a motion, the matter whereof cannot be insisted upon as a legal right, nor presented in the form of a plea. Shriner v. Lamborn, 12 Md. 170.

1. *Alabama*.—McGehee v. Dougherty, 10 Ala. 863; Black v. Everett, 5 Stew. & P. (Ala.) 60; Harrison v. Marshall, 6 Port. (Ala.) 65; Goodwyn v. Lloyd, 8 Port. (Ala.) 237; Dunklin v. Wilkins, 5 Ala. 199; Carville v. Reynolds, 9 Ala. 969.

Arkansas.—Buckner v. Greenwood, 6 Ark. 200; Anderson v. Lewis, 10 Ark. 304.

Connecticut.—Woodbridge v. Perkins, 3 Day (Conn.) 364; Colbourn v. Rossiter, 2 Conn. 503; Bulkley v. Landon, 3 Conn. 76; Magill v. Lyman, 6 Conn. 59; Lyon v. Summers, 7 Conn. 399; Sanford v. Nichols, 14 Conn. 328; Smith v. Russell, 17 Conn. 107.

Delaware.—Kinniken v. Dulaney, 5 Harr. (Del.) 384.

Illinois.—Henderson v. Welch, 8 Ill. 340; Chapman v. Shattuck, 8 Ill. 49; Chadsey v. Lewis, 6 Ill. 153; McKinney v. Alvis, 14 Ill. 33; Carlyle v. Carlyle Water, etc., Co., 140 Ill. 445; Creighton v. Hyde Park, 6 Ill. App. 272; Lee v. Pennington, 7 Ill. App. 247.

Iowa.—Sater v. Hendershott, Morr. (Iowa) 118; Farwell v. Tyler, 5 Iowa 535; Howey v. Willtrout, 10 Iowa 105; McLott v. Savery, 11 Iowa 323.

Kentucky.—Stogdel v. Fugate, 2 A. K. Marsh. (Ky.) 136; Lee v. Chambers, 3 J. J. Marsh. (Ky.) 506; Jones v. Com., 2 Litt. (Ky.) 357; Neyfong v. Wells, Hard. (Ky.) 571; Boyd v. Snelling, 7 T. B. Mon. (Ky.) 416.

Maine.—Sawtelle v. Rollins, 23 Me. 196; Smalley v. Wight, 44 Me. 442; McDonald v. Laughlin, 74 Me. 480; Cole v. Bodfish, 17 Me. 310.

Massachusetts.—Dix v. Cobb, 4 Mass. 511; Ayer v. Hutchins, 4 Mass. 370; Crocker v. Whitney, 10 Mass. 316; Jones v. Witter, 13 Mass. 304; Usher v. D'Wolfe, 13 Mass. 290; Skinner v. Somes, 14 Mass. 107; Dunn v. Snell, 15 Mass. 481; Jenkins v. Brewster, 14 Mass. 291; Eastman v. Wright, 6 Pick. (Mass.) 316; Amherst Academy v.

b. EFFECT OF RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.—Where statutes merely permit the assignee to sue in his own name, or circumstances exist which will justify a resort to

Cowls, 6 Pick. (Mass.) 427; Nesmith v. Washington Bank, 6 Pick. (Mass.) 324; Sylvester v. Crapo, 15 Pick. (Mass.) 92; Gardner v. Hoeg, 18 Pick. (Mass.) 170; Hodges v. Holland, 19 Pick. (Mass.) 43; Brigham v. Clark, 20 Pick. (Mass.) 43; Dyer v. Homer, 22 Pick. (Mass.) 256; Clapp v. Shepard, 2 Met. (Mass.) 127; Clark v. Swift, 3 Met. (Mass.) 394; Hart v. Western R. Corp., 13 Met. (Mass.) 99; Sigourney v. Severy, 4 Cush. (Mass.) 176; Drury v. Vannevar, 5 Cush. (Mass.) 442; Palmer v. Merrill, 6 Cush. (Mass.) 282; Pitts v. Holmes, 10 Cush. (Mass.) 93; Hay v. Green, 12 Cush. (Mass.) 282; Rockwood v. Brown, 1 Gray (Mass.) 261; Chapin v. Vermont, etc., R. Co., 8 Gray (Mass.) 576; Riley v. Taber, 9 Gray (Mass.) 372; Foss v. Nutting, 14 Gray (Mass.) 484; Macomber v. Doane, 2 Allen (Mass.) 541; Stevens v. Parker, 3 Allen (Mass.) 256; Moore v. Coughlin, 4 Allen (Mass.) 335; Angell v. Stone, 110 Mass. 54; Norton v. Piscataqua F. & M. Ins. Co., 111 Mass. 535; Leach v. Greene, 116 Mass. 534; Tucker v. Tucker, 119 Mass. 79; Hunt v. Mann, 132 Mass. 53; Rogers v. Union Stone Co., 134 Mass. 31; Moore v. Spiegel, 143 Mass. 413.

Mississippi.—Oldham v. Ledbetter, 1 How. (Miss.) 43; Wilson v. McElroy, 2 Smed. & M. (Miss.) 250; Lee v. Gardiner, 26 Miss. 521.

Missouri.—Chauvin v. Labarge, 1 Mo. 557; Thomas v. Cox, 6 Mo. 506; Wooden v. Butler, 10 Mo. 716.

New Hampshire.—Currier v. Hodgdon, 3 N. H. 82; Sanborn v. Little, 3 N. H. 539; Farnsworth v. Sweet, 5 N. H. 267; Barrett v. Barron, 13 N. H. 151; Gordon v. Drury, 20 N. H. 354; Tibbets v. Gerrish, 25 N. H. 41; Rollins v. Columbia Mut. F. Ins. Co., 25 N. H. 204; Thompson v. Emery, 27 N. H. 273.

New Jersey.—Lacey v. Collins, 5 N. J. L. 563; Carhart v. Miller, 5 N. J. L. 662; Parsons v. Woodward, 22 N. J. L. 196; Wright v. Williamson, 3 N. J. L. 520.

New York.—Cock v. Fellows, 1 Johns. (N. Y.) 143; Ford v. Stuart, 19 Johns. (N. Y.) 342; Briggs v. Dorr, 19 Johns. (N. Y.) 95; Thalimer v. Brinkerhoff, 20 Johns. (N. Y.) 386;

Prescott v. Hull, 17 Johns. (N. Y.) 284; Chase v. Chase, 1 Paige (N. Y.) 198; Wheeler v. Wheeler, 9 Cow. (N. Y.) 34; Thurman v. Wells, 18 Barb. (N. Y.) 500.

Pennsylvania.—Guthrie v. White, 1 Dall. (Pa.) 268; Cummings v. Lynn, 1 Dall. (Pa.) 444.

Tennessee.—Hobbs v. Memphis Ins. Co., 1 Sneed (Tenn.) 444; Erwin v. Rutherford, 1 Yerg. (Tenn.) 169; Vincent v. Groom, 1 Yerg. (Tenn.) 430; Nelson v. Marly, 2 Yerg. (Tenn.) 576; Burton v. Dees, 4 Yerg. (Tenn.) 4; Wright v. McLemore, 10 Yerg. (Tenn.) 235; Mt. Olivet Cemetery Co. v. Shubert, 2 Head (Tenn.) 116; Trezevant v. McNeal, 2 Humph. (Tenn.) 352; Johnson v. Irby, 8 Humph. (Tenn.) 654; Marney v. Byrd, 11 Humph. (Tenn.) 95; Simpson v. Moulden, 3 Coldw. (Tenn.) 429; East Tennessee, etc., R. Co. v. Henderson, 1 Lea (Tenn.) 1.

Texas.—Ross v. Smith, 19 Tex. 173; Heard v. Lockett, 20 Tex. 162.

Vermont.—Hagar v. Buck, 44 Vt. 290.

Virginia.—Craig v. Craig, 1 Call (Va.) 483; Henderson v. Hepburn, 2 Call (Va.) 232; Norton v. Rose, 2 Wash. (Va.) 233; Garland v. Richeson, 4 Rand. (Va.) 268; Tyler v. Ricamore, 87 Va. 466.

West Virginia.—Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555.

United States.—Glenn v. Marbury, 145 U. S. 499; Tiernan v. Jackson, 5 Pet. (U. S.) 580; Swann v. Scholfield, 2 Cranch (C. C.) 140.

Action in Name of First Assignor.—All actions to recover damages, upon the failure of the obligor of an assigned bond to perform any stipulated engagement, must be brought in the name of the first assignor. Chapin v. Vermont, etc., R. Co., 8 Gray (Mass.) 576; Skinner v. Somes, 14 Mass. 107.

Note Given for Prior Obligation.—Where the equitable owner of a note payable to another recovered judgment upon it in the name of the payee, and gave the execution to an officer who took the note of a third person for the amount, payable to the judgment creditor, and discharged the execution, it was held

such mode of procedure, the assignee will not thereby be precluded from suing in the name of the person originally possessed of the right.¹

c. PARTICULAR CHOSSES IN ACTION.—Thus, within this rule, one to whom the beneficial interest in a judgment passes may use the name of the judgment creditor to enforce it,² or may proceed against a sheriff or other like officer for a breach of duty in respect to an execution issued thereon.³ And on the same

that the equitable owner might maintain an action on the last note in the name of the payee. *Harriman v. Hill*, 14 Me. 127.

Under an Act Authorizing Contractors for City Work to collect certified tax bills issued for the work, in the name of the city, it was held that the assignee of such a contractor might sue to his own use in the name of the city. *St. Louis v. Rudolph*, 36 Mo. 465; *St. Louis v. Clemens*, 42 Mo. 69; *Kansas v. Rice*, 89 Mo. 685.

State Practice in Federal Courts.—In 1852, Mr. Justice Blatchford, then sitting in the United States Circuit Court for the Southern District of New York, held that the provision of the New York Code of Procedure requiring actions to be brought by the real parties in interest had not been adopted in that court, and that in common-law cases the assignee of a non-negotiable chose in action had no capacity to sue upon it in his own name, but was required to bring the action in the name of the person with whom the contract was originally made, or, in case of the latter's death, in the name of his legal representative. *Suydam v. Ewing*, 2 Blatchf. (U. S.) 359.

Rights of Legatee of Debt.—If by will a testator gives a debt due him from a third person by way of a specific legacy, the legatee is a mere assignee of the debt as against the debtor and may bring a suit at law in the name of the executor of the will, for his own use, if the executor do not object. *Hayes v. Hayes*, 45 N. J. Eq. 461.

1. *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489; *Chase v. Plymouth*, 20 Vt. 469; *Mims v. Swartz*, 37 Tex. 13.

Action on Judgment.—In *Florida* an action at law may be maintained on a judgment at law in the name of a judgment creditor for the use of an assignee of the judgment, notwithstanding the Act of 1881 (c. 3241, Laws; § 981, Rev. Stat.), allowing real parties to sue in

their own names. *Sammis v. Wightman*, 31 Fla. 10.

In *West Virginia* the assignee of a note or draft does not acquire the legal title to the debt, but the equitable right, which, by virtue of the statute in that state, he may assert at law in his own name, or in that of the original payee for his own benefit. *Clarke v. Hogeman*, 13 W. Va. 728.

2. *Haden v. Walker*, 5 Ala. 86; *Bunnell v. Magee*, 9 Ala. 433; *Clark v. Moss*, 11 Ark. 737; *Sammis v. Wightman*, 31 Fla. 10; *Ware v. Bucksport, etc., R. Co.*, 69 Me. 97; *Vanhouten v. Reily*, 6 Smed. & M. (Miss.) 440; *Clarke v. Hogeman*, 13 W. Va. 718. See also article EXECUTIONS.

An Action of Debt on a Judgment may be maintained by the assignee. *Tarleton v. Weir*, 1 Tex. App. Civ. Cas., § 142.

An Assignee of a Justice's Judgment, on notes given for the purchase price of land, may enforce a vendor's lien in like manner as the judgment creditor himself might. *Houston v. Musgrove*, 35 Tex. 594; *Hargrave v. Simpson*, 25 Tex. 396.

Death of Assignor.—In *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 508, an assignee of a judgment was permitted to sue in equity in his own name, there being no administration on the assignor's estate.

England.—In *O'Callaghan v. Thome*, 3 Taunt. 82, it was held that, under the provisions of the Irish Statutes of 9 and 25 Geo. II., the assignee of an Irish judgment by cognovit might sue in England in his own name.

3. *Bryant v. Dana*, 8 Ill. 343; *Com. v. Fugua*, 3 Litt. (Ky.) 41; *Waterman v. Williamson*, 3 Ired. (N. Car.) 198.

The Assignee of a Judgment, although Not a Party to the Record, may bring a suit in his own name for a breach of duty on the part of the sheriff respecting an execution issued to him. Page

principle the assignee of a mortgage, or of the debt secured thereby,¹ or the assignee of a policy of insurance, unless aided by statute, must pursue his remedy in the name of the mortgagee, or of the insured.²

v. Thompson, 43 N. H. 373; *Jackson v. Smith*, 52 N. H. 9.

Failure to Return Execution.—In *Woodman v. Jones*, 8 N. H. 344, it was decided that an action against a sheriff for not returning an execution, brought in the name of a nominal party having no interest, might be maintained, and (apparently on the authority of *Harrington v. Ward*, 9 Mass. 251) that the right could be maintained only in the name of such plaintiff. But in *Page v. Thompson*, 43 N. H. 373, the court said that the opinion in *Woodman v. Jones*, 8 N. H. 344, so far as it applied to the right of the real plaintiff to sue in his own name, was extrajudicial, and that it was greatly weakened, if not overthrown, by *Lyford v. Dunn*, 32 N. H. 81, in which case it appeared that a debt, for the recovery of which a suit was pending, had been assigned to the plaintiff and the assignment placed on file, and that in the execution the sheriff was ordered to cause the same to be levied and paid to the assignee, and in which it was held that the assignee was to be regarded as the creditor to whom the execution was to be paid and satisfied, and levy of the execution and delivery of seisin were properly made to him.

An Assignee of Executions cannot maintain a suit in his own name on a constable's bond for failure of the latter to collect and pay over. The suit must be in the name of the assignor for the use of the assignee. *Jones v. Com.*, 2 Litt. (Ky.) 357.

Action for Neglect to Levy or Return Execution.—The assignee of a judgment may maintain an action against the officer for neglect to levy the execution or to make proper return in the name of the judgment creditor. *Chase v. Plymouth*, 20 Vt. 469. It was also held in this case, upon the authority of *McGregor v. Walden*, 14 Vt. 450, that the assignee might have maintained the action in his own name.

An Action against a Sheriff for Failure to Pay Over Proceeds obtained by execution may be brought either in the name of the creditor of record or in the name of the real owner of the

judgment. *Bradley v. Chamberlain*, 31 Vt. 468.

Action for Escape.—Where an assignee recovers judgment in the name of his assignor, takes out a *ca. sa.*, notifies the sheriff of his equitable interest, and the latter allows the defendant, whom he has arrested, to escape, the assignee may maintain the action against the sheriff in the name of the assignor. *Martin v. Hawks*, 15 Johns. (N. Y.) 405.

1. The assignment of a note and mortgage, with authority to the assignee to foreclose, will not transfer the legal estate so as to enable the assignee to maintain an action of ejectment. *Cottrell v. Adams*, 2 Biss. (U. S.) 351.

An equitable assignee of a mortgage of personalty cannot maintain an action in his own name for conversion of the mortgaged property, *Baker v. Seavey*, 163 Mass. 522; but must sue in the name of the assignor, *Crain v. Paine*, 4 Cush. (Mass.) 483. But see *Rigney v. Lovejoy*, 13 N. H. 247; *Page v. Pierce*, 26 N. H. 317; *Southerin v. Mendum*, 5 N. H. 420; *Smith v. Moore*, 11 N. H. 55.

An Assignment of a Debt Secured by Mortgage, in the absence of some agreement to the contrary, is an equitable assignment of the mortgage, and the assignee of the debt may use the name of the mortgagee to enforce the mortgage at law. *Graham v. Newman*, 21 Ala. 497; *Edgerton v. Young*, 43 Ill. 464. And see *Bryant v. Damon*, 6 Gray (Mass.) 564; *Young v. Miller*, 6 Gray (Mass.) 152; *Cutler v. Haven*, 8 Pick. (Mass.) 490; *Warden v. Adams*, 15 Mass. 233; *Crane v. March*, 4 Pick. (Mass.) 131.

2. **Insurance Policies.**—The common-law rule that the assignee of a contract, negotiable instruments excepted, could maintain no action upon it, except in the name of the original contracting party, applies to policies of insurance, though in terms made to the party assured and his assigns. *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 204; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; *Sanders v. Hillsborough Mut. F. Ins. Co.*, 44 N. H. 243; *Wilson v. Hill*, 3 Met.

d. DEATH OF ASSIGNOR.—If the assignor be dead, the assignee may, as a general rule, proceed in the name of the assignor's personal representative.¹

e. RATIONALE AND CONSEQUENCES OF THE RULE.—The reasons variously assigned for thus allowing the assignee to use the name of the assignor are that the latter stands, with relation to the former, in the position of trustee, agent, attorney, or the like,² and it has been held that, by the fact of assignment, the assignor authorizes the assignee to use his name in any legal proceeding which may become necessary to give full effect to the assignment;³ that the name of the assignor may be so used

(Mass.) 66; *Foster v. Equitable Mut. F. Ins. Co.*, 2 Gray (Mass.) 216. See also article **INSURANCE**.

Effect of Assignment of Policy.—"The familiar principle of the common law is that a chose in action is not assignable, so as to vest by the assignment a right of action in the assignee. A policy of insurance does not constitute an exception to the general rule. It has been repeatedly adjudged that an action on a policy of insurance will not lie in the name of the assignee. The suit must be brought in the name of the parties originally insured, and they will not be suffered to prejudice or defeat the right of action. (*Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301.) To avoid this difficulty, the charters of many modern insurance companies contain a clause that the assignee of a policy, having the same confirmed to him, 'shall be entitled to all the rights and privileges, and be subject to all the liabilities, to which the original party to whom the policy issued was entitled under the act.' This clause authorizes an action on the policy assigned in the name of the assignee, and is so far an alteration of the rule of common law. *Ferriss v. North American F. Ins. Co.*, 1 Hill (N. Y.) 71; *Mann v. Herkimer County Mut. Ins. Co.*, 4 Hill (N. Y.) 187; *Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 56." *Green, C. J.*, in *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 511.

1. *Orr v. Thompson*, 9 Ill. 452; *Phillips v. Wilson*, 25 Ill. App. 427; *Dawes v. Boylston*, 9 Mass. 337; *Cutts v. Perkins*, 12 Mass. 206; *Suydam v. Ewing*, 2 Blatchf. (U. S.) 359.

The Donee of a Promissory Note may sue on it, in the name of the administrator of the donor and against the consent of the administrator. *Grover v. Grover*, 24 Pick. (Mass.) 261.

An Assignee of a Bank Account, by Delivery of the book and an order for the payment of the deposit, may sue the bank after the death of the assignor in the name of the administrator. *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285.

2. *Parsons v. Woodward*, 22 N. J. L. 196; *Sloan v. Sommers*, 14 N. J. L. 510; *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Amherst Academy v. Cowls*, 6 Pick. (Mass.) 427; *Mosher v. Allen*, 16 Mass. 452; *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Waterman v. Williamson*, 13 Ired. (N. Car.) 198; *McKinney v. Alvis*, 14 Ill. 33; *Pickford v. Ewington*, 4 D. P. C. 453; *Winch v. Keeley*, 1 T. R. 619.

In *Smith v. Russell*, 17 Conn. 107, the court said that in modern times an assignment is looked upon rather as a power of attorney authorizing the assignee to sue for a recovery in the name of the assignor than as such a transfer as will be of any benefit to the assignee in a court of law.

3. *Phillips v. Wilson*, 25 Ill. App. 427; *Orr v. Thompson*, 9 Ill. 452; *Eastman v. Wright*, 6 Pick. (Mass.) 316.

Indorsement of Note.—If the payee of a negotiable promissory note puts his name on the back of it with the intention of transferring it, he thereby authorizes the prosecution of a suit in his name. *Mosher v. Allen*, 16 Mass. 451.

Demand of Indemnity as Authorization.—The assent of the assignor to the prosecution of suit on an assigned claim may be inferred from his demand and reception of a bond of indemnity from the assignee against the costs,

without his consent,¹ and even against his protest;² and that the courts may compel such permission,³ the assignor at most being entitled to indemnification or protection against costs.⁴

f. RIGHTS ACQUIRED BY ASSIGNEE.—But by the mere fact of the assignment, the assignee acquires no greater rights with re-

charges, and liabilities created by it. *Rockwood v. Brown*, 1 Gray (Mass.) 261; *Lee v. Gardiner*, 26 Miss. 521; *Vanhouten v. Reily*, 6 Smed. & M. (Miss.) 440.

In East Tennessee, etc., *R. Co. v. Henderson*, 1 Lea (Tenn.) 3, *Freeman*, Judge, *quoting* Comyn, vol. 2, p. 567, stated that an assignment is an agreement to protect the assignee in using the assignor's name to recover possession. See *Mill. & V. Code Tenn.*, §§ 3492, 3493.

1. *Clark v. Moss*, 11 Ark. 737; *Walker v. Brooks*, 125 Mass. 247; *Jones v. Witter*, 13 Mass. 304; *Dyer v. Homer*, 22 Pick. (Mass.) 256; *Grover v. Grover*, 24 Pick. (Mass.) 261; *Dennis v. Twitchell*, 10 Met. (Mass.) 180; *Rockwood v. Brown*, 1 Gray (Mass.) 261; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Riley v. Taber*, 9 Gray (Mass.) 372; *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285; *McFadin v. MacGreal*, 25 Tex. 78.

The Assignment Carries with It an Authority to Use the Name of the Assignor in enforcing the collection of the demand assigned, but care will be taken that his name shall not be used to his injury. *Harriman v. Hill*, 14 Me. 127.

Where there has been a Transfer of an Instrument without a Regular Assignment, courts of law will permit the use of the name of the person to whom the instrument is made payable without an express power to do so. *Ransom v. Jones*, 2 Ill. 291.

Extent of Assigned Right.—In *Allen v. Pannell*, 51 Tex. 165, the court said that whether at common law an assignee had an unqualified right to use the name of the holder of the legal title admits of some question, and *cited* *Spicer v. Todd*, 2 Tyrw. 172; *Chambers v. Donaldson*, 9 East 471; *Moseley v. Boush*, 4 Rand. (Va.) 392.

2. *Walker v. Brooks*, 125 Mass. 247; *Grover v. Grover*, 24 Pick. (Mass.) 261.

Restraint of Action.—A special injunction will not be granted against the assignee to restrain an action brought by him in the name of the assignor. *Portarlington v. Graham*, 5 Sim. 416.

Early Tennessee Practice.—The proper practice to question the right or the authority of a person who has instituted a suit in the name of another for his own use is to obtain a rule of court upon him to show by what authority the suit is brought in the name of another for his benefit. *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1.

To Dispute the Assignee's Authority to Bring Suit, the defendant may state facts on affidavit, and have a rule to show cause why the suit should not be dismissed. *Cage v. Foster*, 5 Yerg. (Tenn.) 261.

Laches.—After a suit has been pending several terms, an affidavit by defendant, upon which to ground a rule upon the person for whose use the suit is brought, to show by what authority he used the name of the plaintiff in instituting and carrying on the suit, must state specifically the reason why the application was not sooner made. *Wilson v. Turk*, 10 Yerg. (Tenn.) 247.

3. *Anderson v. Miller*, 7 Smed. & M. (Miss.) 586. But see *Ward v. Audland*, 8 Beav. 201, 9 Jur. 384.

4. *Illinois.*—*Henderson v. Welch*, 8 Ill. 340; *Chapman v. Shattuck*, 8 Ill. 49; *Creighton v. Hyde Park*, 6 Ill. App. 272; *Dazey v. Mills*, 10 Ill. 67.

Maine.—*Laws* 1874, c. 235; *Wood v. Decoster*, 66 Me. 542.

Massachusetts.—*Rockwood v. Brown*, 1 Gray (Mass.) 261; *Walker v. Brooks*, 125 Mass. 247; *Dennis v. Twitchell*, 10 Met. (Mass.) 180; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285.

Mississippi.—*Anderson v. Miller*, 7 Smed. & M. (Miss.) 586.

New Hampshire.—*Gordon v. Drury*, 20 N. H. 354; *Farnsworth v. Sweet*, 5 N. H. 267.

Tennessee.—*Mill. & V. Code Tenn.*, § 3493.

Texas.—*Allen v. Pannell*, 51 Tex. 165. See also *Ex p. Little*, 3 Moll. 67.

Liability of Assignor for Abuse of Process.—An assignor in whose name an action is brought is liable for any

pect to the subject of the assignment than his assignor had.¹

3. Control of Suit.—The right thus conferred on the assignee to sue in the name of the assignor cannot be controlled by the assignor,² who, by the fact of assignment, loses the right to

abuse of the process, as if he were the real party. *Tichout v. Cilley*, 3 Vt. 415.

1. *Learned v. Ayres*, 41 Mich. 677; *Dyer v. Homer*, 22 Pick. (Mass.) 256; *Lyon v. Summers*, 7 Conn. 399.

The Right of the Assignee to sue depends on the right of the assignor to have brought suit. *Hill v. McPherson*, 15 Mo. 204; *Stedman v. Riddick*, 4 Hawks (N. Car.) 29.

Defeat of Right Acquired by Assignment.—The general rule is that the assignee of negotiable paper for a pre-existing debt is not a holder in the due course of trade without notice, and hence, with respect to existing equities, stands in the shoes of the assignor. But the assignee does not continue to stand simply in the shoes of the assignor, especially after notice, so that his right to enforce the payment of the debt may be defeated by the subsequent acts of the assignor or of the debtor. *Taylor v. Deakins*, 9 Lea (Tenn.) 520.

Assignment by One Partner.—Where the assignment of a chose in action accruing to two partners was executed by but one of them, and purported to transfer only his right, title, and interest, it was held that in the absence of any proof of dissolution of the partnership, or that the right to the whole claim had ever vested in the assignor partner, or that his copartner had done any act to vest his interest in the assignor, the assignee could not maintain the action. *Mills v. Pearson*, 2 Hilt. (N. Y.) 16.

2. *Connecticut.*—*Bishop v. Holcomb*, 10 Conn. 444.

Kentucky.—*Russell v. Petree*, 10 B. Mon. (Ky.) 184; *Neyfong v. Wells*, Hard. (Ky.) 571.

Maine.—*Swett v. Green*, 4 Me. 384.

Massachusetts.—*Gould v. Newman*, 6 Mass. 239; *Jones v. Witter*, 13 Mass. 304; *Jenkins v. Brewster*, 14 Mass. 291; *Dunn v. Snell*, 15 Mass. 481; *Brigham v. Clark*, 20 Pick. (Mass.) 43; *Clapp v. Shepard*, 2 Met. (Mass.) 127; *Rockwood v. Brown*, 1 Gray (Mass.) 261; *Riley v. Taber*, 9 Gray (Mass.) 372.

New Hampshire.—*Sanborn v. Lit-*

tle, 3 N. H. 539; *Duncklee v. Greenfield Steam Mill Co.*, 23 N. H. 245.

New Jersey.—*Sloan v. Sommers*, 14 N. J. L. 509; *Belton v. Gibbon*, 12 N. J. L. 77.

New York.—*Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51; *Littlefield v. Storey*, 3 Johns. (N. Y.) 425; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343; *Briggs v. Dort*, 19 Johns. (N. Y.) 95.

Tennessee.—*Boyd v. Anderson*, Overt. (Tenn.) 438; *Taylor v. Deakins*, 9 Lea (Tenn.) 520.

Texas.—*Galveston, etc., R. Co. v. Freeman*, 57 Tex. 156.

Virginia.—*McClintic v. Wise*, 25 Gratt. (Va.) 448; *Gordan v. Fitzhugh*, 27 Gratt. (Va.) 835; *Grubbs v. Wysors*, 32 Gratt. (Va.) 127.

West Virginia.—*Clarke v. Hoge-*

man, 13 W. Va. 718.

United States.—*Moore v. Marsh*, 7 Wall. (U. S.) 515; *Corser v. Craig*, 1 Wash. (U. S.) 424.

England.—*Winch v. Keely*, 1 T. R. 619; *Master v. Miller*, 4 T. R. 340; *Heath v. Hall*, 4 Taunt. 326.

It Has Long Since been Settled that where a chose in action is assigned by the owner, he shall not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference whether the assignment be good at law or in equity only. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277.

Right of Nominal Plaintiff to Dismiss Suit.—A nominal plaintiff, suing for the benefit of his assignee, cannot, by dismissal of the suit under a collusive agreement with the defendant, create a valid bar against a subsequent suit for the same cause of action, *Welch v. Mandeville*, 1 Wheat. (U. S.) 237; but he may dismiss a suit brought in his name by a creditor to whom the cause of action has not been assigned. *Welch v. Mandeville*, 7 Cranch (U. S.) 152.

Release by Assignor.—In *Andrews v.*

proceed himself on the assigned claim.¹

Objection by Defendant.—Nor, ordinarily, can the person against whom the claim originally arose raise objection.²

III. RIGHT OF ASSIGNEE IN EQUITY—1. No Remedy at Law.—As to the forum to which an assignee of a chose in action may resort to perfect his right, the better doctrine seems to be that if he is unable to assert in a court of law the legal right of the assignor, which is equitably vested in him, he may invoke the jurisdiction of a court of equity, and there enforce his equitable right because of his inability to enforce such right at law.³

Suit in Whose Name.—When thus seeking relief in a court of chancery, the assignee may sue in his own name.⁴ The reason

Beecker, 1 Johns. Cas. (N. Y.) 411, the obligor of a bond set up a release from the obligee in an action brought by the assignee of the latter. The plaintiff replied that the assignment was made before the release, and the replication was held good.

In *Raymond v. Squire*, 11 Johns. (N. Y.) 47, the court, in commenting on *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411, after stating the above proposition in effect, said: "The same decision was made in the case of *Littlefield v. Storey*, 3 Johns. (N. Y.) 425, and these decisions are founded upon the plain principle that a release appearing on the face of the record to have been procured by fraud is, and must be adjudged by a court of law, as well as by a court of equity, null and void. The English courts of law have, with equal effect, protected the rights of the assignee by setting aside a plea so founded in injustice, *Legh v. Legh*, 1 B. & P. 447; *Lord Ellenborough*, in 1 Campb. N. P. 392."

1. *Reed v. Nevins*, 38 Me. 193; *Lytle v. Lytle*, 2 Metc. (Ky.) 127.

Two persons entered into an entire contract, whereby one was to do a specific piece of work for the other. Before the completion of the work, the person undertaking to perform it addressed a note to the other, stating: "I hereby authorize R R to finish the job already commenced, * * * and to take the balance, whatever may be due," and the recipient indorsed thereon: "Whatever balance may be due on the within job, when completed as per agreement, shall be paid to R R." It was held that the original undertaker could not bring an action on the contract in his own name. *Derby v. Sanford*, 9 Cush. (Mass.) 263.

Ratification by Assignee.—If a suit is begun without the authority of the assignee, he may subsequently ratify the bringing of the suit. *Moore v. Spiegel*, 143 Mass. 414.

The appearance of the assignee in court, and a statement by him that he does not desire to prevent recovery, is a ratification of the bringing of the suit, and is sufficient authority to the plaintiff to prosecute the action. *Coulter v. Haynes*, 146 Mass. 458.

2. *Rockwood v. Brown*, 1 Gray Mass. 261.

3. *Hayward v. Andrews*, 106 U. S. 675; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205; *Root v. Railway Co.*, 105 U. S. 189; *Riddle v. Mandeville*, 5 Cranch (U. S.) 322; *Rolt v. White*, 7 L. T. N. S. 345.

Assignee as Administrator of Assignor.—If the assignee of a chose in action becomes the administrator of the assignor, he may recover the same to his own use as administrator without account. *Dawes v. Boylston*, 9 Mass. 337.

Failure to Administer Estate of Deceased Assignor.—Pending a suit by an assignee in the name of the assignor, the assignor died intestate, and, there having been no administration had upon his estate, the suit abated. The assignee then filed a bill in equity setting out the facts, and further stating that no person would administer upon the assignor's estate in consequence of its embarrassed and insolvent condition, but the court decided that it had no jurisdiction. *Smiley v. Bell, Mart. & Y. (Tenn)* 378.

4. *Alabama.*—*Plowman v. Riddle*, 14 Ala. 169.

Arkansas.—*Caldwell v. Meshew*, 44 Ark. 564.

for thus allowing the assignee to proceed in equity in his own name is that courts of equity will uphold the assignment as the declaration of a trust,¹ or when the assignment is by way of an order to pay out of a specific fund, that a contract to pay is implied.²

2. Legal Remedy.—On the other hand, when the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of the assignor, there

District of Columbia.—Young v. Kelly, 3 App. Cas. (D. C.) 296.

Illinois.—Smith v. Brittenham, 109 Ill. 540. And see Frye v. State Bank, 10 Ill. 332; Moore v. School Trustees, 19 Ill. 83; Elder v. Jones, 85 Ill. 384.

Kentucky.—Blackerby v. Holton, 5 Dana (Ky.) 522.

Maine.—Moore v. Griffin, 22 Me. 355.

Maryland.—Coale v. Mildred, 3 Har. & J. (Md.) 278.

Massachusetts.—Ensign v. Kellogg, 4 Pick. (Mass.) 1; Murphy v. Marland, 8 Cush. (Mass.) 575.

New York.—Hooker v. Eagle Bank, 30 N. Y. 83; Sedgwick v. Cleveland, 7 Paige (N. Y.) 287.

Ohio.—Townsend v. Carpenter, 11 Ohio 21.

Texas.—Heard v. Lockett, 20 Tex. 162.

Wisconsin.—Varney v. Bartlett, 5 Wis. 276.

United States.—Lenox v. Roberts, 2 Wheat. (U. S.) 373; Riddle v. Mandeville, 5 Cranch (U. S.) 322; Bradford v. Williams, 4 How. (U. S.) 576.

Maryland.—In *Schaferman v. O'Brien*, 28 Md. 565, it was said that even prior to the Act of 1829, c. 51, the *bona fide* assignee of a chose in action was considered as having peculiarly an equitable remedy.

Specific Performance.—Where a bond was made to the promoters of a corporation by name, and to their associates and successors, and was thereafter assigned by the promoters to a corporation which built a railroad, as stipulated in the bond, the latter was allowed to maintain a bill for specific performance of the obligation entered into by the maker of the bond. *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

Under the Massachusetts Statute of 1853, c. 371, the assignee of a written contract, assigned by verbal agreement and by delivery, might enforce specific performance in an action at

law brought in his own name and asking equitable relief. *Currier v. Howard*, 14 Gray (Mass.) 511. See *Darling v. Roarty*, 5 Gray (Mass.) 71.

If the Assignment Is Absolute and Unconditional, the assignee may maintain a bill in equity in his own name to enforce the performance of the agreement assigned. *Allyn v. Allyn*, 154 Mass. 570; *Hodges v. Saunders*, 17 Pick. (Mass.) 470; *Currier v. Howard*, 14 Gray (Mass.) 511; *Field v. Maghee*, 5 Paige (N. Y.) 539; *Rogers v. Trader's Ins. Co.*, 6 Paige (N. Y.) 583.

Establishment and Enforcement of Equitable Assignment.—A bill in equity is maintainable to establish and enforce an equitable assignment. *Kingsbury v. Burrill*, 151 Mass. 199.

Suit to Remove Cloud.—In *MacDonald v. Kneeland*, 5 Minn. 352, it appeared that the obligee named in certain bonds in the hands of a third person assigned them, and that a creditor of the obligee garnished the holder of the bonds before notice of the assignment and obtained judgment for the bonds or their value, and it was held that the assignee might maintain an action to remove the cloud upon his title to the bonds, created by the judgment.

Rights of Subsequent Assignees.—The right of the assignee to file a bill in equity is not confined to the first assignee or transferee of the right, but may be exercised by any person who, by assignment or transfer, becomes the assignee of the equitable right. *Young v. Kelly*, 3 App. Cas. (D. C.) 296. See also *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 400.

1. *Blackerby v. Holton*, 5 Dana (Ky.) 522.

2. An equitable assignee of a fund may maintain an action upon an implied contract to pay. *Nimocks v. Woody*, 97 N. Car. 1.

is no ground for an appeal to equity, because the disputed right may be perfectly vindicated in an action at law.¹ From this it follows, as a general rule, that unless special circumstances render it necessary for the assignee to go into a court of equity to prevent a failure of justice,² the mere fact of the assignment, or the

1. *Hayward v. Andrews*, 106 U. S. 675; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205; *Root v. Railway Co.*, 105 U. S. 189; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Moseley v. Boush*, 4 Rand. (Va.) 392; *Gover v. Christie*, 2 Har. & J. (Md.) 67; *Smiley v. Bell*, Mart. & Y. (Tenn.) 378; *Hammond v. Messenger*, 9 Sim. 327; *Hammond v. Wilkes*, 2 Jur. 655; *Rolt v. White*, 31 Beav. 520; *Dhegetoft v. London Assur. Co.*, Mosely R. 83. But see *Jones v. Farrell*, 1 De G. & J. 208.

Adequate Remedy at Law.—Equity will not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary by reason of the inability of a court of common law to afford the suitor adequate justice. *Adair v. Winchester*, 7 Gill & J. (Md.) 114.

Right to Sue in Name of Assignor as Adequate Remedy.—The right of the assignee of a chose in action to sue at law in the name of the assignor for his own benefit furnishes to him such a plain and adequate remedy at law as will preclude him from filing a bill in equity, or from obtaining relief therein, in the absence of any allegation to show that he had no adequate or complete remedy, that the assignment was denied by the assignor, that the assignor claimed the fund in question or in any way objected to payment of the complaint, or that there is any controversy between the assignor and the assignee. *Angell v. Stone*, 110 Mass. 54.

Rights of Assignee to Contract.—Where a person who had a contract with a railroad corporation to furnish it certain cars assigned his contract to another after partial performance, it was held that his assignees could not sue in chancery to enforce the payment of the amount due under the contract, but that, if the assignment was bona fide, they could maintain a suit at law for their use. *Chicago, etc., R. Co. v. Nichols*, 57 Ill. 466.

Rights of Assignee of Bond.—The court will not, in ordinary cases, assist the assignee of a bond in recovering what is due on such bond, but will leave him to bring his action at law in the name of the assignor; but *semble*, where a bond has been assigned, the court will, in special cases, order payment of the money due upon the bond. *Keys v. Williams*, 3 Y. & Coll. 462, 3 Jur. 950. And see *Taylor v. Ficklin*, 5 Munf. (Va.) 25.

2. *Walker v. Brooks*, 125 Mass. 241; *Gover v. Christie*, 2 Har. & J. (Md.) 67; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373; *Riddle v. Mandeville*, 5 Cranch (U. S.) 322; *Hammond v. Messenger*, 9 Sim. 327.

In *Walker v. Brooks*, 125 Mass. 241, Gray, C. J., who delivered the opinion, commented on the statement in Story's Equity Jurisprudence (§ 1057) that *Hammond v. Messenger*, 9 Sim. 327, holding, in effect, that a bill cannot be filed in equity against the debtor by the assignee of a debt as a matter of right, was apparently new and did not seem to have been generally adopted in America. He reviewed a number of cases and said: "But the adjudged cases, including those cited by the learned commentator, upon being examined fail to support his position, and show that the doctrine of *Hammond v. Messenger* is amply sustained by earlier authorities in England and in this country."

Mississippi Doctrine.—In *Taylor v. Reese*, 44 Miss. 93, it is said: "Courts of law, which take no cognizance of equitable interests, have so far relaxed the rigidity of the rules as to permit a suit in the name of the payee, for the use of the beneficial equitable holder, and in the conduct of the suit regard the use as the real plaintiff. * * * We think, on principle, that if a party goes into the chancery court to seek redress founded on a purely equitable title, or growing out of equitable interests, that he is in the proper court, with full original jurisdiction in such class of cases, and that no sufficient

fact that the interest of the assignee is an equitable one, will not give him a right to invoke the jurisdiction of a court of equity.¹

Effect of Assignee Not Being Able to Sue in His Own Name.—Nor will a court of equity entertain a bill by the assignee of a strictly legal right merely on the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits or prevents such an action from being brought in his name, or it appears that an action so brought will not afford the assignee an adequate remedy.²

To Give the Assignee a Standing in Equity, it must appear that the assignor had some substantial possession, or some capability of

reason exists for turning him out, because the legal tribunal will give him a remedy through the instrumentality of the holder of the legal title.”

One of Two Obligees of a Bond may assign it, but if one of them is also an obligor, neither the assignee nor the other obligees can sue at law. *Gatewood v. Lyle*, 5 T. B. Mon. (Ky.) 6; *Bradford v. Williams*, 4 How. (U. S.) 576.

Assignee of Bond Secured by Trust Fund.—A man indebted by bond executed a conveyance of all his property in trust, for payment of his just debts in the first place; for his own support during life in the second; and, afterwards, for the benefit of his wife, etc. He died without a will, or any property acquired after the date of such conveyance; and no person administered on his estate. It was held that an assignee of the bond was not restricted to his remedy at law against the assignor, but that, without bringing any action at law, he might obtain relief in equity by a decree for a sale of the property in the hands of the trustee; also that in such case, if the fund in possession of the trustee proved insufficient, that the complainant might recover the balance of his claim from a debtor of the obligor; and in default of both these funds, in the whole or in part, that he might proceed against the assignor. *Taylor v. Picklin*, 5 Munf. (Va.) 25.

Conclusion of Assignee by Decision at Law against Assignor.—The assignee of a chose in action is concluded in equity by a decision at law against his assignor. *Curtis v. Cisna*, 1 Ohio 429.

1. *Alabama.*—*McGehee v. Dougherty*, 10 Ala. 863.

Maryland.—*Adair v. Winchester*, 7 Gill & J. (Md.) 114.

Tennessee.—*Smiley v. Bell*, Mart. & Y. (Tenn.) 378.

Virginia.—*Moseley v. Boush*, 4 Rand. (Va.) 392.

United States.—*New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 214; *Glenn v. Marbury*, 145 U. S. 499; *Hayward v. Andrews*, 106 U. S. 672.

England.—*Rose v. Clarke*, 1 Y. & Coll. 534.

Texas.—But see *Mims v. Swartz*, 37 Tex. 13, and *Devine v. Martin*, 15 Tex. 30, holding, in effect, that on proof of his equitable interest the assignee may maintain a suit in a court of equitable jurisdiction.

2. *Illinois.*—*Chicago, etc., R. Co. v. Nichols*, 57 Ill. 464.

Maryland.—*Adair v. Winchester*, 7 Gill & J. (Md.) 114.

Massachusetts.—*Walker v. Brooks*, 125 Mass. 241.

New Jersey.—*Hayes v. Hayes*, 45 N. J. Eq. 461.

New York.—*Field v. Maghee*, 5 Paige (N. Y.) 539; *Rogers v. Trader's Ins. Co.*, 6 Paige (N. Y.) 583.

Vermont.—*Hagar v. Buck*, 44 Vt. 290.

Virginia.—*Moseley v. Boush*, 4 Rand. (Va.) 392.

United States.—*Hayward v. Andrews*, 106 U. S. 672.

England.—*Dhegetoft v. London Assur. Co.*, *Mosely* 83, 4 Bro. P. C. (2d ed.) 436; *Hammond v. Messenger*, 9 Sim. 327; *Motteux v. London Assur. Co.*, 1 Atk. 545; *Cator v. Burke*, 1 Bro. Ch. 434; *Rose v. Clarke*, 1 Y. & Coll. 534.

Refusal or Wrongful Act of Assignor.—The assignee of a debt cannot sue for it in a court of equity unless the assignor refuses to allow the assignee to sue for it at law in his name, or has done, or intends to do, some act which will prevent the assignee from recov-

personal enjoyment, and not a mere legal right.¹

3. Assignee of Mortgage.—Respecting mortgages, the assignee of the mortgage, or an assignee standing in legal privity with the mortgagor, is possessed of the same rights as his assignor.²

4. Assignee of Patent.—By the federal statutes relative to the assignment of patents, the assignee of the patent may sue for an infringement without joining the patentee. See, for a treatment of this subject, article PATENTS.

IV. RIGHT OF ASSIGNEE TO SUE IN OWN NAME—1. Generally.—The tendency of common-law courts to extend their aid to assignees of choses in action³ undoubtedly led to the adoption of

ering it at law in the assignor's name. *Hammond v. Messenger*, 9 Sim. 327, 7 L. J. N. S. Ch. 310, 2 Jur. 655.

1. *Prosser v. Edmonds*, 1 Y. & Coll. 481.

The Purchaser of a Chose in Action for a valuable consideration will be protected in equity. — *v. Arrington*, 1 Hayw. (N. Car.) 164.

An Assignment of an Interest in an Executory Devise or contingent remainder will be enforced in equity if free from fraud and founded upon a valuable consideration. *Watson v. Smith*, 110 N. Car. 6.

Discovery and Account.—An assignee of one to whom has been assigned an interest in a land purchase may file a bill in equity against the other persons interested to compel a discovery of the amount of land purchased and sold, and may apply for an account and distribution of the proceeds. *Pendleton v. Wambersie*, 4 Cranch (U. S.) 73.

Equitable Title to Money Secured by Bond.—In *England* it has been held, in effect, that the mere fact that one had an equitable title to money secured by a bond was not enough to entitle him to sue the obligor in equity for payment of the money. *Rose v. Clarke*, 1 Y. & Coll. 534; *Cator v. Burke*, 1 Bro. Ch. 434.

2. Foreclosure.—An assignee of a bond and mortgage may foreclose in his own name. *Natchez v. Minor*, 9 Smed. & M. (Miss.) 544.

Usury.—An assignee standing in legal privity with the mortgagor may avoid the contract for excessive usury, and is entitled to a proper reduction on the mortgage debt. *Banks v. McClellan*, 24 Md. 62.

Reformation of Mortgage.—Respecting the right to reform a mortgage, the assignee of the mortgage stands in

the same position as the mortgagee. *Ruhling v. Hackett*, 1 Nev. 360.

See article MORTGAGES.

3. England.—In *Master v. Miller*, 4 T. R. 320, Mr. Justice Buller, after referring to the rights of assignees of choses in action in equity and the development of the recognition of such rights in courts of law, said: "It must be admitted that though the courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet in many cases they have adhered to the formal objection that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the courts have taken care that it shall never work injustice."

Massachusetts.—In *Skinner v. Somes*, 14 Mass. 107, the court said: "This is the first attempt to maintain an action of debt by the assignee of a bond in his own name. The word 'assigns' has been for centuries inserted in bonds and obligations; no one has conceived that it gave to them a negotiable property, so as to transfer the right of action upon them to the assignee. * * * We have gone as far in favor of assignments as the authorities or the reason of them would justify us. But to support the present action would be to disregard settled and established rules, founded on sound principles of law and the highest reason."

New Hampshire.—In *Page v. Thompson*, 43 N. H. 373, the court said, *per Bellows, J.*, that the tendency of all courts is to regard the assignee as the real owner of the debt; that little is now left of the old doctrine that a

statutes obviating the necessity of the cumbersome method of requiring suit to be brought in the name of the assignor for the use of the person beneficially interested, by allowing the latter to sue directly, and in his own name.¹

chose in action cannot be assigned; that the necessity of suing in the name of the assignor is a mere matter of form when the action is founded directly upon the claim of itself, and that in all matters of substance, the assignee is treated as the real owner, and his equitable right should not be subjected to any unnecessary embarrassments in the matter of form.

Pennsylvania.—An equitable assignment will be recognized in Pennsylvania in a common-law form of action, and it is unnecessary that the assignee should resort to a court of equity. *Caldwell v. Hartuppee*, 70 Pa. St. 74.

Texas.—The practice in Texas has conformed to the general equity practice of permitting the equitable owner to sue in his own name. *Galveston, etc., R. Co. v. Freeman*, 57 Tex. 156; *Merlin v. Manning*, 2 Tex. 351; *Guest v. Rhine*, 16 Tex. 549; *Rollinson v. Hope*, 18 Tex. 446; *Bullion v. Campbell*, 27 Tex. 653; *Winn v. Ft. Worth, etc., R. Co.* (Tex. Civ. App. 1896), 33 S. W. Rep. 593; *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287; *Devine v. Martin*, 15 Tex. 25; *Texas, etc., R. Co. v. Wright*, 2 Tex. App. Civ. Cas., § 339.

In *Texas Western R. Co. v. Gentry*, 69 Tex. 625, it was said that it is well settled in Texas that the holder of the legal title of a chose in action may bring suit upon it in his own name, although the equitable right may be in another, and *Rider v. Duval*, 28 Tex. 623; *Wimbish v. Holt*, 26 Tex. 674; *Butler v. Robertson*, 11 Tex. 142; *Thompson v. Cartwright*, 1 Tex. 87; *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511, were cited in support of the proposition. See also *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287; *Watertown F. Ins. Co. v. Grover, etc., Sewing Mach. Co.*, 41 Mich. 131.

Action by United States.—In *U. S. v. Buford*, 3 Pet. (U. S.) 12, which was an action at law by the United States on a claim assigned to it, it was objected that the general government might claim as assignee in equity, though not at law, but the court, Mr. Justice McLean delivering the opinion, said

that, as in England, any instrument or claim, though not negotiable, could be assigned to the king, who could sue on it in his own name, no valid objection existed to giving the same effect to an assignment to the government in this country. In this case, however, a special act under which the assignment was made obviated a decision on this point.

1. *Russell v. Minnesota Outfit*, 1 Minn. 162. And see the codes and statutes of the various states.

In Arkansas, by chapter 11 of the Rev. Stat., § 1, bonds, bills, notes, agreements or contracts in writing for the payment of money or property, or for both money and property, were made assignable and the assignee given a right to sue in his own name in the same manner that the original obligee or payee might or could do. *Lafferty v. Rutherford*, 5 Ark. 649.

The effect of this statute was to subordinate the assignee to the rights of the assignor, and to allow him to resort to the same form of remedy, and sue in the same manner. *Lafferty v. Rutherford*, 5 Ark. 649. See also *Small v. Strong*, 2 Ark. 198.

In California the right of the assignee to sue in his own name was given by the first section of the amended practice act passed May 7, 1855. See *Ryan v. Maddux*, 6 Cal. 247.

The Delaware Act of January 24, 1811, enables assignees legally under its provisions to sue in their own names, and makes them legal plaintiffs, against whom a plea of abatement or set-off in a proper case, or any other legal defense, would be available at common law. *Herdman v. Morris*, 2 Harr. (Del.) 509.

Iowa.—In *Merchants', etc., Bank v. Hewitt*, 3 Iowa 93, it was said that the Code of 1851 had so altered the common-law rule as to the assignability of nonnegotiable instruments that suit might be brought thereon in the name of the assignee, subject to such defenses as the obligee might have against the assignor before notice of assignment.

Maine.—Under the Act of 1874, c. 235, which provides that "assignees of

Abolition of Distinction between Law and Equity.—In some of the states it has been held that the effect of abolishing the distinction between practice at law and the practice in chancery was to allow the assignee to sue in his own name in cases where, by the common law, no assignment would be recognized.¹

A Covenant for the Payment of Rent is not within the common-law rule prohibiting the assignment of choses in action, hence the assignee of rent to become due may sue therefor in his own name.²

choses in action, not negotiable, assigned in writing, are hereby authorized to bring and maintain actions in their own name, and the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof, and all rights of set-off shall be preserved to the defendant," the assignee of a judgment for debt and costs may maintain an action of debt thereon in his own name. *Wood v. Decoster*, 66 Me. 542, holding also that the statute does not confine this right to the first assignee, but the remedy is available to any subsequent assignee who can show a good title from the judgment creditor.

By the Maryland Act of 1829, c. 51, the assignee of a judgment, specialty, or other chose in action, was authorized to sue in any court of law or equity, reserving to the defendant all such legal or equitable defenses as might be maintained against the assignor. See *Schaf-erman v. O'Brien*, 28 Md. 565.

Michigan.—In *Watson v. Watson*, 49 Mich. 540, it is said that the policy of legislation in Michigan is to permit the real party to bring an action in his own name, and that it is no longer necessary for assignees to sue in the name of the assignor, or to bring an action in the name of one person for the use and benefit of another, even in case of tort, when the cause of action is assignable. See also *Felt v. Reynolds'* Rotary Fruit Evaporating Co., 52 Mich. 602.

In Mississippi the assignee of a chose in action may sue in his own name. *Harper v. Butler*, 2 Pet. (U. S.) 239.

New York.—By the adoption in New York of section 111 of the Code of Procedure (now section 449 Code of Civil Procedure) the chancery practice as to parties was prescribed for the courts of law in that state with a few modifications. See *Wallace v. Eaton*, 5 How. Pr. (N. Y. Supreme Ct.) 99; *Hollenbeck v. VanValkenburgh*, 5 How. Pr. (N. Y. Supreme Ct.) 281; *Voorhis v.*

Baxter, 18 Barb. (N. Y.) 592; *Billings v. Jane*, 11 Barb. (N. Y.) 620; *Brownson v. Gifford*, 8 How. Pr. (N. Y. Supreme Ct.) 389.

Tennessee.—It is expressly declared in the Code, § 2795, that "the person for whose use the suit is brought shall be held the real plaintiff of record." *Wolfe v. Tyler*, 1 Heisk. (Tenn.) 316; *Boyd v. Anderson*, 1 Overt. (Tenn.) 438.

Virginia.—Under section 2860 of the Code, the assignee of a chose in action may maintain an action thereon in his own name. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185; *Tyler v. Ricamore*, 87 Va. 466; *Stebbins v. Bruce*, 80 Va. 389.

Claim against the United States.—Under the Act of 1887 (24 Stat. at L. 505) the assignee of a claim against the United States may sue thereon in his own name. *Emmons v. U. S.*, 48 Fed. Rep. 43. See *U. S. v. Jones*, 131 U. S. 1.

In Admiralty.—An assignee of a chose in action may sue in his own name in the admiralty. *Swett v. Black*, 1 Sprague (U. S.) 574.

1. *Van Rensselaer v. Read*, 26 N. Y. 558; *Devine v. Martin*, 15 Tex. 25; *Ogden v. Slade*, 1 Tex. 13.

The Missouri Code of Practice, founded on the New York Code, by abolishing the distinction between law and equity had the effect of allowing assignees of choses in action to bring suits in their own names in cases where, by common law, no assignment would be recognized. *Long v. Heinrich*, 46 Mo. 603; *Walker v. Mauro*, 18 Mo. 564.

2. **Illinois.**—*Wineman v. Hughson*, 44 Ill. App. 22; *Potter v. Gronbeck*, 117 Ill. 409.

Massachusetts.—*Kendall v. Carland*, 5 Cush. (Mass.) 74.

New York.—*Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Willard v. Tillman*, 2 Hill (N. Y.) 274; *Van Rensselaer v. Read*, 26 N. Y. 558.

United States.—*Scott v. Lunt*, 7 Pet. (U. S.) 596.

2. Assignability of Subject-matter as Test of Right.—It may be stated as the generally-accepted doctrine that if the subject-matter is assignable, either by the common law or by reason of statutory provisions, the assignee may bring suit in his own name,¹ the test

England.—Allen *v.* Bryan, 5 B. & C. 512, 11 E. C. L. 292.

The Assignee of a Fee Farm Rent, the same being an estate of inheritance, is, upon the principles of common law, entitled to sue therefor in his own name. It is an exception from the general rule that choses in action cannot be transferred, and stands upon the ground of being, not a mere personal debt, but a perdueable inheritance. Scott *v.* Lunt, 7 Pet. (U. S.) 596.

Costs under Statute to Assignee of Claim for Services.—The costs allowed upon the recovery of the price or value of labor or services by Minn. Laws 1891, c. 41, may be recovered by an assignee of the person rendering the labor or services. Clifford *v.* Northern Pac. R. Co., 55 Minn. 150.

1. *Arkansas.*—Gamblin *v.* Walker, 1 Ark. 220; Roane *v.* Lafferty, 5 Ark. 465; Buckner *v.* Greenwood, 6 Ark. 200.

California.—Lazard *v.* Wheeler, 22 Cal. 139.

Illinois.—Ransom *v.* Jones, 2 Ill. 291; Potter *v.* Gronbeck, 117 Ill. 404.

Indiana.—Mountjoy *v.* Adair, 1 Ind. 254.

Iowa.—Williams *v.* Soutter, 7 Iowa 435, citing Andrews *v.* Brown, 1 Iowa 154.

Kentucky.—Marcum *v.* Hereford, 8 Dana (Ky.) 1; Russell *v.* Petree, 10 B. Mon. (Ky.) 184; Pigman *v.* Ward, Sneed (Ky.) 305; Neyfong *v.* Wells, Hard. (Ky.) 571; Hicks *v.* Doty, 4 Bush (Ky.) 420.

Massachusetts.—Clark *v.* Swift, 3 Met. (Mass.) 390.

Michigan.—Cook *v.* Bell, 18 Mich. 387; Final *v.* Backus, 18 Mich. 218.

Minnesota.—Spencer *v.* Woodbury, 1 Minn. 105.

Mississippi.—Lowenburg *v.* Jones, 56 Miss. 688; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280; Montgomery *v.* Handy, 63 Miss. 43; Kirkland *v.* Lowe, 33 Miss. 423.

Missouri.—Chauvin *v.* Labarge, 1 Mo. 557; Thomas *v.* Wash, 1 Mo. 665; Jeffers *v.* Oliver, 5 Mo. 434; Davis *v.* Christy, 8 Mo. 569; McCarty *v.* Hall,

13 Mo. 480; Hill *v.* McPherson, 15 Mo. 204; Draher *v.* Schreiber, 15 Mo. 602; Smith *v.* Kennett, 18 Mo. 154.

New Hampshire.—Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231. See Jordan *v.* Gillen, 44 N. H. 424.

New Jersey.—Lacey *v.* Collins, 5 N. J. L. 563; Norris *v.* Douglass, 5 N. J. L. 942.

New York.—Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Butler *v.* New York, etc., R. Co., 22 Barb. (N. Y.) 110; Smith *v.* New York, etc., R. Co., 28 Barb. (N. Y.) 605; King *v.* Kirby, 28 Barb. (N. Y.) 49; Grocers' Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26; Robinson *v.* Weeks, 6 How. Pr. (N. Y. Supreme Ct.) 161; Hodgman *v.* Western R. Corp., 7 How. Pr. (N. Y. Supreme Ct.) 492; Johnston *v.* Bennett, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 331; McKee *v.* Judd, 12 N. Y. 622; Merrill *v.* Grinnell, 30 N. Y. 594; Monahan *v.* Story, 2 E. D. Smith (N. Y.) 393; Drake *v.* Smith, 12 Hun (N. Y.) 532; Purple *v.* Hudson River R. Co., 4 Duer (N. Y.) 74.

Ohio.—Hall *v.* Cincinnati, etc., R. Co., 1 Disney (Ohio) 58.

Pennsylvania.—Waters *v.* Millar, 1 Dall. (Pa.) 369; Reed *v.* Ingraham, 3 Dall. (Pa.) 505, 4 Dall. (Pa.) 169; Mitchell *v.* Walker, 7 Rep. 425; Aldricks *v.* Higgins, 16 S. & R. (Pa.) 212; Fahnestock *v.* Schoyer, 9 Watts (Pa.) 102.

South Carolina.—Folk *v.* Cruikshanks, 4 Rich. (S. Car.) 243; Waring *v.* Cheeseborough, 4 Rich. (S. Car.) 243, note; Sims *v.* Radcliffe, 3 Rich. (S. Car.) 287; Smith *v.* Cook, 2 McMull. (S. Car.) 58.

Tennessee.—Moore *v.* Weir, 3 Sneed (Tenn.) 46; Mutual Protection Ins. Co. *v.* Hamilton, 5 Sneed (Tenn.) 269; East Tennessee, etc., R. Co. *v.* Henderson, 1 Lea (Tenn.) 1.

Texas.—Koenigheim *v.* Randolph, 1 Tex. App. Civ. Cas., § 764.

Virginia.—Craig *v.* Craig, 1 Call (Va.) 483; Norton *v.* Rose, 2 Wash. (Va.) 233; Feazle *v.* Dillard, 5 Leigh (Va.) 31.

Wisconsin.—Pillsbury *v.* Mitchell,

of the right so to bring the action being the assignability of the matter or thing in question.¹

3. Effect of Statutes.—It may also be stated as a general rule that the assignee of a chose in action which is not assignable at common law can maintain an action thereon in his own name only when this right is given by reason of statutory regulations,² but in just what cases, or under what circumstances, cannot be authoritatively laid down. However, it is evident that the right of the assignee does not depend on the character of the thing assigned, but rather on the aid extended to him by force of the statutes or otherwise.³

5 Wis. 17; *Minert v. Emerick*, 6 Wis. 355; *Kimball v. Spicer*, 12 Wis. 668; *Tyson v. McGuineas*, 25 Wis. 656; *Murray v. Buell*, 76 Wis. 657.

United States.—*Kemmil v. Wilson*, 4 Wash. (U. S.) 308; *Withers v. Greene*, 9 How. (U. S.) 213.

Contract Assignable by Custom.—In *Reed v. Ingraham*, 3 Dall. (Pa.) 505, 4 Dall. (Pa.) 169, the assignee of a stock contract was allowed to sue thereon in his own name, it being proven by stock-brokers that like contracts had always been considered assignable within the place where the transaction took place, and that such assignment vested the interest completely in the assignees, and authorized them, in case of default, to proceed in their own name.

1. *Arkansas*.—*Buckner v. Greenwood*, 6 Ark. 200; *Roane v. Lafferty*, 5 Ark. 465.

Kentucky.—*Conn v. Jones*, Hard. (Ky.) 9; *Yantes v. Smith*, 12 B. Mon. (Ky.) 395.

Massachusetts.—*Coolidge v. Rugles*, 15 Mass. 387.

Missouri.—*St. Louis v. Clemens*, 42 Mo. 69.

Nebraska.—*Weir v. Anthony*, 35 Neb. 396.

New Hampshire.—*Folsom v. Belknap County Mut. F. Ins. Co.*, 30 N. H. 231.

Texas.—*Devine v. Martin*, 15 Tex. 25.

A Debt Due upon a Contingency may be assigned with a mortgage given to secure it, and the assignee is entitled to a conditional judgment in an action commenced on the mortgage after the debt has become absolute by the happening of the contingency. *Bancroft v. Marshall*, 16 N. H. 244.

Judgment.—Under a statute, *Laws Me. 1874, c. 235*, providing that "assignees of choses in action, not negoti-

able, assigned in writing, are hereby authorized to bring and maintain actions in their own name," etc., an assignee of a judgment may maintain *scire facias* against a trustee. *Ware v. Bucksport, etc., R. Co.*, 69 Me. 97.

An Assignment by One Partner to the Other of his interest in all the partnership demands is good in equity, and will give to the assignee the right to use the name of the assignor for the purpose of collecting for his own use any debts due to the partnership at the time. *Lunt v. Stevens*, 24 Me. 534.

Chose in Action Made Assignable on Day of Assignment.—In *Meredith v. Duval*, 1 Munf. (Va.) 76, *decided* on the authority of *Craig v. Craig*, 1 Call (Va.) 483, it appeared that the assignment was made upon the day on which the act allowing the chose in action to be assigned by its terms took effect, but the chose in action itself accrued before that period, and at the time of its making was not assignable, and it was held that the assignee might, according to the statute, bring an action thereon in his own name.

2. *Sammis v. Wightman*, 31 Fla. 10; *Hooker v. Gallagher*, 6 Fla. 351; *Kendig v. Giles*, 9 Fla. 278; *Smock v. Taylor*, 1 N. J. L. 206; *Mulford v. French*, 3 N. J. L. 54; *Sharp v. Moore*, 3 N. J. L. 413; *Smith v. Cook*, 2 McMull. (S. Car.) 58.

Action Improperly Brought—Waiver of Error.—Although a chose in action may not be assignable, so as to enable the assignee to maintain an action in his own name, yet, if he do so bring the action and the defendant confess judgment, it is a waiver of the error and the judgment will not be arrested for irregularity. *Matheson v. Crain*, 1 McCord (S. Car.) 219.

3. **Attachment by Assignee.**—In *Bes-*

V. ACTION BY REAL PARTY IN INTEREST—1. Who Is Such Party.—

In some jurisdictions the "real party in interest," within statutory provisions requiring every action to be prosecuted in the name of the real party in interest, is held to mean the party having the

ley *v. Palmer*, 1 Hill (N. Y.) 482, it was held that the assignee of a demand might bring proceedings by attachment under a statute relating to absconding, concealed, and nonresident debtors.

Garnishment may be resorted to by the assignee of several nonnegotiable claims aggregating enough to bring the principal action within the jurisdiction of the court. *Crippen v. Fletcher*, 56 Mich. 386.

An Assignee of a Right of Pre-emption may maintain an action of trespass to try title. *Horne v. Gambrell*, 1 Tex. App. Civ. Cas., § 996.

Assignee of Covenant Not Running with Land.—The personal representative of an assignee of a covenant which does not run with the land may maintain a suit in equity in his own name as if no assignment or covenant had been made. *Hagar v. Buck*, 44 Vt. 285.

Action on Undertaking.—In *Snodgrass v. Krenkle*, 49 How. Pr. (N. Y. Supreme Ct.) 122, an undertaking was given to plaintiff's assignor by name without adding his assigns, as a condition for a continuance, and it was held that the assignee of the plaintiff could maintain an action upon the undertaking after the condition upon which it was given had been forfeited.

Holder of Check.—A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof, and is in effect, an assignment of the amount of the check, and the holder, upon refusal of the bank to pay the same where such funds have not been drawn out before its presentation, may bring an action thereon against the bank in his own name. *Fonner v. Smith*, 31 Neb. 107, where it was acknowledged, however, that there is a direct conflict in the authorities upon the question whether the check operates as an assignment.

Contractors for City Works may assign their contracts to third persons, although an assessment has been laid by the city to pay the former for the work, and after the completion of the work, the assignees may sue to recover the assessment. *Ernst v. Kunkle*, 5 Ohio St. 520.

Assignees of an Equitable Interest in a fund created by a marriage settlement should, if they desire to be perfectly secured, obtain a distringas on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into court. *Phipps v. Lovegrove*, L. R. 16 Eq. 80.

Assignment of Claim for Son's Wages.—In *Kent v. Watson*, 46 N. H. 148, it appeared that a father had hired his son for a fixed time and at a price certain, and before the expiration of the time gave an order on the person engaging the services to pay to a third person an amount then due, or which might become due, for the services rendered by the son. This order was accepted, and it was held that after the termination of the services and the full performance of the contract, such third person might maintain an action for money had and received, and that should he sell the order to another, before or after suit brought, the action might still be maintained in the name of such third person, by his consent, for the benefit of the true owner.

Lost Instruments.—If a negotiable note indorsed in blank by the payee is lost, an assignee of the indorsee's right to the note cannot maintain an action at law in his own name upon such lost note. *Willis v. Cresey*, 17 Me. 9.

An indebtedness for which a note was given, and thereafter lost, may be assigned after the loss so as to enable the assignee to bring suit thereon in his own name, under the *Missouri* statute allowing recovery on lost instruments. *Sauter v. Leveridge*, 103 Mo. 615.

"**Labor Tickets**" issued by a corporation, payable "to employees only," and containing a proviso that they should be "not transferable," cannot be sued upon in his own name by an assignee of the tickets. *Tabler v. Sheffield Land, etc., Co.*, 79 Ala. 377.

Assignee of Agreement to Pay for Withdrawal of Defense.—An assignee of an agreement to pay a certain sum of money to the defendant in consideration that he withdraw his defense may sue in his own name. *Gray v. Garrison*, 9 Cal. 325.

beneficial interest as well as the legal title,¹ while in others a plaintiff is the real party in interest if he has a valid transfer as

Assignment of Claim to Attorney.—Where an assignment is made to a clerk in an attorney's office, who is likewise an attorney, he is not precluded from bringing an action in his, the clerk's, name by reason of Cal. Penal Code, § 161, which inhibits attorneys from having claims assigned to them for the purpose of bringing suits thereon. *Tuller v. Arnold*, 98 Cal. 522.

Stock Subscriptions.—Under the Virginia Code of 1873, c. 141, § 17, which empowers assignees of nonnegotiable instruments to sue in their own names, an assignee of a corporation may sue in his own name for unpaid subscriptions to the capital stock. *Glenn v. Scott*, 28 Fed. Rep. 804.

Railroad-aid Note.—An equitable assignee of a railroad-aid note may proceed upon it in his own name. *Toledo, etc., R. Co. v. Johnson*, 55 Mich. 456.

Assignment to Pay Indebtedness.—In *Gates v. Northern Pac. R. Co.*, 64 Wis. 64, the cause of action was assigned on consideration that the assignee apply the net proceeds of the claim to the payment of certain indebtedness of the assignors and pay the excess thereover to them, and it was held that the assignee might maintain an action in his own name. *Applying Smith v. Chicago, etc., R. Co.*, 23 Wis. 267.

1. *Wheatley v. Strobe*, 12 Cal. 92.

In Georgia the real owner of a fund, deriving his title through an equitable assignment, must assert his right to the fund against an attaching creditor of the assignor by claiming under section 3541 of the Georgia Code. *Haas v. Old Nat. Bank*, 91 Ga. 307.

In Indiana, under a statutory provision that the real party in interest must sue, suit must be brought by the person in whom the beneficial interest is vested by the divestiture of all the beneficial interest of the original owner in the claim. *Bartholomew County v. Jameson*, 86 Ind. 154. And see *Swift v. Ellsworth*, 10 Ind. 205.

Iowa.—Under the provisions of the Iowa revision, the party beneficially interested was required to sue in his own name, though he had not the legal title. *Cottle v. Cole*, 20 Iowa 431.

In Construing the Iowa Code of 1851, which required that civil actions should be prosecuted in the name of the real party in interest, the earlier cases held the provision to refer to parties having the legal interest (*Cooper v. Armstrong*, 3 Greene (Iowa) 120; *Roberts v. Taliaferro*, 7 Iowa 110). But this construction was shaken, if not overthrown, by *Shepard v. Ford*, 10 Iowa 502. However, in *Conyngnam v. Smith*, 16 Iowa 471, the court, after discussing the foregoing decisions, held that, under the system of practice introduced by the Revision, the assignee of a bond claiming under a parol contract of assignment might maintain an action thereon in his own name.

An Assignment by Parol transfers the property of which the assigned instrument is the evidence, so as to enable the assignee to maintain a suit to recover in his own name. *Green v. Marble*, 37 Iowa 95; *McDowell v. Bartlett*, 14 Iowa 157; *Yunker v. Martin*, 18 Iowa 143; *Rice v. Savery*, 22 Iowa 470; *Pearson v. Cummings*, 28 Iowa 344.

Code Nebraska, § 29, is but a statutory enactment of the rule which prevailed in courts of equity, that an action must be brought in the name of the party beneficially interested in the subject-matter. A mere assignment of a claim, therefore, where the proceeds of the suit are to be paid to the assignor, will not entitle the assignee to maintain the action. He must possess the beneficial interest. *Hoagland v. Van Etten*, 23 Neb. 462.

Permitting Acquisition of Beneficial Interest.—Where a claim has been assigned to a plaintiff, and he thereby acquires the legal title, but not the beneficial interest, the court may, where it will be in the furtherance of justice, upon payment of costs, permit him to acquire the beneficial interest and proceed with the action. *Hoagland v. Van Etten*, 23 Neb. 462.

Legal Title in Assignor.—If, notwithstanding the assignment, the legal title remains in the assignor, he may maintain the suit. *Winn v. Ft. Worth, etc., R. Co.* (Tex. Civ. App. 1896), 33 S. W. Rep. 593; *Allison v. Phoenix Ins. Co.*, 87 Tex. 593.

against the assignor, and holds the legal title to the demand.¹

2. Effect of Legislation.—The effect of legislation allowing actions by the real party in interest, or conferring similar rights, is not to enlarge the right of assignment, nor to authorize it in cases where it did not before exist.²

1. *Cottle v. Cole*, 20 Iowa 481; *Sheridan v. New York*, 68 N. Y. 30; *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Armstrong v. Cushney*, 43 Barb. (N. Y.) 340; *Allgoever v. Edmunds*, 66 Barb. (N. Y.) 579; *Monahan v. Story*, 2 E. D. Smith (N. Y.) 393; *Drake v. Smith*, 12 Hun (N. Y.) 532; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Dawson v. Pogue*, 18 Oregon 94; *Gregoire v. Rourke*, 28 Oregon 275.

Where one sues for the use of another, the former is the nominal and the latter the real plaintiff. *Kendig v. Giles*, 9 Fla. 278.

Others Beneficially Interested.—An assignee who holds the legal title to a chose in action by a valid assignment is the real party in interest, so as to entitle him to bring suit in his own name, although others may have a limited beneficial result in the recovery, and even if he would be liable to them by agreement for the amount of the recovery. *Allen v. Brown*, 44 N. Y. 228; *Meeker v. Claghorn*, 44 N. Y. 349.

An Action on a Special Guaranty is required to be brought in the name of the assignee as the real party in interest. *Small v. Sloan*, 1 Bosw. (N. Y.) 352.

Code Iowa, § 1676 (Laws 1859), which provides that civil actions are to be prosecuted in the name of the real party in interest, construed to mean that the action must be brought by the party having the legal title. *Allen v. Newberry*, 8 Iowa 65.

Under this statute the assignee of a judgment was held to be the real party in interest. *Edmonds v. Montgomery*, 1 Iowa 143.

In *Missouri* the rule that the action must be brought in the name of the party in whom the legal interest of the contract is vested, without reference to who has the beneficial interest in the same, is stated not to have been changed by Rev. Code 1855 Mo., p. 1217, § 2, art. 2. *Gardner v. Armstrong*, 31 Mo. 535.

Estoppel of Assignor.—In an action by

an assignee upon an instrument assigned to him, it is enough for the defendant to know that the plaintiff is the holder of the instrument by assignment, and if the assignor, without objection, allows the action to be prosecuted to final judgment, he is estopped from thereafter bringing suit upon the same instrument. *Morrison v. Ross*, 113 Ind. 186.

2. New York.—The only alteration made by the New York Code of Procedure in former existent rights was to enable assignees of choses in action to maintain actions in their own name in those cases only in which, by the law as it existed when the code was adopted, the right of action was assignable in law or in equity. *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Hodgman v. Western R. Corp.*, 7 How. Pr. (N. Y. Supreme Ct.) 492; *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

South Carolina.—Under the South Carolina Code of Procedure, § 132, requiring an action to be prosecuted in the name of the real party in interest, when a transfer or an assignment is made which in equity would have the effect of making the assignee the real party in interest, then the assignee is the proper plaintiff. *Childs v. Alexander*, 22 S. Car. 182. In this case the court said that this section was intended to adopt the practice which formerly prevailed in equity, but that it had not gone to the extent of making things legally assignable which were not so before.

The Virginia Statute (Code Va., § 2860), providing that the assignee of any note, bond, or writing, not negotiable, may maintain any action thereupon in his own name which the original obligor or payee might have brought, did not abridge the rights of the obligor, nor enlarge those of the assignee beyond that of giving him the right to sue in his own name. *Stebbins v. Bruce*, 80 Va. 389; *Gordon v. Rixey*, 76 Va. 694; *Faezle v. Dillard*, 5 Leigh (Va.) 30.

3. Assignee as "Real Party."—Under such legislation it would seem to follow that the assignee of a chose in action which is legally assignable is the real party in interest, and as such is entitled to sue in his own name.¹

The Holder of Commercial Paper to whom it has been transferred other than by indorsement is the real party in interest.²

Possession of Nonnegotiable Instrument.—But it has been held that the mere possession of a nonnegotiable instrument will be sufficient to enable the holder to sue upon it.³

1. *Kansas*.—*Krapp v. Eldridge*, 33 Kan. 106.

Missouri.—*Ashby v. Winston*, 26 Mo. 210; *Thornton v. Crowther*, 24 Mo. 164; *Waterman v. Frank*, 21 Mo. 108; *Van Doren v. Relfe*, 20 Mo. 455; *Webb v. Morgan*, 14 Mo. 428; *Williams v. Whitlock*, 14 Mo. 552; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Brady v. Chandler*, 31 Mo. 28; *Hutchings v. Weems*, 35 Mo. 285.

New York.—*Monahan v. Story*, 2 E. D. Smith (N. Y.) 393; *Drake v. Smith*, 12 Hun (N. Y.) 352; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Allen v. Smith*, 16 N. Y. 415.

Ohio.—*Allen v. Miller*, 11 Ohio St. 374.

Oregon.—*Dawson v. Pogue*, 18 Oregon 94; *Gregoire v. Rourke*, 28 Oregon 275.

United States.—*May v. Logan County*, 30 Fed. Rep. 250; *Weed Sewing Mach. Co. v. Wicks*, 3 Dill. (U. S.) 261. And see *Wilkins v. Ellett*, 108 U. S. 257.

Colorado.—The right of an assignee to maintain an action in his own name before a justice of the peace is recognized by the decisions of the Colorado courts. *Layton v. Kirkendall*, 20 Colo. 236; *Rio Grande Extension Co. v. Coby*, 7 Colo. 299; *Jackson v. Hamm*, 14 Colo. 58.

Assignee of Cestui Que Trust.—Within a statutory provision allowing actions by the real parties in interest, an assignee of a *cestui que trust* may sue in his own name. *Lee v. Fraternal Mut. Ins. Co.*, 1 Handy (Ohio) 217.

2. *Iowa*.—*Warnock v. Richardson*, 50 Iowa 450; *Barthol v. Blakin*, 34 Iowa 452; *Moore v. Lowrey*, 25 Iowa 336; *Allison v. Barrett*, 16 Iowa 278; *Rising v. Teabout*, 73 Iowa 419; *Younker v. Martin*, 18 Iowa 143; *Pearson v. Cummings*, 28 Iowa 345.

Missouri.—*Boeka v. Nuella*, 28 Mo.

180; *Bennett v. Pound*, 28 Mo. 598; *Willard v. Moies*, 30 Mo. 142.

Under the Provisions of the Iowa Code of 1851, allowing actions to be brought in the name of the real party in interest, which was construed by prior decisions to mean the party having the legal interest, it was decided that the holder of a note not negotiable by delivery nor assigned in writing could not sue upon it in his own name. *Farwell v. Tyler*, 5 Iowa 536. See *Hays v. Southgate*, 10 Hun (N. Y.) 511.

Transfer Complete.—Although a note may be transferred so as to vest the title in the holder by separate writing and an indorsement, for transfers need not be made upon the note itself, yet, if the transfer is complete so as to vest the title to the note in the holder as the legal owner, he must sue in his own name, notwithstanding authority is given in the transfer of indorsement to sue in the name of the payee or indorser. *Allen v. Newberry*, 8 Iowa 65.

Note Payable to Agent.—Where a note was made payable to C as agent for D, and D thereafter assigned it to another, it was held that C was the proper person to bring suit. *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

3. The holder of a nonnegotiable instrument may sue upon it in his own name, but he must show his right to it. *Merlin v. Manning*, 2 Tex. 351.

Status of Holder of Note.—Though by statute the transferee of a note may maintain an action upon it in his own name where the transfer is by mere delivery, the ability to sue in his own name will not confer upon him the rights nor the status of one who has purchased an instrument transferable by mere delivery, or payable to order and indorsed in blank. *Quigley v. Mexico Southern Bank*, 80 Mo. 295.

Under the New York Code of Procedure, the assignee had the whole interest, whether his title was legal or

The Reasons for the Assignment, the consideration thereof, or the object sought to be attained thereby, are immaterial. It is sufficient that the original beneficiary has divested himself of all legal title to the subject-matter.¹

4. Assignment for Purposes of Collection.—Although an assignment may not have been intended to convey any beneficial interest, but was merely for the purpose of facilitating collection of the assigned claim, the assignee may, nevertheless, maintain an action on the assigned claim in his own name.²

equitable, and could maintain the action. *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

Possession of County Warrant.—In *McCormick v. Grundy County*, 24 Iowa 382, which was an action upon a county warrant, the petition set out a copy of the warrant, on its face payable to S B or order, which was assigned by the payee to E T S or bearer, and it was held that the possession of the instrument by M, a third person, was sufficient to enable him to maintain an action thereon.

When Notes or Bills Sent for Collection are indorsed in blank to enable the holder to fill in the blank, he may do so, and sue in his own name. *Orr v. Lacy*, 4 McLean (U. S.) 243.

The Delivery of a Bank Book will not entitle the person receiving it to maintain an action in his own name for the money it represents. *Stewart v. State*, 42 Tex. 242.

1. *Pogue*, 18 Oregon 94; *Gregoire v. Rourke*, 28 Oregon 275.

Under the California Code, to entitle the assignee to sue it is sufficient that he hold the legal title. *Tuller v. Arnold*, 98 Cal. 522; *O'Connor v. Irvine*, 74 Cal. 440.

In New York a plaintiff is the real party in interest if he has a valid transfer as against the assignor and holds the legal title to the demand, and the defendant has no legal interest to inquire further. *Sheridan v. New York*, 68 N. Y. 30; *Eaton v. Alger*, 57 Barb. (N. Y.) 179, *affirmed* in 47 N. Y. 345; *Richardson v. Mead*, 27 Barb. (N. Y.) 178; *Arthur v. Brooks*, 14 Barb. (N. Y.) 533; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132; *Cunningham v. Cohn*, 14 Misc. Rep. (N. Y. C. Pl.) 12; *Bedford v. Sherman*, 68 Hun (N. Y.) 317.

Agreement to Indemnify Assignee.—The right of an assignee to proceed in his own name is not affected by the

circumstance that one of the assignors agreed to take care of the case and to save the plaintiffs from costs if he was unsuccessful. *Allen v. Brown*, 51 Barb. (N. Y.) 86, *affirmed* in 44 N. Y. 228.

Right to Inquire as to Nature of Title of Plaintiff.—One sued by an assignee has no right to inquire whether the plaintiff in whom the legal title seems to be vested be an agent or the real owner, unless by a fictitious assignment it be attempted to deprive him of a substantial ground of defense which he may have against the true owner. *Marvin v. Ellis*, 9 Fed. Rep. 367.

2. *Iowa*.—*Goodnow v. Litchfield*, 63 Iowa 275; *Cottle v. Cole*, 20 Iowa 482.

Minnesota.—*Anderson v. Reardon*, 46 Minn. 185; *Struckmeyer v. Lamb* (Minn. 1896), 65 N. W. Rep. 930.

Missouri.—*Guerney v. Moore*, 131 Mo. 650; *Webb v. Morgan*, 14 Mo. 428; *Simmons v. Belt*, 35 Mo. 461; *Young v. Hudson*, 99 Mo. 102; *Haysler v. Dawson*, 28 Mo. App. 531; *Beattie v. Lett*, 28 Mo. 596.

One to Whom a Number of Persons have Transferred Claims for labor for the purpose of collection, the transferee to receive a percentage of the amount collected and to pay the remainder over to the respective claimants and himself to stand all costs and charges in the collection or attempt at collection of the claims, may sue in his own name under a provision authorizing suit in the name of the real party in interest. *Peters v. St. Louis, etc., R. Co.*, 24 Mo. 586.

Suit by Assignor—Disregard of Assignment.—The assignor of a chose in action assigned to an agent for collection may disregard the assignment and sue in his own name by striking out the assignment, or by showing that the indorsement was only for collection. *Dickinson v. Burr*, 15 Ark. 372, *approving* *Block v. Walker*, 2 Ark. 9,

5. In United States Courts.—Where the local law directs that suits be brought in the name of the real party in interest, the real party has a right to sue in a court of the United States if the case is one otherwise within the federal jurisdiction and there is no special statute to the contrary.¹

VI. PERMISSIVE AND MANDATORY STATUTES.—Statutes which are merely directory will usually enable the assignee to sue either in his own name or in the name of the assignor, at his election,² and

and *disapproving* Purdy v. Brown, 4 Ark. 535.

1. Weed Sewing Mach. Co. v. Wicks, 3 Dill. (U. S.) 261; Thompson v. Central Ohio, etc., R. Co., 6 Wall. (U. S.) 134. See also Rev. Stat. U. S., § 914.

Following State Practice.—A federal court sitting in a district where it is required that actions shall be brought in the name of the real parties in interest will follow the state statute in that respect. May v. Logan County, 30 Fed. Rep. 250. See generally, article UNITED STATES COURTS.

Where a statute of the state, applicable by express adoption to the practice in the federal court sitting therein, requires that actions shall be brought by "the real party in interest," an order on an insurance company, given by the assured to his creditor, after the loss, and directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order an assignee of the cause of action, and entitles him, under the statute above mentioned, to sue on the policy, for the loss, in his own name. Spratley v. Hartford Ins. Co., 1 Dill. (U. S.) 392, *distinguishing* Thompson v. Central Ohio, etc., R. Co., 6 Wall. (U. S.) 134.

Action by Insurance Company against Wrongdoer. — Under section 4933 of Mansf. Dig. (Ark.), which requires every action to be prosecuted in the name of the real party in interest, an insurance company which has paid the loss on goods destroyed by fire may sue in its own name the person who caused the fire. Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643.

Although by the State Law actions are required to be brought in the name of the real party in interest, yet it has been held that if that provision has not been adopted by the federal court, the real party cannot so sue. Suydam v. Ewing, 2 Blatchf. (U. S.) 359. This

case was decided prior to the Act of 1872. The court further stated that this practice applied not only to the action originally commenced in that court, but to one removed into the federal court from a state court, and also to all the proceedings in the action after the removal.

2. In Florida, by Laws of 1881, c. 3241, all civil actions at law "may be" commenced, maintained, and continued in the name of the real party in interest, and it was held in Sammis v. Wightman, 31 Fla. 10, that this statute did not abolish or preclude the common-law practice, but merely permitted the assignee to sue in his own name if he saw fit to do so, and the court distinguished the statute from the provision of the New York Code of Proc., § 111 by calling attention to the fact that under that provision every action "must be" brought in the name of the real party in interest.

Maine.—Laws of Maine, 1874, c. 235, which authorizes assignees of certain choses in action to bring suit in their own names, is merely directory and does not require assignees of choses in action assigned in writing to bring actions upon them in their own names. McDonald v. Laughlin, 74 Me. 480.

Permissive Statute—Michigan.—Under a statute permitting the assignee of a chose in action to sue on it in his own name, the assignee may sue in his own name or, as he might have done prior to the statute, in the name of the assignor. Park v. Toledo, etc., R. Co., 41 Mich. 352.

Tennessee.—An assignee of nonnegotiable paper may sue in his own name or in the name of the payee for his use. Simpson v. Moulden, 3 Coldw. (Tenn.) 429; Moore v. Weir, 3 Sneed (Tenn.) 46.

Under the Virginia Statute in force in 1826, authorizing the assignment of bonds, the assignee did not acquire a legal title to the debt, but an equitable

it has been held that a statute permitting an assignee to sue at law in his own name was merely cumulative to his right to sue in equity.¹

If the Statute Is Mandatory, and provides that the action must be brought in the name of the real party in interest, it is improper to sue in the name of an assignor who has parted with his entire interest.²

right, which, by force of the statute, he could enforce in his own name, and he still had his election to sue at law in his own name or in that of the original obligee for his own benefit. *Garland v. Richeson*, 4 Rand. (Va.) 266. And see *Dunn v. Price*, 11 Leigh (Va.) 210.

West Virginia.—An assignee of a note or draft does not acquire the legal title to the debt, but an equitable right, which, by virtue of the statute, he may assert at law in his own name, or in that of the original payee, for his benefit; and it is not necessary that the record should show that the suit is for the benefit of the assignee. *Clarke v. Hogeman*, 13 W. Va. 718.

A simple assignment of a chose in action vests in the assignee only the equitable title, the legal title remaining in the assignor, and under Code W. Va., c. 99, § 14, the assignee may sue in his own name or he may sue in the name of the assignor for his, the assignee's, use. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

In Admiralty.—Although the assignee of a bottomry bond may maintain a suit in admiralty in his own name, yet he may also sue in the name of the assignor; thus, a suit brought in the name of the assignor may be maintained where the real party in interest appears in the progress of the suit and files a supplemental libel which is answered by the respondent, and the parties proceed to issue and trial. *Burke v. The Brig M. P. Rich*, 1 Cliff. (U. S.) 308.

1. *Winn v. Bowles*, 6 Munf. (Va.) 23.

Missouri.—An equitable assignee may sue in equity in his own name, and the ancient jurisdiction of the courts of chancery in relation to such matters is not taken away because courts of law permit an assignee to use the name of the assignor to recover an assigned debt. *Dobyns v. McGovern*, 15 Mo. 662.

Ohio.—The fact that the assignee "may" bring an action in a court of law in the name of the assignor will

not preclude him from maintaining a suit in equity in his own name. *Townsend v. Carpenter*, 11 Ohio 21.

Texas.—An assignee by parol or delivery of a nonnegotiable note may sue the maker at law in the name of the assignor, but in equity may bring suit in his own name. *Ross v. Smith*, 19 Tex. 173.

Vermont.—An assignee of a chose in action who has a right to proceed upon it at law in the name of the assignor has a right to proceed upon it in equity in his own name, in a case which may be proceeded with in equity. *Hagar v. Buck*, 44 Vt. 285.

2. *Brady v. Chandler*, 31 Mo. 28; *Buffington v. South Missouri Land Co.*, 25 Mo. App. 492.

Use of Assignor's Name.—Under a statute requiring the real party in interest to sue, an assignee cannot sue in the name of his assignor, although in the instrument of assignment the assignor authorized suit to be brought in his own name. *Van Doren v. Relfe*, 20 Mo. 455.

Where the law is imperative that suits must be brought in the name of the real party in interest, a suit brought in the name of the assignor to the use of the assignee is improper, and judgment rendered therein will be arrested. *Hutchings v. Weems*, 35 Mo. 285.

Mississippi.—The assignor of an account cannot maintain an action at law in his own name, though the suit be brought for the use of the assignee, where, by statute (Code Miss. 1880, 1507, now § 660 of the Code of 1892), it is provided that the assignee of a chose in action may sue for a recovery on the same in his own name. *Beck v. Rosser*, 68 Miss. 72.

Right of Assignor to Sue for Use of Assignee.—Under statutory provisions that an action for the recovery of a nonassignable debt must be brought in the name of the equitable owner, and that the assignor must be made a party to the action, the assignor can-

VII. EFFECT OF FORM OR MANNER OF ASSIGNMENT.—Sometimes the right of the assignee depends, not on his right as the real party in interest or the like, but on the form of the assignment, as that it should be in writing,¹ or upon some statutory provision, as that the assignment be filed with the writ,² while again the right may exist only in a prescribed case.³

not sue for the use of the equitable owner, since he does not thereby become either substantially or formally a party to the action. *Lytle v. Lytle*, 2 Metc. (Ky.) 127.

A Lessee Who has Assigned His Interest in a leasehold cannot bring an action in his own name to the use of the executor of the original lessor and against his assignee, but the action must be brought by the executor as the real party in interest. *Weise v. Gerner*, 42 Mo. 527.

Wisconsin.—If the cause of action is assignable, and by statute the action is required to be brought in the name of the real party in interest, the action must be brought in the name of the assignee. *Webber v. Quaw*, 46 Wis. 118, in which case the court said: "The provisions of our statute, and those of the state of New York, not only allow but require the action to be brought in the name of the assignee as the real party in interest." *Citing* *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *McKee v. Judd*, 12 N. Y. 622; *Tyson v. McGuineas*, 25 Wis. 656; *Noonan v. Orton*, 34 Wis. 259; *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 151.

Assignee of Patent.—Rev. Stat. U. S., §§ 491, 492, authorizing suits for infringements of patents in the name of the party interested, require that the party in interest must bring the suit in his own name, and he cannot delegate the right to another person.

1. **Under the Iowa Code** of 1851 it was necessary that the transfer of a chose in action should be in writing in order that the transferee might sue in his own name. *Andrews v. Brown*, 1 Iowa 154; *Williams v. Soutter*, 7 Iowa 436.

In Mississippi the assignee of a note in account cannot sue in his own name unless the debt has been assigned to him in writing. *Tully v. Herrin*, 44 Miss. 626.

Under Code Miss. 1892, § 660, providing that the assignee of any chose in action may sue in his own name for a recovery on the same, if the assign-

ment be in writing, it was held that the equitable owner of a chose in action to whom a written assignment had not been made could sue in his own name. *Lowenburg v. Jones*, 56 Miss. 688.

Remedy in Equity of Assignee of Chose in Action—Virginia.—The remedy provided by section 2860 of the Virginia Code of 1887, for actions by assignees of nonnegotiable choses in action, in their own names, is not exclusive of the jurisdiction of equity to grant relief, save in so far as the jurisdiction is excluded by section 2862. The latter excludes equitable jurisdiction only in the case of "suits upon a bond, note, or writing by an assignee." So that equity still has jurisdiction of suits by assignees of choses in action other than bonds, notes, or writings, though under section 2860 the assignee of any chose in action (whether in writing or not) may maintain an action at law thereon in his own name. See Virginia Law Register 384, *citing* *Winn v. Bowles*, 6 Munf. (Va.) 23; *Garland v. Richeson*, 4 Rand. (Va.) 266; *Galt v. Calland*, 7 Leigh (Va.) 594; *Walters v. Farmers Bank*, 76 Va. 12.

Federal Courts Controlled by State Decision.—Code *Washington*, which provides that a cause of action assigned in writing may be sued upon by the assignee, notwithstanding the fact that the assignor retains an interest therein, is controlling upon a federal court sitting within that state. *Dexter v. Sayward*, 51 Fed. Rep. 729.

2. **Under the Maine Revised Statutes**, c. 82, § 130, an assignee of a nonnegotiable instrument cannot sue thereon in his own name unless he files with his writ "the assignment or a copy thereof." *National Shoe, etc., Bank v. Gooding*, 87 Me. 337.

3. **As in New York**, prior to the adoption of the Code of Procedure, where, by the Act of May 2, 1835, an action at law on a chose in action was required to be brought in the name of the assignor, or, if he were dead, by his

VIII. ASSIGNMENT OF CAUSE OF ACTION ARISING IN TORT.—The removal of the common-law prohibition against the assignment of things in action, and the allowance or requirement of suits by the real party in interest, of necessity will authorize an assignee of a right of action arising in tort to pursue his remedy in his own name.¹ Therefore torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action as will survive to the personal representatives, may be assigned so as to pass an interest to the assignee which he can enforce by a suit in his own name.² But an assignee

personal representatives, if any, but if there were no personal representatives the assignee could sue in his own name.

"Assignor," as used in this act, was held to mean the payee or obligee of a chose in action, or if the assignment had been made by the executor or administrator, then the latter, but not to mean any intermediate party standing in the relation of assignor. *Seeley v. Seeley*, 2 Hill (N. Y.) 496.

Under this act, where a promissory note payable to order was transferred by a guaranty indorsed thereon by the payee, a subsequent holder was required to bring himself within the statute before he could sue the guarantor in his own name. *VanDerveer v. Wright*, 6 Barb. (N. Y.) 547.

However, the statute was held not to cover cases of mere gifts or assignments founded upon natural love and affection between near relatives by blood. *VanDerveer v. Wright*, 6 Barb. (N. Y.) 547.

In *Murphy v. Cochran*, 1 Hill (N. Y.) 339, it was held that where the assignee sued to recover a judgment in the name of the assignor, after which the latter died, and no executors or administrators were appointed upon his estate, the assignee might sue out a *scire facias* in his own name by reason of the provisions of the act.

1. *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Waldron v. Willard*, 17 N. Y. 466; *McKee v. Judd*, 12 N. Y. 622.

2. **Injuries to Property.**—*Doering v. Kenamore*, 86 Mo. 588; *Snyder v. Wabash, etc., R. Co.*, 86 Mo. 613, *overruling* *Wallen v. St. Louis, etc., R. Co.*, 74 Mo. 521; *Robertson v. Stuart*, 1 Hayw. (N. Car.) 159; *Morgan v. Bradley*, 3 Hawks (N. Car.) 559.

An Action of Tort which will Survive to the personal representatives of the

person wronged is within a statutory provision (How. Stat. Mich., § 7344) allowing the assignee of any note, bond, or "other chose in action" to sue and recover the same in his own name. *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Finn v. Corbitt*, 36 Mich. 318; *Cook v. Bell*, 18 Mich. 387; *Watson v. Watson*, 49 Mich. 540; *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 52 Mich. 602.

Claim for Personal Injuries.—In *Iowa* it is held that the assignee of a claim for personal injuries sustained by the negligence of a railroad corporation may sue on the claim. *Vimont v. Chicago, etc., R. Co.*, 64 Iowa 513, 19 Am. & Eng. R. Cas. 215.

Claims for Conversion of Property.—The assignee of property converted has a right of action therefor, and may maintain an action for the property and for damages in his own name. *Goodger v. Finn*, 10 Mo. App. 226; *Smith v. Kennett*, 18 Mo. 154; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38.

A donee of property may maintain an action for its conversion by sale under process against a third person, under Neb. Code Civ. Pro., § 29, as "the real party in interest." *Kinsella v. Sharp*, 47 Neb. 664.

An assignee may maintain trover for the conversion of a bond or other instrument assigned to him, although the assignor alone could have maintained suit to enforce the contract. *Clowes v. Hawley*, 12 Johns. (N. Y.) 484.

If promissory notes are assigned before a conversion, the assignee alone has a right to maintain an action of trover, but a simple assignment of the notes after their conversion gives him no such right. *Chase v. Chase*, 1 Paige (N. Y.) 198.

of a cause of action arising upon a tort consisting of the unlawful taking or conversion of personal property cannot maintain an action in his own name without a demand and refusal after he has acquired his title.¹

IX. NECESSITY OF PROMISE BY OR NOTICE TO DEBTOR.—Unless expressly aided by statute, the mere fact of the assignment will not entitle the assignee to maintain an action in his own name on the assigned claim, unless there has been a promise by the debtor to pay him,² or, where an order has been given, an acceptance of

If one of two joint owners of personal property verbally tells the other that if he will bring an action for conversion of the property he may have the benefit of it, or that he may prosecute the action for his own benefit, it will assign the cause of action sufficiently to allow the person so told to sue alone. *Arpin v. Burch*, 68 Wis. 619.

An equitable assignee of a chattel mortgage cannot maintain an action at law in his own name for the conversion of the mortgaged property. *Baker v. Seavey*, 163 Mass. 522. See also *Clapp v. Shepard*, 3 Met. (Mass.) 127.

One Joint Tort Feasor, who has settled with the person injured and received from him an assignment of his claim, cannot sue the other tortfeasors, either in his own name or in the name of the assignor, to recover the damages alleged to have been sustained. *Upsham v. Dickinson*, 38 Mich. 338.

1. *Smith v. Kennett*, 18 Mo. 154; *Robinson v. Weeks*, 6 How. Pr. (N. Y. Supreme Ct.) 161, *overruling* *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Van-Hassell v. Borden*, 1 Hilt. (N. Y.) 128, *citing* *Hall v. Robinson*, 2 N. Y. 293; *Cass v. New York, etc., R. Co.*, 1 E. D. Smith (N. Y.) 522. See article CONDITIONS PRECEDENT, vol. 4, p. 626.

Necessity of Showing Conversion Subsequent to Assignment.—No action is maintainable by the assignee of a right of action for a conversion of personal property, where the assignment merely transfers the property and there is no showing of a conversion subsequent to the assignment. *Duell v. Cudlipp*, 1 Hilt. (N. Y.) 166.

2. *Connecticut.*—Rev. Swift. Dig., vol. 1, p. 438.

Florida.—*Sammis v. Wightman*, 31 Fla. 10; *Hooker v. Gallagher*, 6 Fla. 351; *Kendig v. Giles*, 9 Fla. 278.

Illinois.—*Carlyle v. Carlyle Water, etc., Co.*, 140 Ill. 445.

Maine.—*Lang v. Fiske*, 11 Me. 385; *Smith v. Berry*, 18 Me. 122; *Norris v. Hall*, 18 Me. 332; *Warren v. Wheeler*, 21 Me. 484; *Ballard v. Greenbush*, 24 Me. 336; *Myers v. York, etc., R. Co.*, 43 Me. 232; *Farnum v. Virgin*, 52 Me. 576; *Page v. Danforth*, 53 Me. 174; *Vose v. Treat*, 58 Me. 378.

Maryland.—*Barger v. Collins*, 7 Har. & J. (Md.) 213; *Allstan v. Contee*, 4 Har. & J. (Md.) 351.

Massachusetts.—*Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 42; *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Usher v. D'Wolfe*, 13 Mass. 290; *Coolidge v. Ruggles*, 15 Mass. 387; *Foss v. Nutting*, 14 Gray (Mass.) 484; *Derby v. Sanford*, 9 Cush. (Mass.) 264; *Hay v. Green*, 12 Cush. (Mass.) 282; *Bourne v. Cabot*, 3 Met. (Mass.) 305; *Parkhurst v. Dickerson*, 21 Pick. (Mass.) 307; *Leach v. Greene*, 116 Mass. 534.

Minnesota.—*Dean v. St. Paul, etc., R. Co.*, 53 Minn. 504.

Missouri.—*Walker v. Mauro*, 18 Mo. 564.

New Hampshire.—*Currier v. Hodgdon*, 3 N. H. 83; *Wiggin v. Damrell*, 4 N. H. 75; *Edson v. Fuller*, 22 N. H. 191; *Tibbets v. Gerrish*, 25 N. H. 41; *Thompson v. Emery*, 27 N. H. 273; *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 237; *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 24; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; *Boyd v. Webster*, 58 N. H. 336.

New Jersey.—*Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

New York.—*Compton v. Jones*, 4 Cow. (N. Y.) 13; *DeForrest v. Frary*, 6 Cow. (N. Y.) 151; *Dubois v. Doubleday*, 9 Wend. (N. Y.) 317; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Weston v. Barker*, 12 Johns. (N.

the order.¹ But when this has been done, the assignee may then proceed against the debtor, as for money had and received,² whether or not a new promise was made in any given case depending upon the peculiar facts and circumstances therein.³

Y.) 276; *Hudson v. Reeve*, 1 Barb. (N. Y.) 89.

Pennsylvania.—*Horbach v. Huey*, 4 Watts (Pa.) 455; *DeBarry v. Withers*, 44 Pa. St. 356.

Rhode Island.—*Clarke v. Thompson*, 2 R. I. 146.

Tennessee.—*Nelson v. Marly*, 2 Yerg. (Tenn.) 576; *Mt. Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.) 116; *Marney v. Byrd*, 11 Humph. (Tenn.) 95; *Flickley v. Loney*, 4 Baxt. (Tenn.) 169; *Smith v. Cottrel*, 8 Baxt. (Tenn.) 62.

Texas.—*Rollison v. Hope*, 18 Tex. 446; *Ross v. Smith*, 19 Tex. 173; *Texas, etc., R. Co. v. Wright*, 2 Tex. App. Civ. Cas., § 339.

Vermont.—*Moar v. Wright*, 1 Vt. 67; *Bucklin v. Ward*, 7 Vt. 195; *Hodges v. Eastman*, 12 Vt. 358; *Stiles v. Farrar*, 18 Vt. 444; *Goss v. Barker*, 22 Vt. 520; *Wood v. Rutland, etc., Mut. F. Ins. Co.*, 31 Vt. 552; *Allis v. Jewell*, 36 Vt. 547; *Simonds v. Pierce*, 51 Vt. 467.

West Virginia.—*Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

United States.—*Tiernan v. Jackson*, 5 Pet. (U. S.) 580.

England.—*Fenner v. Meares*, 2 W. Bl. 1269; *Israel v. Douglas*, 1 H. Bl. 239; *Jones v. Farrell*, 1 De G. & J. 215; *Ex p. South*, 3 Swanst. 392; *Fairlie v. Denton*, 8 B. & C. 395, 15 E. C. L. 246; *Innes v. Dunlop*, 8 T. R. 595; *Wilson v. Coupland*, 5 B. & Ald. 228, 7 E. C. L. 77.

An Assignee of a Bank Account, by Delivery of the Book and an order for the payment of the deposit, cannot sue the bank unless it expressly promises to pay the amount, but he may sue in the name of the assignor, or, after the death of the assignor, in the name of the administrator, with or without his consent. *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285. See also *Jones v. Witter*, 13 Mass. 304; *Rockwood v. Brown*, 1 Gray (Mass.) 261; *Riley v. Taber*, 9 Gray (Mass.) 372.

1. Necessity of Acceptance of Order.—To entitle the holder of an order to recover, he must show acceptance by the person on whom it was drawn. *Woodruff v. Hensel*, 5 Colo. App. 103.

Where an Order is Accepted, the title to demand the fund is a legal title, and the payee may sue the acceptor and recover. *Brooks v. Hatch*, 6 Leigh (Va.) 534.

Refusal to Accept Order.—It is well settled that where one having funds in the hands of another gives an order on the latter for payment to a third party, the title to such funds is one which a court of equity will enforce. But if the holder of the funds refuses to accept the order, the payee cannot recover at law; he has his option either to return the order to the maker thereof or to sue the latter in equity for the funds. *Shenandoah Valley R. Co. v. Miller*, 80 Va. 833.

2. Lang v. Fiske, 11 Me. 385; *Austin v. Walsh*, 2 Mass. 401; *Weston v. Barker*, 12 Johns. (N. Y.) 276; *Tiernan v. Jackson*, 5 Pet. (U. S.) 580; *Surtees v. Hubbard*, 4 Esp. 203; *Fenner v. Meares*, 2 W. Bl. 1269.

Nature of the Action.—Where the debtor promises to pay, the action is not brought upon the promise of the debtor to pay the debt of the assignor, but upon the assignment of the claim, and consequently is not within the statute of frauds. *Rollison v. Hope*, 18 Tex. 446.

Election to Assignee.—A special promise to pay by the maker of a non-negotiable instrument in the hands of an assignee will not merge the original promise in the debt, but the assignee may either maintain an action in his own name upon the special promise to himself, or may maintain an action in the name of the payee upon the note. *Hatch v. Spearin*, 11 Me. 354.

3. Promise to Assignee Legally Entitled to Payment.—Where a chose in action was assigned, and payment was requested of the debtor, who said that he would pay to the assignee if he were legally entitled to payment, it was held that the assignee might maintain an action in his own name on proving a legal assignment. *Lang v. Fiske*, 11 Me. 385.

Sale by Assignee of Insolvent.—The rule that the assignee of a chose in action cannot, in the absence of a

The Promise need Not be Express; it will be sufficient if it can be fairly implied that it was made;¹ but at least there must have been a recognition of, or an assent to, the assignment,² and it is

promise to himself, maintain an action thereon in his own name, but is required to do so in the name of his assignor, has been held to apply to a sale by an official assignee of a chose in action belonging to the estate of an insolvent debtor. *Hay v. Green*, 12 Cush. (Mass.) 282.

Requirement of Indemnity.—Where a debtor received notice of the assignment and promised to act upon it, and thereafter the assignor sued the debtor at law and he offered to pay the assignees if they would indemnify him, which they refused to do, and he thereafter paid the assignor and took indemnity, it was held that he had no defense at law against the assignees, and that their refusal of the indemnity was immaterial. *Jones v. Farrell*, 1 De G. & J. 208.

Reassignment.—The assignor of a chose in action, which has been reassigned to him by his assignee, may bring an action thereon in his own name, although notice of the first assignment was given to the debtor, who promised to pay the debt to the assignee, and no notice was given to him of the reassignment; and the debtor may avail himself of the same defense as if the action were brought in the name of the assignee. *Clark v. Parker*, 4 Cush. (Mass.) 361.

The Second Assignee of a promissory note cannot avail himself of a special promise made to the first assignee as the foundation of his action, but must resort to an action on the note. *Hatch v. Spearin*, 11 Me. 354.

Where a Debt Is Due a Copartnership which is afterwards dissolved, and the debt is assigned to one of the partners, he may sustain an action upon it in his own name by proving that the debtor, with knowledge of the assignment, promised to pay it to him. *Barger v. Collins*, 7 Har. & J. (Md.) 213.

1. In *Robinson v. Watson*, 101 Mich. 466, the court said that 2 How. Ann. Stat. Mich., § 7344, allowing the assignee of a chose in action to recover in his own name, was the same as the English Bankruptcy Statute, 6 Geo. IV., c. 1663, allowing an assignee in bankruptcy to recover debts due the bankrupt in his own name, and that

it would be sufficient to show an express or implied promise to the assignee.

Presumption of Promise.—Although the assignee of a chose in action cannot in general sue in his own name without showing an express promise upon sufficient consideration from the debtor to pay him, and though, under certain circumstances, the law will imply a promise to pay over the money to the assignee of the person originally entitled, the promise will not be implied until the debtor has notice of the assignment. *Sears v. Patrick*, 23 Wend. (N. Y.) 528.

Sufficiency of Promise.—Where a bond for a conveyance of land upon conditions was assigned by the obligee, and the obligor agreed with the assignee by name, under seal, to extend the time of performance limited in the condition of the bond, it was held that an action thereon could not be supported by the assignee in his own name. *Cole v. Bodfish*, 17 Me. 310.

2. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729; *Winchester v. Hackley*, 2 Cranch (U. S.) 342. And see *Surtees v. Hubbard*, 4 Esp. 203.

Recognition of Assignment.—In *St. Louis v. Clemens*, 42 Mo. 69, which was an action by the assignee of a city contract to recover against a landowner on tax bills issued for work, it appeared that the city did not object to the assignment of the contract nor to the work as done, but recognized the plaintiff as the assignee and the person entitled to receive the tax bills, and it was held that the plaintiff was properly allowed to maintain the suit. See also *St. Louis v. Rudolph*, 36 Mo. 465.

Assent to Assignment of Policy of Insurance.—If, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner while he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for

immaterial whether the promise be made before or after the assignment.¹

Notice of Assignment.—There are decisions to the effect that an assignment of a chose in action becomes complete, so as to entitle the assignee to maintain his action, as soon as notice of the assignment is given to the debtor.²

such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 512, citing *Wilson v. Hill*, 3 Met. (Mass.) 69. See also *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 517; *Lynch v. Daltzell*, 4 Bro. P. C. 497; *Sadlers Co. v. Badcock*, 2 Atk. 554.

Mutual Insurance Companies.—The assignment of a policy of a mutual insurance company, with the express consent of the company, will enable the assignee to sue thereon in his own name, for the reason that the consent will operate as a promise to pay the loss. *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393; *Wilson v. Hill*, 3 Met. (Mass.) 69; *Crocker v. Whitney*, 10 Mass. 316; *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. (Mass.) 350; *Fuller v. Boston Mut. F. Ins. Co.*, 4 Met. (Mass.) 208; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 200; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506. But there are decisions to the effect that in the absence of provisions in the charter, or in the by-laws of the company, or in the policies issued by it, the assignee cannot recover in his own name, though the company assent to the assignment. *Folsom v. Belknap County Mut. F. Ins. Co.*, 30 N. H. 241; *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 205; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88; *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 232; *Conover v. Mutual Ins. Co.*, 3 Den. (N. Y.) 254. These cases, however, are exceptions to the general rule, or to the law on the subject, founded on the peculiar nature of the contract and the limited powers of such corporations. *Lowell v. Middlesex Mut. F. Ins. Co.*, 8 Cush. (Mass.) 127; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.) 28; *Phillips v. Merri-*

mack Mut. F. Ins. Co., 10 Cush. (Mass.) 350; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175.

It is with a similar view of the nature of the contract that it is held that an assignee, to whom a policy has been confirmed by the directors, cannot maintain an action upon the policy for any loss after the assignment, if he has no conveyance or assignment of the property insured. *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 200; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339. But by a by-law for that purpose the company may provide that a mortgagee, to whom a policy has been assigned as collateral security, may have the policy ratified to him by the assent of the directors. *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 201, and under such a by-law the mortgagee may bring suit in his own name. *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393; *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. (Mass.) 350; *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 200; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506. *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 24.

1. *Morse v. Bellows*, 7 N. H. 549; *Tiernan v. Jackson*, 5 Pet. (U. S.) 580.

2. *DeLiquero v. Munson*, 11 Heisk. (Tenn.) 15; *Burck v. Taylor*, 152 U. S. 634.

If a Draft Not Negotiable be accepted by the drawee, with an agreement to pay the amount to a person to whom it is assigned, the assignee, after notice, may maintain an action for money had and received to his use against the acceptor. *Weston v. Penniman*, 1 Mason (U. S.) 306.

Order for Payment out of Moneys to be Collected—Claim of Acceptor.—In *McLellan v. Walker*, 26 Me. 114, a creditor drew an order on his attorney, with whom he had left a demand for collection, requesting the payment of the amount to the creditor's order, which order was accepted by the attorney, payable when the money should come

X. ASSIGNMENTS MADE WITHOUT THE STATE.—Where the assignment is made without the state, the question whether a suit upon a chose in action shall be brought in the name of the assignor or in the name of the assignee is a question of form of remedy only, and is to be determined by the *lex fori*;¹ it has also been held that a foreign executor or administrator may assign a claim in his own jurisdiction, so as to enable the assignee to sue in a state other than that in which the executor or administrator was appointed.²

into his hands, and was assigned by the creditor whose assignee gave notice of the assignment to the attorney, who at the time said nothing as to any demand of his own against the assignor, and thereafter the money was collected by the attorney, and it was held that the assignee might maintain an action in his own name against the attorney to recover the amount collected, and that the latter could not set off against the original creditor his own demand, which arose out of other transactions, and existed at the time of the acceptance of the order.

Origin of Requirement of Notice.—In *Gayoso Sav. Institute v. Fellows*, 6 Coldw. (Tenn.) 471, it is said that the doctrine stated in *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, that the assignment of a judgment at law is incomplete and invalid unless notice of the assignment was given to the judgment debtor, originated in England upon a construction of the English bankrupt laws, and that since the case of *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, it has been established that notice to the debtor is not necessary in cases where instruments which are negotiable or assignable at common law or by statute are assigned, so as to pass the legal title. See also *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269.

1. *Mayhew v. Pentecost*, 129 Mass. 332; *Tully v. Herrin*, 44 Miss. 626; *Foss v. Nutting*, 14 Gray (Mass.) 484.

The rule that if a thing be not assignable under the laws of the state wherein the relief is sought, so as to transfer the legal title, the assignee cannot maintain an action upon it in his own name in a court of law, applies to assignments made under the laws of foreign states. *Kirkland v. Lowe*, 33 Miss. 423. And see *Orr v. Amory*, 11 Mass. 25; *Dawes v. Boylston*, 9 Mass. 337; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Blane v. Drum-*

mond, 1 Brock. (U. S.) 62; *Wolff v. Oxholm*, 6 M. & S. 92.

Whether an Assignee of a Chose in Action shall Sue in His Own Name or in that of his assignor is a technical question of mere process, determinable by the laws of the forum, but whether a foreign assignment on which the plaintiff claims is valid at all, or whether its validity against the defendant goes to the merits, must be decided by the law in which the case has its legal seat. *Pritchard v. Norton*, 106 U. S. 124; *Glenn v. Marbury*, 145 U. S. 499.

The Lex Loci Governs a contract of assignment, and also the original contract, and, where an assignment to an unauthorized banking association is void in one state, it gives no right to the assignee in that or any other state. *McClintick v. Cummins*, 3 McLean (U. S.) 158.

Place of Bringing Action—Indiana.—Rev. Stat. Ind. 1881, § 312, which provides that any action brought by the assignee of a claim arising out of a contract, etc., shall be commenced in the county where one or more of the parties immediately liable to judgment and execution reside, has no application to an action *in rem*, where the party immediately liable is a nonresident. *Singleton v. O'Brien*, 125 Ind. 151.

By the Law of Pennsylvania, where transfers of an account were made, the transferee had an equitable interest in the account, but it being a chose in action not assignable at common law, it was held that he could not sue in his own name in that state, but that he might sue in Louisiana, where no distinction existed between the legal and equitable title. *Martin v. Ihmsen*, 21 How. U. S. 394.

But see *Bird v. Caritat*, 2 Johns. (N. Y.) 342; *Bird v. Pierpoint*, 1 Johns. (N. Y.) 118.

2. *Campbell v. Brown*, 64 Iowa 425;

XI. PARTIAL ASSIGNMENTS.—Unless there exists some statutory authority therefor, a portion of a chose in action cannot, as a rule, be assigned so as to enable the assignee to recover thereon in his own name¹ without the assent of the debtor,² where the effect will be to split up the cause of action,³ or to oppress the debtor

Rand v. Hubbard, 4 Met. (Mass.) 252; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Guy v. Craighead*, 6 N. Y. App. Div. 463; *Wilkins v. Ellett*, 108 U. S. 256.

By the Law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When therefore an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was held to have been well brought by the assignee in Mississippi without any probate of the will in that state. *Harper v. Butler*, 2 Pet. (U. S.) 239.

1. *Illinois*.—*Chicago, etc., R. Co. v. Nichols*, 57 Ill. 467; *Crosby v. Loop*, 13 Ill. 625, 14 Ill. 330.

Massachusetts.—*James v. Newton*, 142 Mass. 366.

New Jersey.—*Sloan v. Sommers*, 14 N. J. L. 509.

Ohio.—*Stanbery v. Smythe*, 13 Ohio St. 495.

Pennsylvania.—*Jermyn v. Moffitt*, 75 Pa. St. 399; *Fairgrievs v. Lehig* Nav. Co., 2 Phila. (Pa.) 182.

United States.—*Tyler v. Tuel*, 6 Cranch (U. S.) 324; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277.

The Provision in the Missouri Practice Act of 1849, requiring suits to be brought in the name of the real party in interest, did not authorize suit to be brought by the assignee of a part of a cause of action, but in such a case suit was required to be brought in the name of the original owner for the whole cause of action. *Cable v. St. Louis Marine R., etc., Co.*, 21 Mo. 133.

2. *Thomas v. Rock Island Gold, etc., Min. Co.*, 54 Cal. 578; *Loomis v. Robinson*, 76 Mo. 488; *Burnett v. Crandall*, 63 Mo. 410; *Love v. Fairfield*, 13 Mo. 300; *Dean v. St. Paul, etc., R. Co.*, 53 Minn. 504.

Enforcement in Equity.—The assignee may, however, maintain a bill in equity. *Hutchinson v. Simon*, 57 Miss. 628.

Courts of Law Originally Refused to Recognize Any Assignments of choses in action made without the assent of the debtor; but for a long time they have

recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts never recognize, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although the common-law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. *Warren v. Comings*, 6 Cush. (Mass.) 103; *James v. Newton*, 142 Mass. 366.

Under the New York Code of Procedure, in case of an assignment of parts of an entire demand to several persons, an assignee of one of the parts could maintain a suit in equity to recover his part, and, in the absence of any agreement by the debtor to pay him, his remedy was confined to a court of equity. *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514.

3. *McPike v. McPherson*, 41 Mo. 521; *State Ins. Co. v. Oregon R., etc., Co.*, 20 Oregon 563.

As to splitting causes of action, see also article ACTIONS, vol. 1, p. 148.

At Common Law, the Transfer of a Part Only of a Note to two distinct persons, and a reservation of the balance of the instrument to the original payee, was not recognized, and no action at law could be maintained on such title by any of the parties to it. *Goldman v. Blum*, 58 Tex. 630; *Conover v. Earl*, 26 Iowa 169; *Groves v. Ruby*, 24 Ind. 418; *Field v. New York*, 6 N. Y. 179; *Miller v. Bledsoe*, 2 Ill. 530; *Heilbut v. Nevill*, L. R. 4 C. P. 358.

by a multiplicity of suits.¹

However, according to the practice in some of the states the action may be so brought² by proceeding upon the assigned demand in equity.³

Where an Insurance Company has Paid Part of a Loss by Fire caused by a wrongdoer, and has taken an assignment of a claim against the wrongdoer to the extent of such portion, it cannot sue the latter in its own name either at law or under a statute requiring suits to be brought by the real parties in interest, but the action must be in the name of the owner of the destroyed property. *Ætna Ins. Co. v. Hannibal, etc., R. Co.*, 3 Dill. (U. S.) 1. And see *London Assur. Co. v. Sainsbury*, 3 Doug. 245, 26 E. C. L. 97; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 253; *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99; *Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Continental Ins. Co. v. Loud, etc., Lumber Co.*, 93 Mich. 139.

Assignment of Part of Patent Right.—Volume 2, *Laws U. S.*, p. 202, §§ 4, 5, which authorized the assignment of patent rights, did not give a right to assign part of such a right so as to enable the assignee to maintain an action for infringement of the patent. *Tyler v. Tuel*, 6 Cranch (U. S.) 324.

1. *Lindsay v. Price*, 33 Tex. 280.

Assignment of Unpaid Remainder.—Although the payee of an assignable instrument may not assign part of it so as to subject the obligor to two actions, yet, when a part of the instrument has been paid to the legal owner, the remainder may be assigned and the assignee may sue for it in his own name. *Smith v. Oldham*, 5 Mo. 483.

2. *Cochran v. Glover, Morr.* (Iowa) 151.

Transfer of Whole Legal Title.—Where it was understood by the parties that the beneficial interest passed by the assignment was limited to a portion of the claim, the assignee, as holder of the legal title, was allowed to sue for a recovery of the whole amount, it being held competent, however, for the assignors to assert their equitable right by intervening in the action. *Gradwohl v. Harris*, 29 Cal. 150.

In Maine the equitable assignee may use the name of the assignor to enforce collection of the assigned instru-

ment to the extent of his proportional interest. *Penobscot R. Co. v. Mayo*, 60 Me. 306.

In Texas the common-law rule that an action at law could not be maintained by an assignee of a portion of a chose in action has been changed, and such an assignee may bring an action and recover. *Goldman v. Blum*, 58 Tex. 630. And see *Stachely v. Peirce*, 28 Tex. 328; *Moore v. Minerva*, 17 Tex. 20; *Faulk v. Faulk*, 23 Tex. 653; *Lanes v. Squyres*, 45 Tex. 383.

Assignment by One Joint Obligee.—The principle that one joint payee or obligee may use the name of the other in a suit without his consent applies as well to an assignee of one of such payees or obligees. *Wright v. McLemore*, 10 Yerg. (Tenn.) 235.

3. *National Exch. Bank v. McLoon*, 73 Me. 498; *Horne v. Stevens*, 79 Me. 262; *James v. Newton*, 142 Mass. 366; *Philadelphia's Appeal*, 86 Pa. St. 179; *Texas Western R. Co. v. Gentry*, 69 Tex. 630.

Courts of Equity will Enforce Partial Assignments of choses in action upon the theory that the interests of all the parties can be determined in a single suit. The debtor, in case of conflicting claims, if not in default, can bring the entire fund into court, where a decree can be made awarding part distribution, without the risk of having judgment rendered against him for costs and disbursements of the suit. *Little v. Portland*, 26 Oregon 235.

Missouri.—In *Burnett v. Crandall*, 63 Mo. 410, *Sherwood, Judge*, in delivering the opinion of the court holding that an assignee of a part of a chose in action to whom it had been assigned without the consent of the debtor could not recover at law or in equity, discussed the proposition laid down in *Story's Equity Jurisprudence*, explained and commented on the several cases there cited in support of the text, and said: "I have thus briefly reviewed the causes on which the doctrine laid down in the text is supposed to rest, but find none of them to go to the extent there claimed."

In Rhode Island.—Under a statute al-

At Law, the transfer to one of the parties of a right of action in which two or more are jointly interested will not enable the transferee to sue in his own name.¹

XII. ASSIGNMENTS AS COLLATERAL SECURITY.—One to whom a chose in action has been assigned as collateral security, in so far as concerns his right to enforce the obligation, stands in the same position as an assignee of the entire interest of the assignor.²

lowing any person aggrieved to appeal, etc., the assignee of a part of the interest of a residuary devisee under a will may appeal from a decree of the court of probate. *O'Rourke v. Elsbree*, 11 R. I. 430; *Yeaw v. Searle*, 2 R. I. 164.

In Texas the rule that at common law the transfer of a part only of a note to two distinct persons and a reservation of the balance of the instrument to the original payee would not be recognized, and that no action at law could be maintained on such a title by any of the parties to it, does not prevail, the distinction between legal and equitable rights as to the manner of their assertion having been abolished; and under operation of the very liberal rules as to the joinder of parties plaintiff and of causes of action, parties who have a lien on a part of a note may maintain a suit in chancery to foreclose an express lien on real estate, and thus secure payment of the note. *Goldman v. Blum*, 58 Tex. 630. And see *Stachely v. Peirce*, 28 Tex. 328; *Moore v. Minerva*, 17 Tex. 20; *Faulk v. Faulk*, 23 Tex. 653; *Lanes v. Squires*, 45 Tex. 383.

In Admiralty the assignee may sue in his own name though the assignment be only of a part of the entire right; or, at least, the respondents cannot object, on that ground, if the whole right be represented by the libelants. *Swett v. Black*, 1 Sprague (U. S.) 574.

1. *McGehee v. Dougherty*, 10 Ala. 863; *Allen v. White, Minor* (Ala.) 365; *Horbach v. Huey*, 4 Watts (Pa.) 455.

2. *Warner v. Wilson*, 4 Cal. 310; *Castner v. Austin*, 2 Minn. 44.

Promissory Notes Secured by Collateral were placed with an attorney for collection, and by him given to others for a like purpose. Afterwards, by an oral contract, he purchased the interest of his clients in the notes and took an assignment of the collateral. It was held that under the provision of the *Indiana* code of 1858, the suit upon the note was properly brought in the name

of the purchaser, he being the real party in interest. *Hancock v. Ritchie*, 11 Ind. 48.

If notes are assigned as collateral security for a debt, the holder may at the same time, unless there is an agreement to the contrary, bring different suits, one on the original debt and others on the collaterals, prosecute them to judgment, and collect thereon the amount of the original indebtedness and the costs in all the suits, but if he collect anything on the collateral after the indebtedness which they are assigned to secure is paid, he receives it for the benefit of the assignor. *Plant's Mfg. Co. v. Falvey*, 20 Wis. 200.

Where an Account is Assigned to a Creditor in accordance with an agreement that if he collect it he may apply a portion of the same to the indebtedness and return the remainder to the assignor, but that if nothing is collected no credit is to be given, the assignee is not entitled to sue in his own name, for the reason that there is no assignment or partial assignment, but simply an agreement to pay the debt out of a particular judgment, provided the plaintiff's name is used and a recovery had. *Ritter v. Stevenson*, 7 Cal. 388.

One Acting for a Judgment Debtor who takes an assignment of the judgment for his own use may hold it as security for money advanced for its purchase, and if he is not repaid by the debtor, he may enforce the judgment on any property upon which it is a lien. *Carnes v. Platt*, 6 Robt. (N. Y.) 270.

Assignment of Insurance Policy as Collateral.—Where a mutual insurance company has ratified an assignment of one of its policies to a mortgagee as collateral security, the holder is to be regarded and treated in all respects as the party insured and may bring suit in his own name on the policy. *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21.

Certificate of Indebtedness Issued by City.—Where a certificate of indebted-

XIII. PARTIES—1. **Generally.**—The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and, under a system which requires all parties in interest to be joined as parties to the action, the parties interested may be joined as plaintiffs, or may be made defendants, in order that the whole controversy may be determined in one suit.¹

2. **Assignor as Party**—*a.* **IN GENERAL.**—Where, by statute or otherwise, the assignee may bring suit in his own name, the assignor is not a necessary party;² but if the thing transferred

ness, which is afterwards judicially declared void, is issued against a lot for benefits which accrued to it by reason of opening an alley, and this certificate is delivered by the municipality to another lot holder in satisfaction of damages awarded him in condemnation proceedings, an assignment of the certificate by the latter to a third party as security for an indebtedness amounts to an equitable assignment of the claim for damages, and entitles the assignee to enforce this claim against the city to the extent of the debt secured, when default is made in the payment thereof. *McCormick v. Dist. of Columbia*, 18 D. C. 534.

1. *Grain v. Aldrich*, 38 Cal. 514; *Elderkin v. Shultz*, 2 Blackf. (Ind.) 345; *Dean v. St. Paul, etc., R. Co.*, 53 Minn. 504; *Schilling v. Mullen*, 55 Minn. 122; *Risley v. Phenix Bank*, 83 N. Y. 318; *National Exch. Bank v. McLoon*, 73 Me. 510; *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514; *Taylor v. Ficklin*, 5 Munf. (Va.) 25. See, in general, article PARTIES.

An Assignee of a Part of a Debt may sue in equity, bring in all the parties in interest, and enforce the payment of the obligation and the distribution of the proceeds among those entitled thereto. *Harris County v. Campbell*, 68 Tex. 22; *Clark v. Gillespie*, 70 Tex. 513.

Joinder of Assignor and Assignee.—In *Indiana* an assignee of an undivided interest in a promissory note may join in an action thereon with the assignor, when the assignment is set up in the complaint, and where the assignor retains an interest; the provisions of the Rev. Stat. 1881, § 276, have no application, since, in such a case, the assignor is estopped to deny the allegations of the complaint. *Earnest v. Barrett*, 6 Ind. App. 371.

Action by Assignee of Unpaid Part of Claim.—In an action by one assignee of a demand, the complaint stated that the portion of the demand assigned to another person had been collected. The answer did not controvert that averment, but stated that such person had recovered judgment for it, and this was held sufficient reason for not making such person a party in equity. *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514.

Action by Insurance Company against Wrongdoer.—In an action to recover a sum of money paid by an insurance company to the owners of certain merchandise, which had been destroyed through the negligence of the defendant, it was held that the insurance company, as assignee of the claim of the insured against the wrongdoer to the extent of the insurance money paid, could not alone sue the wrongdoer, but must join the insured with it. *State Ins. Co. v. Oregon R., etc., Co.*, 20 Oregon 563. To the same effect see *Continental Ins. Co. v. H. M. Loud & Sons Lumber Co.*, 93 Mich. 139. See *contra*, *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643.

2. *Young v. Kelly*, 3 App. Cas. (D. C.) 296; *Colerick v. Hooper*, 3 Ind. 316; *Vimont v. Chicago, etc., R. Co.*, 69 Iowa 296, 19 Am. & Eng. R. Cas. 215; *Snelling v. Boyd*, 5 T. B. Mon. (Ky.) 172; *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 508; *Snelling v. Boyd*, 5 T. B. Mon. (Ky.) 172; *Clark v. Smith*, 7 B. Mon. (Ky.) 273; *Kennedy v. Davis*, 7 T. B. Mon. (Ky.) 372; *Davis v. Sutton*, 23 Minn. 307; *Carpenter v. Johnson*, 1 Nev. 331; *Gunderson v. Thomas*, 87 Wis. 406.

Making Assignor Party for Purpose of Accounting.—In *Allen v. Smith*, 16 N. Y. 415, it appeared that the master of a vessel assigned his interest in a claim against the owner to a third person,

is not assignable, so as to pass the legal title to the assignee,¹ or, if expressly or impliedly required by statute, the assignor must be made a party.²

who brought action thereon, and that on the trial it was shown that there was a sum due the owner, and it was held that, under the provisions of the Code of Procedure, the defendant could not require the master to be made a party to the action for the purposes of an accounting.

Where the Debtor Refuses Payment to the Assignee upon the ground that the amount claimed has been paid in transactions with the assignors to which the assignee was a stranger, the latter cannot join the debtor and the assignors in an action in which he seeks an accounting to ascertain the rights and liabilities of the parties and for judgment against the one who may be found liable, since his remedy is either upon the assigned claim against the debtor or against the assignor for a breach of warranty. *Camblos v. Butterfield*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 197.

Proper Party.—In an action by the assignee of a promissory note against the maker thereof, the payee was joined as defendant. He did not demur or answer, but filed a reply to the answer of his codefendants, and formed an issue which enabled the court to determine the amount the assignee was entitled to recover from the maker, and what reductions the maker was entitled to for payments severally made to the payee or the assignee, thus determining the amount of the payee's responsibility. It was held that the assignor had not improperly been made a party. *Swift v. Ellsworth*, 10 Ind. 205.

Arkansas.—Under a statute (Mans. Dig., § 4934) providing that where the assignment of a thing in action is not authorized by statute the assignor must be made a party as plaintiff or defendant, a written acknowledgment of an account stated, signed by the debtor, may be sued on by the holder without making the assignor a party, although the assignment is not in writing. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541.

Statutory Provisions—Ohio.—In *Allen v. Miller*, 11 Ohio St. 374, the assignee of an account brought an action against the debtor, and made the as-

signors parties defendant. The assignors resided within the jurisdiction wherein the suit was brought, but the debtor did not. It was held that the assignors were improperly made parties, within a statutory provision requiring defendants resident or served with process within the jurisdiction to have a real and substantial interest in the subject-matter of the action adverse to the plaintiff, and that hence the court had no jurisdiction in the action.

If the Assignment Is Involuntary, as by operation of law, the assignor must be made a party. *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 289; *Mills v. Hoag*, 7 Paige (N. Y.) 18.

1. *Allen v. Crockett*, 4 Bibb (Ky.) 240; *Lemmon v. Brown*, 4 Bibb (Ky.) 308; *Pemberton v. Riddle*, 5 T. B. Mon. (Ky.) 401; *Young v. Rodes*, 5 T. B. Mon. (Ky.) 498; *Hicks v. Doty*, 4 Bush (Ky.) 420; *Gill v. Johnson*, 1 Metc. (Ky.) 649; *Lytle v. Lytle*, 2 Metc. (Ky.) 127.

Assignee of Parol Promise or Implied Promise.—A parol promise or promise implied by law is not assignable, and if such promise be made to three and one transfers his interest to the other two, though the defendant, with complete knowledge of the fact, promise to pay the two, yet all three must join in the action. *Jarman v. Howard*, 3 A. K. Marsh. (Ky.) 383.

2. Assignment Otherwise than by Indorsement.—Under the *Indiana* statutes, Rev. Stat. 1894, § 277, providing that the assignor must be made a party to an action brought by the assignee of a claim arising out of contract and not assigned by indorsement in writing, where the claim arose out of contract and was assigned in writing, but the contract itself was not in writing, it was held that the assignor was a necessary party. *Stewart v. Fralich*, 14 Ind. App. 260.

In an action upon an account assigned otherwise than by indorsement in writing, if the assignor is not made a party, the complaint is demurrable under Rev. Stat. 1881, § 276, for a defect of parties defendant. *Watson v. Conwell*, 3 Ind. App. 518. See also *Hubbell v. Skiles*, 16 Ind. 138.

Proceedings in Equity.—Irrespective of statutory provisions affecting proceedings in equity, usually, where suit is brought therein by an assignee, the assignor should be made a party.¹

b. INTEREST REMAINING IN ASSIGNOR.—If, after an assignment, there remain any interest, right, or liability in the assignor which can be affected by the decree, a *scintilla juris* even, then he is a proper and, in most instances, a necessary party.²

On a Petition to Assert a Claim in a Pending Cause as assignee of a debt therein reported, the assignor is a necessary party, and should be summoned. *Daily v. Warren*, 80 Va. 512.

1. *Robinson v. Springfield Co.*, 21 Fla. 203; *Plowman v. Riddle*, 14 Ala. 171; *Elderkin v. Shultz*, 2 Blackf. (Ind.) 345; *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514; *M'Kinnie v. Rutherford*, 1 Dev. & B. Eq. (N. Car.) 14; *Carter v. Jones*, 5 Ired. Eq. (N. Car.) 196; *Corbin v. Emmerson*, 10 Leigh (Va.) 697; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Preston v. Aston*, 85 Va. 104; *Cathcart v. Lewis*, 1 Ves. Jr. 463. *Compare* *Hobart v. Andrews*, 21 Pick. (Mass.) 532.

The manner of assignment, *i. e.*, whether legal or equitable, does not go to the cause of action, but to the simple question of whether or not the assignor should be joined. *Treadway v. Cobb*, 18 Ind. 36.

Assigned Judgment.—The assignor of a nonnegotiable judgment is a necessary party to a suit by the assignee to set aside a conveyance. *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338.

An assignor of a judgment, or of a chose in action on which a judgment has been obtained in the name of the assignor, is not a necessary party to a creditor's bill filed by the assignee. *Morey v. Forsyth*, Walk. (Mich.) 465. In this case the chancellor said: "If there be a controversy between the assignor and assignee touching the assignment, the court will direct the assignor to be made a party for the protection of all; otherwise he need not be a party." See also *Beach v. White*, Walk. (Mich.) 495.

Suit on Order.—Where a paper under which a plaintiff in a petition claims to be an assignee does not on its face purport to be an assignment, but only an order for money, it is necessary that the alleged assignor, or his personal representative, should be a party to the petition, either as plaintiff or

defendant. *Clark v. Edney*, 6 Ired. (N. Car.) 50.

Suit to Obtain Duplicate of Lost Certificate.—The loser of a public certificate bearing interest, which never was transferred to him by actual assignment from the original holder, ought not to obtain its renewal from the commonwealth by a suit in chancery without making the original holder a party to the suit. *Auditor v. Johnson*, 1 Hen. & M. (Va.) 536.

Requiring Assignor to be Made Party.—If there is any controversy between the assignor and the assignee in relation to the fact of assignment, or as to the right of the assignee to the chose in action, the chancellor, in the exercise of a sound discretion, may require the assignor to be made a party, so that both may be bound by the decree. *Ward v. Van Bokkelen*, 2 Paige (N. Y.) 289.

In Suits for Specific Performance the assignor is a proper if not a necessary party. *Bradly v. Morgan*, 2 A. K. Marsh. (Ky.) 369; *Hancock v. Beckham*, 5 Litt. (Ky.) 135. Action to reform and enforce insurance policy. *Sykora v. Insurance Co.*, 2 Wkly. L. Bul. (Ohio) 223. But see *Anderson v. Wells*, 6 B. Mon. (Ky.) 540.

Waiver of Failure to Make Assignor Party.—Although the assignor of a contract for the sale of land is the proper party in a suit for specific performance by his assignee, yet if he be not made a party, and no objection on that score is raised until the hearing, a decree may be directed upon the execution and filing by such assignor of an assent and agreement to be bound by the decree. *Voorhees v. De Myer*, 3 Sandf. Ch. (N. Y.) 614.

2. *Montague v. Lobdell*, 11 Cush. (Mass.) 114; *Hobart v. Andrews*, 21 Pick. (Mass.) 526; *Miller v. Henderson*, 10 N. J. Eq. 320; *Thompson v. McDonald*, 2 Dev. & B. Eq. (N. Car.) 477; *Corning v. Roosevelt*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 220, 18 Civ. Pro. Rep. (N. Y.) 399; *East Texas F.*

c. ASSIGNMENT ABSOLUTE.—But where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and no question is raised as to the extent of the assignment or its validity, and the assignor will be unaffected by the decree, he need not be made a party to a suit instituted by the assignee.¹

Ins. Co. v. Coffee, 61 Tex. 287; *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514.

Failure to Transfer Legal Right.—Where the assignment of a chose in action transfers only an equity, the assignor must be made a party to a suit on the thing assigned, because the legal right is in him. *Craig v. Johnson*, 3 J. J. Marsh. (Ky.) 573; *Neyfong v. Wells, Hard.* (Ky.) 571.

Enforcement of Lien for Purchase-money.—Under the general rule in equity that all persons materially interested in the subject ought to be parties to the suit, either as plaintiffs or defendants, the vendors of land should be parties to a suit against the vendee to enforce the lien of the purchase-money on the land; and this rule applies where they have assigned the bonds or notes given for the price of the land, if there are any remaining rights or liabilities of the assignors which may be affected by the decree. Where there are such rights, or the assignment is not absolute and unconditional, or the extent or vitality of the assignment is denied, then an assignor is not only a proper but a necessary party. *Betton v. Williams*, 4 Fla. 11.

An Allegation of the Insolvency of the assignor is not sufficient to excuse the omission to make the assignor a party. *Betton v. Williams*, 4 Fla. 11.

A Trustee Holding for the Separate Use of a Married Woman, and for certain contingent trusts, will be a proper and necessary party in a bill by the married woman, although he has executed a deed purporting to assign his whole interest to her. *Thompson v. McDonald*, 2 Dev. & B. Eq. (N. Car.) 477.

Retention of Legal Title.—An assignor who has made an absolute assignment of his interest need not be made a party to a suit by the assignee to enforce the equitable title acquired by the transfer, against a third party, even when the former retains the legal title. *New Mexico Land Co. v. Elkins*, 20 Fed. Rep. 545.

1. Florida.—*Robinson v. Springfield Co.*, 21 Fla. 203; *Betton v. Williams*, 4 Fla. 11.

Illinois.—*Dixon v. Buell*, 21 Ill. 203. **Kentucky.**—*Kenney v. Davis*, 7 T. B. Mon. (Ky.) 372.

Maine.—*Haskell v. Hilton*, 30 Me. 419; *Moor v. Veazie*, 32 Me. 343.

Maryland.—*Grand United Order, etc. v. Merklin*, 65 Md. 583; *Coale v. Mildred*, 3 Har. & J. (Md.) 278.

Massachusetts.—*Montague v. Lobdell*, 11 Cush. (Mass.) 111; *Hodges v. Saunders*, 17 Pick. (Mass.) 470; *Currier v. Howard*, 14 Gray (Mass.) 511; *Allyn v. Allyn*, 154 Mass. 570.

Michigan.—*Morey v. Forsyth, Walk.* (Mich.) 465; *Beach v. White, Walk.* (Mich.) 495.

New Jersey.—*Bruen v. Crane*, 2 N. J. Eq. 347; *Bruen v. Crane*, 2 N. J. Eq. 348; *Vreeland v. Loubat*, 2 N. J. Eq. 104; *Chester v. King*, 2 N. J. Eq. 405.

New York.—*Ward v. VanBokkelen*, 2 Paige (N. Y.) 289; *Miller v. Bear*, 3 Paige (N. Y.) 467; *Rogers v. Trader's Ins. Co.*, 6 Paige (N. Y.) 583; *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287; *Field v. Maghee*, 5 Paige (N. Y.) 539; *Brasher v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 247; *Whitney v. M'Kinney*, 7 Johns. Ch. (N. Y.) 144; *Allen v. Smith*, 16 N. Y. 415.

North Carolina.—*Polk v. Gallant*, 2 Dev. & B. Eq. (N. Car.) 395; *Thompson v. McDonald*, 2 Dev. & B. Eq. (N. Car.) 477.

Ohio.—*McGuffey v. Finley*, 20 Ohio 474; *Grant v. Ludlow*, 8 Ohio St. 1.

Tennessee.—*Wilson v. Davidson County*, 3 Tenn. Ch. 536.

Vermont.—*Day v. Cummings*, 19 Vt. 496.

Virginia.—*Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Omohundro v. Henson*, 26 Gratt. (Va.) 511; *James River, etc., Co. v. Littlejohn*, 18 Gratt. (Va.) 83.

West Virginia.—*Vance v. Evans*, 11 W. Va. 342.

United States.—*Trecothick v. Austin*, 4 Mason (U. S.) 16; *Boon v. Chiles*, 8 Pet. (U. S.) 532.

However, there are cases from which it appears that the joinder of the assignor and the assignee as parties is not objectionable when convenience will be promoted thereby, or the defendant will be protected.¹

England.—*Hill v. Adams*, 2 Atk. 39; *Chambers v. Goldwin*, 9 Ves. Jr. 269; *Kirk v. Clarke*, Pre. Ch. 276; *Whitworth v. Davis*, 1 Ves. & B. 545; *Blake v. Jones*, 3 Anstr. 651; *Brace v. Harrington*, 2 Atk. 235; *Norrish v. Marshall*, 5 Madd. 478; *Bromley v. Holland*, 7 Ves. Jr. 14.

Development of the Doctrine.—"By the ancient practice of the English court of chancery * * * the assignor of a chose in action was a necessary party to a bill to recover the amount. And as late as 1792, *Cathcart v. Lewis*, 1 Ves. Jr. 463, * * * Lord Thurlow allowed a demurrer to a bill filed by the assignee of a judgment, because the assignor was not made a party; though some years previous to that time Lord Hardwick had declared it was not necessary in every case to make the assignor a party, where all the equitable interest had been assigned. *Brace v. Harrington*, 2 Atk. 235. In 1802, in the court of errors of this state [New York], there was a difference of opinion among some of the judges as to the necessity of making the assignor of a mortgage a party to a bill of foreclosure brought by the assignee. *Johnson v. Hart*, 3 Johns. Cas. (N. Y.) 322. But at this day [1830] the rule is well settled that where there has been an absolute assignment of all the interest of the mortgagee in the debt secured by the mortgagee, he is not a necessary party to a bill to redeem, or to a bill of foreclosure. *Chambers v. Goldwin*, 9 Ves. Jr. 269; *Newman v. Chapman*, 2 Rand. (Va.) 93; *Whitney v. M'Kinney*, 7 Johns. Ch. (N. Y.) 144. The reason why it was formerly considered necessary to make the assignor of a chose in action a party to a bill in equity brought by the assignee, I apprehend, must have been that courts of law did not sanction and protect such assignments, considering them a species of maintenance. And the assignor having the legal title or interest in the thing assigned, he might sustain an action at law thereon, notwithstanding a decree in equity to which he was not a party. This reason has long since ceased, as it is now well settled, at least in this state [New

York], that after an absolute assignment of a chose in action, the assignee, at law as well as in equity, is considered the real party to the suit; and the defendant may plead and give in evidence any matter of defense which exists in his favor against the assignee." Chancellor Walworth in *Ward v. Van Bokkelen*, 2 Paige (N. Y.) 289.

An Assignor of a Part of a Debt need not be brought in as a party where the complaint alleges that the portion of the debt retained by the assignor has been fully paid, and there is no question as to the validity or extent of the interest between the assignor and the assignee. *Insurance Co. of North America v. Martin*, 139 Ind. 317.

Costs for Misjoinder.—A married woman, being entitled to a share of the estate of a testator, joined her husband in selling and assigning it to a purchaser. The assignors and assignees having joined in a suit for its recovery, it was dismissed at the hearing for misjoinder; but the objection not having been taken previously, no costs were given. *Padwick v. Platt*, 11 Beav. 503.

1. *Blevins v. Buck*, 26 Ala. 292; *Plowman v. Riddle*, 14 Ala. 169; *Gunter v. Williams*, 40 Ala. 561; *Wilson v. Davidson County*, 3 Tenn. Ch. 536.

Effect of Joining Assignor as Complainant.—The filing of a bill in the name of an assignor and an assignee in a litigation of the assignment is a demand between them of the interests of the assignee. *Ryan v. Anderson*, 3 Madd. 174, *quoted in* *McLane v. Riddle*, 19 Ala. 180.

What Constitutes an Improper Joinder.—The proposition that, where one who has no right to sue by himself and who is an entire stranger to the defendant is joined as a coplaintiff with those having a right to sue the defendant by themselves, advantage may be taken of this improper joinder by plea or demurrer, does not apply where the assignor and assignee join in the assertion of a claim as to which there has been, at least, even if it do not continue, a privity between each of them and the defendant. *Thompson*

d. MORTGAGE FORECLOSURE.—The mortgagee is not a necessary party on mortgage foreclosure if he has parted with all his interest in the mortgage and the debt thereby secured, and there is nothing special or peculiar in the case. See, for a full discussion of this subject, article FORECLOSURE.

3. Assignee as Party.—No positive statement can be made as to the propriety or the necessity of making the assignee a party to a suit brought in the name of the assignor, but it seems that generally he need not be made a party unless there will be a failure of justice without his presence.¹

v. McDonald, 2 Dev. & B. Eq. (N. Car.) 477.

Convenience Promoted.—In *Wilson v. Davidson County*, 3 Tenn. Ch. 536, a bill to enforce a covenant of indemnity was held not objectionable for multifariousness or misjoinder of parties because filed in the names of a succession of assignors and assignees, where it appeared that the assignments were made in connection with the transfer of railroad property, and that there was such an admixture of parties and confusion of their rights as corporators, copartners, and co-owners that it could not be seen precisely what the legal status of each was and in whom the beneficiary interests rested. Cooper, Chancellor, said: "Upon principle, I am unable to see why the assignor of a bond or other security might not be joined with the assignee as coplaintiff in a suit for its enforcement. It obviates the necessity of proving the assignment, or going into any of the minutiae of the relation between the parties. It is, moreover, an additional protection to the obligor against any future demand upon the obligation. And such protection, it is obvious, may be desirable where the security has been informally transferred in the lump with other property, or not transferred at all, except by implication from the dealings between the parties."

Protection of Defendant.—Rev. Stat. Ind. 1881, § 276, which provides that when any action is brought by the assignee of a claim arising out of a contract and not assigned by indorsement, the assignor shall be made a defendant, etc., in connection with sections 251 and 269, which provide that actions must be prosecuted in the name of the real party in interest, and that persons united in interest must be joined as plaintiffs or defendants, do not apply where one who has assigned his inter-

est in the claim in question is before the court urging the assignment. In such a case both assignor and assignee should be made parties plaintiff, thus fully protecting the obligor. *Singleton v. O'Brien*, 125 Ind. 151.

1. *Coale v. Mildred*, 3 Har. & J. (Md.) 278; *Showell v. Winkup*, 60 L. T. 389.

Defense against Assignee.—The equitable owner is a proper but not a necessary party, unless the debtor have some legal defense as against him alone. *Texas Western R. Co. v. Gentry*, 69 Tex. 625.

Adjustment of Right of All the Parties.—That one of the parties to a joint enterprise transfers an interest in it to another will not affect his right to proceed in equity to enforce his rights, and the assignee is a proper if not a necessary party to such an action when the situation is complicated, and an adjustment of the rights of all the parties is necessary. *Wilcox v. Pratt*, 125 N. Y. 688.

The Assignee of a Negotiable Note payable to order by sale and delivery without indorsement, on which, by direction of the assignee, a suit has been brought and judgment obtained in the name of the payee, is a creditor of the maker, and is the proper person to be served with notice on a petition by the maker for an act of insolvency. *Colbourn v. Rossiter*, 2 Conn. 503.

Suit to Stay Proceedings on Judgment.—Where the owner of a judgment has assigned it to a third person, the assignee of the judgment is a necessary party to a suit for a perpetual stay of the proceedings on such judgment, upon the ground of equities existing between the complainant and the assignor previous to the assignment. *Mumford v. Sprague*, 11 Paige (N. Y.) 438.

Assignee of Mortgage as Security.—An

4. Effect of Assignment Pendente Lite—*a.* IN GENERAL.—The effect of an assignment *pendente lite* of the thing in controversy, or of a right or interest pertaining thereto, is so far dependent on legislation that no rule of general application can be laid down.¹ It seems, however, that where it is necessary that all the parties should be before the court in order that the matters in controversy may be completely determined, and that all persons interested may be thereby concluded, persons who, by assignment, have acquired interests pending the suit should be added as parties.²

b. PLAINTIFF PARTING WITH ALL INTEREST.—It is held that where the party who has instituted the suit parts with all his interest therein, the assignee should be made a party by appropriate proceedings before the cause is further proceeded with;³

assignee of a note with a mortgage to secure the same, who takes them as security for a debt of the obligor, is a necessary party to a bill to redeem, though he afterwards make an absolute assignment of the mortgage to another party. *Brown v. Johnson*, 53 Me. 246.

Assignment of Portion of Claim by Lienor.—Where the holder of a claim secured by a lien prior to the commencement of an action against the defendant assigns a portion of his claim to another person, such assignee is not a necessary party to the action. *Boyle v. Robbins*, 71 N. Car. 130.

Agreement with Attorneys as to Compensation.—An agreement by a party with his attorneys that they may retain as compensation a certain percentage of the sum collected will not give the attorneys such an interest in the cause as will require them to be joined as parties plaintiff. *Herrick v. Minneapolis, etc., R. Co.*, 32 Minn. 435.

1. *Smalley v. Taylor*, 33 Tex. 668; *Devine v. Martin*, 15 Tex. 25; *Saint Anthony Mill Co. v. Vandall*, 1 Minn. 246; *Zane v. Fink*, 18 W. Va. 693.

Illinois Revised Statutes, c. 1, § 23, which provides that no suit instituted in the name of one party for the use of another shall abate by reason of the death of the nominal plaintiff, and which allows the continuance of the suit by the real plaintiff in his own name on the suggestion of the death on the record, is not mandatory, nor does it deprive the assignee of any right which he had at common law. *Phillips v. Wilson*, 25 Ill. App. 427.

2. Death of Assignor before Judgment.—In a pending action on a note and mortgage the plaintiff assigned them and died before final judgment, and it

was held error to allow an action to be prosecuted to final judgment in the name of the administrator of the assignor, and to allow a judgment in favor of the administrator to the use of the assignee who had not been made a party. *Reynolds v. Quaely*, 18 Kan. 361.

Where there Are Contending Assignees of a Pending Cause of Action, the court will not, on motion, decide the merits of their respective claims by ordering the action to be entered upon the docket as for the use of either of them. *Thomas v. Elliot*, 2 Cranch (C. C.) 432.

3. *Iowa*.—*Ferry v. Page*, 8 Iowa 455. *Maine*.—*Mason v. York, etc., R. Co.*, 52 Me. 82.

Massachusetts.—*Reid v. Paul*, 131 Mass. 129.

New York.—*Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287.

See article SUBSTITUTION OF PARTIES.

Sale of Judgment.—Where a plaintiff in a pending action sells and transfers the judgment without investing the purchaser with the legal interest to the thing in action, it is improper to substitute the holder of it as plaintiff with power to prosecute it in his own name. *Allen v. Newberry*, 8 Iowa 65.

In Minnesota, when the assignee of a claim wishes to come in *pendente lite* and prosecute, he must apply to the court to establish his assignment and for permission to continue the prosecution after notice to all the parties. *Chisholm v. Clitherall*, 12 Minn. 375.

Procedure by Defendant.—When a complainant assigns his interest in the suit *pendente lite*, if the defendant wishes to have the suit brought to a termination, his proper course is to apply to

that the suit or action may be continued and carried on in the name of the plaintiff for the benefit of the assignee;¹ or that the

the court for an order that the assignee proceed and file a supplemental bill, in the nature of a bill of revivor, within such time as shall be prescribed by the court, or that the bill in the original suit be dismissed, of which application notice should be given. *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287; *Gamble v. Johnson*, 9 Mo. 605. And see *List v. Pumphrey*, 3 W. Va. 672.

Assignment to Secure Attorney.—Where a party to a litigation assigns to his attorneys sufficient of the claim to pay his obligation in the case in question and other cases, the attorneys, either before or after decree in the pending case, may file their bill in the cause to have the assignment protected, and may have a decree entered to preserve their lien upon the fund when paid into court, since, in such a case, the assignees have no remedy at law to enforce the assignment. *Phillips v. Edsall*, 127 Ill. 535 holding that the bill of the assignees may be exhibited any time after the assignment, for the purpose of giving to the court notice of the rights of the assignees.

Prosecution by Assignor without Objection.—In chancery, to enable the complainant to maintain his suit, he must have an interest in the subject of such suit; but where the complainant assigned his claim against the defendant pending the suit, and the cause proceeded without objection upon that ground until after report by the referee, the court refused to dismiss the bill. *Pond v. Clark*, 24 Conn. 370.

Assignment Pendente Lite as Defense.—Proof that after suit was brought and before trial the plaintiff transferred his cause of action to a third person not a party to the suit will not constitute a defense thereto, and it is immaterial that the answer merely puts in issue the existence of the cause of action, but presents no question as to the ownership thereof, if any exist, and that proof of the transfer was admitted without objection. *Gulf, etc., R. Co. v. Hodge* (Tex. Civ. App. 1895), 30 S. W. Rep. 829.

1. *Alabama*.—*Foster v. Goodwin*, 82 Ala. 384.

Connecticut.—*Pond v. Clark*, 24 Conn. 370.

Michigan.—*Moon v. Harder*, 38 Mich. 566.

Mississippi.—*Montgomery v. Handy*, 63 Miss. 43.

New York.—*Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287; *Gale v. Vernon*, 1 Sandf. (N. Y.) 679.

Tennessee.—*Paul v. Williams*, 12 Lea (Tenn.) 215.

Texas.—*Dowell v. Mills*, 32 Tex. 440.

Washington.—*Hood v. California Wine Co.*, 4 Wash. 88.

United States.—*Ex p. South, etc.*, *Alabama R. Co.*, 95 U. S. 221.

Under the New York Code of Civil Procedure, § 5756, the party succeeding to the plaintiff's rights in the cause may continue to prosecute the action in the name of the original plaintiffs as if no change in interest had taken place. *Cuff v. Dorland*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 194.

Assignment to Secure Attorney.—The fact that a plaintiff in a pending suit for damages assigns her claim to secure her attorneys is not a bar to the continuation of the prosecution in the plaintiff's name. *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 20, 78 Mich. 681.

Texas.—In *Clarke v. Koehler*, 32 Tex. 679, the court said that it had repeatedly decided that the original plaintiffs to an action cannot sell out their interest *pendente lite* and make new parties to the suit, and dismissed an appeal taken by a purchaser of the plaintiff's interest *pendente lite*.

Sale by One Partner to the Other.—After suit by a partnership, the fact that one of them sells all his interest in the partnership property to the other will not render a change of parties necessary. *Evans Co. v. Reeves*, 6 Tex. Civ. App. 254.

Assignment by Administrator.—If, after a cause has been revived in the name of the administrator *de bonis non*, he assigns a judgment, which is the subject-matter of the suit, to another, and the suit proceeds in the name of the administrator *de bonis non*, without making the assignee a party, the cause may so proceed until final decree. *List v. Pumphrey*, 3 W. Va. 672.

A Bill of Review will not lie for assignees. *Thompson v. Maxwell*, 95

assignee may elect whether to proceed in that manner or in his own name.¹

Compromise.—Where a pending suit has been compromised, the rights of the assignee will depend upon the fact of notice.²

c. COSTS.—In some states, where the cause of action is assigned *pendente lite*, the assignee becomes liable for costs.³

U. S. 391. See article *Bills of Review*, vol. 3, p. 590.

Pleading Assignment Pendente Lite.—Where an answer is sought to be avoided by an assignment of the cause of action *pendente lite*, the assignee, by his reply, must show affirmatively that the assignment was made *pendente lite* to make it effectual and at the same time entitle him to proceed in the action in the name of the plaintiff on the record, the assignor. *Saint Anthony Mill Co. v. Vandall*, 1 Minn. 246.

1. Prosecution in Name either of Assignor or Assignee—Minnesota.—Where a cause of action is transferred *pendente lite* under the Minnesota statutes, the assignee may prosecute the action, but it may also be continued in the name of the original plaintiff; but until the transfer is brought to the notice of the court, the parties to the record are *prima facie* the parties before it. *Chisholm v. Clitherall*, 12 Minn. 375.

New York.—Pending a statutory proceeding (Code Proc., § 275) to bring in and have judgment against a joint debtor made a party to the original action, but not served with process, the original judgment was assigned. It was held that the assignment constituted no defense, but was simply a transfer of ownership, and that the assignee might properly have been brought in by motion as plaintiff, or could continue the action in the name of the original plaintiff. *Merchants' Exch. Nat. Bank v. Waitzfelder*, 14 Hun (N. Y.) 47.

Tennessee.—The assignee of an interest in the subject-matter of a pending litigation may either carry on the suit in the name of the assignor or come in by an original bill in the nature of a supplementary bill and conduct the litigation in his own name. *Paul v. Williams*, 12 Lea (Tenn.) 215; *Wills v. Whitmore*, 9 Baxt. (Tenn.) 198; *Trabue v. Bankhead*, 2 Tenn. Ch. 412.

United States.—An assignment by the defendant in the litigation will not necessarily defeat a suit, but his assignee taking *pendente lite* is bound by

what is done against him. The assignee may, however, at his election, come in by an appropriate application, make himself a party, and so assume the burden of the allegation in his own name, or he may act in the name of his assignor. *Ex p. South*, etc., Alabama R. Co., 95 U. S. 221.

2. Where Original Parties to an Action Compromise and agree that judgment may be entered, the defendant having no knowledge of the assignment, the assignee cannot have the judgment set aside. *Chisholm v. Clitherall*, 12 Minn. 375.

In *Ashby v. Winston*, 34 Mo. 311, it appeared that the plaintiff in a pending suit made an assignment of so much of the proceeds thereof as would satisfy his indebtedness to a third party. After notice of the assignment, the defendant compromised the action and paid the money over to the plaintiff's attorney, who made application of the same according as he was directed by the plaintiff. It was held that although the assignee had a right to control the suit, yet the plaintiff's attorney not being his agent, the sum paid by the defendant was not a payment to the assignee.

3. An Assignment of a Cause of Action as Collateral Security is not such a transfer as would make the assignee liable for costs under New York Code of Procedure, § 321, which provided that where, after the commencement of an action, the cause, by assignment or otherwise, became the property of a third person, such person should be liable for costs. *Peck v. Yorks*, 75 N. Y. 424.

Where a Judgment has been Assigned as Collateral for fees due to the attorney for the judgment creditor, and the latter retains a right to the balance of the proceeds, the assignee will not be required to pay the costs on appeal, under Rev. Stat. Wis., c. 133, § 50, which provides that in actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the

5. Amendments as to Parties.—Usually, such amendments as to parties will be permitted as will tend to bring the proper persons before the court, or as will properly designate them.¹

XIV. PLEADING.—**1. General Requirements.**—It may be said generally that in an action or suit by an assignee, on an assigned chose in action, the complaint, declaration, or like pleading, must contain averments substantially like those formerly required in a bill in equity, or such averments as are made necessary by statute,² and should be in such form as may be required by the

property of a person not a party to the action, such person shall be liable to the costs, etc., in the same manner as if he were a party: but it is otherwise if the assignment is absolute. *DeWitt v. Perkins*, 25 Wis. 438.

1. *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 514.

Wrongfully Suing in Name of Assignor.—Where a party entitled to sue in his own name sues in the name of another, for his own use, he may amend by changing the suit into one in his own name. *Heard v. Lockett*, 20 Tex. 162; *Frank v. Kaigler*, 36 Tex. 306; *Barnett v. Logue*, 29 Tex. 282. See article AMENDMENTS, vol. I, p. 537 *et seq.*

Wrongfully Suing in Name of Assignee.—Where suit is commenced on a chose in action in the name of the equitable owner, the proceedings cannot be amended on the trial by inserting the name of the legal owner. *Nelson v. Marly*, 2 Yerg. (Tenn.) 576.

Striking Out Indorsements on Note.—In an action in debt, brought by the payee of a note to the use of the assignee thereof, the plaintiff cannot amend by striking out the indorsements for the purpose of showing that he is the legal owner, as, by his form of action, he has declared that he is not. *Langham v. Lebarge*, 6 Mo. 355.

Striking Out Name of Deceased Usee.—Hutch. Code Miss. 842 provides that it shall be lawful for the party representing the usee as executor or administrator to be entered on the record and papers in the place of such deceased usee before final judgment, and since a usee cannot be a party to an action, and is only treated as such by virtue of statutory provisions, and the statute does not in effect declare the suit abated by reason of the death, the name of the usee may be stricken out on motion. *Lee v. Gardiner*, 26 Miss. 521.

Surplusage—"To Use of."—Under a

statute requiring suit to be brought by the real party in interest, where an indorsee for collection of a promissory note sued in his own name for the use of the payee, using the words "to the use of" the payee, naming him, the words were held to be mere surplusage, which might be stricken out without affecting the petition. *Beattie v. Lett*, 28 Mo. 596.

Ordering Assignees to be Made Parties Pending Suit.—In *Hood v. Hood*, 85 N. Y. 561, it appeared that a legatee, by an assignment absolute on its face, transferred his interest in the estate to a copartnership which at the time agreed with him that if more than a certain sum was realized they would turn over the excess to him. In an action by the legatee against the executors and their sureties, the latter set up the assignment, and claimed that the assignees were necessary parties to the action. On proof of the assignment, on the trial, objection was made by the defendant for a defect of parties, whereupon, one of the firm being present, the court made a statement that it would amend the proceedings, so that the members of the firm should be brought in immediately as parties, and directed the trial to proceed. After plaintiff's case was closed, defendant moved to dismiss for defect of parties, which motion was denied. It was held that the denial was erroneous, since the assignees were necessary parties, and that the mere direction that they should be brought in immediately did not have the effect of making them parties.

2. Kentucky.—*Hubble v. Mullanphy*, Hard. (Ky.) 302; *Tunstall v. Barbour*, Hard. (Ky.) 570; *Keeton v. Scantland*, Hard. (Ky.) 156; *Lynch v. Barr*, Sneed (Ky.) 170; *Conn v. Jones*, Hard. (Ky.) 9.

Missouri.—*Weaver v. Beard*, 21 Mo. 155.

New York.—*Seeley v. Seeley*, 2

local practice.¹

2. Necessary Allegations—Fact of Assignment.—The fact of the assignment of the chose in action in suit should be alleged where the right of action depends upon it,² the sufficiency of

Hill (N. Y.) 496; *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

Pennsylvania.—*De Barry v. Withers*, 44 Pa. St. 356.

Tennessee.—*Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Vermont.—*Roberts v. Smith*, 58 Vt. 492.

In an Action by the Assignee of a Legacy. the petition alleged that the testator owed no debts; that the trustees under the will were in possession of a sum out of which the petitioner was entitled to be paid, and that all the contingencies which entitled the assignee to the sum sought to be recovered had transpired, and it was held that the averments were sufficient on general demurrer, and that if the defendants desired to have them more specific they should have pointed out the defects, if they existed, by special demurrer. *McNeill v. Masterson*, 79 Tex. 670.

Pleading Performance of City Contract.—In a complaint by an assignee of a contract with a city, to recover the amount due on the contract, the complaint need not specifically set out the part performed by the assignor separately from the part performed by the assignee. *Burnham v. Milwaukee*, 69 Wis. 379.

Action against Guarantors.—The assignee of a lessor cannot recover in assumpsit under common counts against guarantors of the lease, but to recover he must proceed on the warranty. *Potter v. Gronbeck*, 117 Ill. 404.

Identity of Cause.—A bill based upon an assignment made by one of two persons whose concurrence was necessary to the validity of the assignment is not, as to a bill founded upon an assignment executed by both the necessary assignees, a bill for the same cause. *Sayles v. Tibbitts*, 5 R. I. 79.

Identification of Corporate Assignor.—In an action on a claim assigned by a corporation, a complaint is insufficient which fails to show whether the assignor had or had not a legal existence, and what the nature of that existence was. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384.

Allegations of General and Special Assignments.—In *Sayles v. Tibbitts*, 5 R. I. 79, the bill set up that the plaintiff was a creditor entitled to benefits under a general assignment, and then set forth a special assignment to the plaintiff by the trustees, of a sum due to the assignee's estate, and prayed relief as special assignee. The court declined to construe the bill as a claim for relief on two distinct grounds, but held that the position of the plaintiff as creditor under the assignment would be regarded as having been stated to avoid the charge of maintenance in taking the special assignment, and further, that the prayer for relief was to be taken as the test of the ground upon which the plaintiff sought the aid of the court.

1. Failure to State and Number Causes Separately.—Within a statutory provision that when the petition contains more than one cause of action each shall be stated and numbered separately, a petition which fails to state and number separately a claim for damages as assignee, and a claim arising for injury to the same property after its purchase by the assignee, is demurrable. *Hall v. Cincinnati, etc., R. Co.*, 1 *Disney (Ohio)* 58.

2. Colorado.—*Gallup v. Lichter*, 4 Colo. App. 296.

Florida.—*Jordan v. John Ryan Co.*, 35 Fla. 259.

Iowa.—*Mainer v. Reynolds*, 4 Greene (Iowa) 187; *McCarn v. Rivers*, 7 Iowa 404; *Montague v. Reineger*, 11 Iowa 503.

Michigan.—*Altman v. Fowler*, 70 Mich. 57; *Peirce v. Closterhouse*, 96 Mich. 124; *Blackwood v. Brown*, 32 Mich. 104; *Rose v. Jackson*, 40 Mich. 29; *Cilley v. Van Patten*, 58 Mich. 404. But see *Draper v. Fletcher*, 26 Mich. 154.

Tennessee.—*Smith v. Cottrel*, 8 Baxt. (Tenn.) 62; *Bradley Co. v. Surgoine*, 6 Baxt. (Tenn.) 108.

Virginia.—*Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Gordon v. Browne*, 3 Hen. & M. (Va.) 219.

In an Action upon a Promissory Note, brought by an assignee against the

the pleading in this respect being largely dependent on the character of the subject-matter assigned, its negotiability, and the like.¹

maker, the assignment need not be set out in the complaint, since it is no part of the cause of action. *Treadway v. Cobb*, 18 Ind. 36.

Necessity of Allegation of Indorsement.—Under the New York Code Pro., § 111, providing that a suit on a claim must be brought by the actual owner or real party in interest, it was held that a person to whom a promissory note, payable to order, had been sold and delivered previous to maturity for a valuable consideration, might maintain an action thereon in his own name without alleging indorsement of the note to him. *Billings v. Jane*, 11 Barb. (N. Y.) 620.

Michigan Practice.—Evidence of assignments by two plaintiffs, each to the other, made for the purpose of enabling the bringing of a joint action on the claim, is inadmissible under a common count declaration which is unaccompanied by a bill of particulars, and which fails to aver that an assigned account or claim of any description will be brought into the action. *Cilley v. Van Patten*, 58 Mich. 404.

Assignment by City Contractor.—An averment that the original contractor with a city, with the consent of his sureties and the board of public works, "assigned the contract to plaintiff, together with all his claims for money earned and to be earned under it, and for and on account of said extra work and materials; that accordingly, in the completion of the sewer under the contract, plaintiff assumed in every respect the position and situation of" such contractor, naming him, is a sufficient averment of the assignment and the substitution. *Burnham v. Milwaukee*, 69 Wis. 379.

Necessity of Alleging Mesne Assignments.—In declaring upon a transferred instrument, it is not necessary to notice the several individuals through whose hands it has passed unless their names appear upon the instrument as indorsers or assignors. And it is no variance between the proof and the declaration if the evidence shows that an instrument which is assigned in blank has passed through the hands of one or more individuals

whose names do not appear upon it, and who are not named in the declaration. *Tibbets v. Gerrish*, 25 N. H. 41.

Amendment.—In *Weinick v. Bender*, 33 Mo. 80, a motion having been made by defendants to amend for the reason that there appeared no assignment of the instrument in suit to the plaintiff, plaintiff was allowed to amend by writing an assignment over the signature of the assignor, and it was held that the written assignment was not sufficient to enable the plaintiff to maintain his action, not because of a lack of authority to write the assignment over the assignor's name, but because of the writing of the assignment after the institution of the suit, as he could recover only on such right as he had when the suit was brought.

Admission by Demurrer.—A demurrer of course admits an assignment of a chose in action sued on, and a presumption therefore follows that the assignment is valid. *Wood v. Decoster*, 66 Me. 542.

1. Alleging Assignment of Note Instead of Debt.—Where it was alleged that a note was assigned, in place of alleging that the debt which the note represented was assigned, the allegation was held sufficient. *Chesnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123.

Averring Assignment of Mortgage Notes.—A bill to foreclose a mortgage averred that the mortgagee, for value received, signed and indorsed the notes secured by the mortgage to the plaintiff, and ordered and appointed the payment thereof to be made to him, and it was held that it was a sufficient averment of the assignment. *Slaughter v. Foust*, 4 Blackf. (Ind.) 379.

Averring Acquisition of Rights.—In a bill to enjoin a foreclosure of a mortgage, a person claiming as assignee of a lease of personality from a trustee to whom and his successors the lease runs, by alleging that he acquired the rights of trustees and beneficiaries, sufficiently alleges his title. *Carpenter v. Talbot*, 33 Fed. Rep. 537.

Necessity of Averring Existence of Fund upon which Order was Given.—An affidavit of defense to a suit to recover the purchase price of certain merchan-

3. Manner or Form of Assignment.—If necessary, the manner or form of the assignment should be set out.¹

4. Execution and Delivery.—Likewise the time of the making of

dise, which sets out that the plaintiff's principal, being then indebted to the defendant, assigned the claim to the defendant by a written transfer set out in the affidavit, of which assignment the plaintiff was then and there notified, which transfer was in the form of an order addressed to the plaintiffs directing them to pay the defendant the sum on demand out of funds in their hands, or to come in their hands, from merchandise sold or to be sold, to the defendant, after paying certain other sums, in accordance with "our agreement," is bad because failing to allege the existence of a fund or a balance which would be applicable by law to the payment of the demand. *Heckscher v. American Tube, etc., Co.*, 137 Pa. St. 421.

An Averment of an Assignment of Covenants, and that it was agreed between the assignor and the assignee that the latter should have the benefit of them, and that, for that purpose, a power of attorney was duly executed and delivered, is equivalent to an averment of formal assignment. *Raymond v. Squire*, 11 Johns. (N. Y.) 47.

Reference to Order for Payment.—A petition stating the assignment of the debt to the plaintiff, and that the assignment is evidenced by an order for the amount on the defendant, is sufficient to show an equitable assignment. *Walker v. Mauro*, 18 Mo. 564.

Appending Indorsed Note.—A complaint averring that a promissory note was assigned by the payee to the plaintiff by indorsement on the back thereof, to which a copy of the note is appended, sufficiently alleges the assignment. *Treadway v. Cobb*, 18 Ind. 36.

Attachment of Assignment to Assigned Account.—Under How. Stat. Mich., § 344, the assignment of an open account is sufficiently averred by attaching the assignment to the account, and also attaching it to a common count declaration. *Morrill v. Bissell*, 99 Mich. 409.

Assignment of Sum Due and to Become Due.—Upon a complaint on an assignment made to recover a sum then due, and such further sum as might become due, a general demurrer will not reach the point that the assignment was not

good for a sum to be earned in the future. *Rice v. Yakima, etc., R. Co.*, 4 Wash. 724.

Identification of Assignor.—Where a contract to subscribe to the stock of a railroad company improperly describes the latter, an assignee of the contract may sue on it in his own name, and identify the assignor. *Racine County Bank v. Ayres*, 12 Wis. 512.

1. Manner.—To enable the court to determine whether or not it is necessary that the assignor of a note should be made a nominal party, the manner of the assignment should be averred. *Treadway v. Cobb*, 18 Ind. 36. And see *Barcus v. Evans*, 14 Ind. 381; *Stowe v. Weir*, 15 Ind. 341.

Form.—A plea alleging an assignment of the instrument sued on by the plaintiff to a third person should aver the form of the assignment. *Thomas v. Cox*, 6 Mo. 506.

Assignment in Writing.—In pleading an assignment required by statute to be in writing, it is sufficient to aver that the assignment was made, as that will be held to imply a valid assignment under the statute. *Gunderson v. Thomas*, 87 Wis. 406, citing *River Falls Bank v. German American Ins. Co.*, 72 Wis. 535.

It is not necessary that the complaint on an assigned claim should allege the assignment to be in writing, even though it may be necessary to prove a written assignment on the trial. *Rice v. Yakima, etc., R. Co.*, 4 Wash. 724.

Necessity of Setting Out Copy.—In an action by the assignee of a note and a mortgage given to secure it, to recover the debt, the assignment is not the foundation of the action, and therefore it is unnecessary to set out a copy of the assignment. *Stanford v. Broadway Sav., etc., Assoc.*, 122 Ind. 422. See also *Keith v. Chamber*, 69 Ind. 477.

When Assignor Is Party.—In an action on a writing not assignable so as to transfer the legal interest to the assignee, if the alleged assignor is made a party it need not be averred how the assignment was made. *Buntin v. Weddle*, 20 Ind. 449.

the assignment or the time of its delivery should be stated, where these facts are material.¹

5. Nature of Plaintiff's Title.—Sometimes the nature of the plaintiff's title should be made to appear for the purpose of showing his right to maintain the action;² or where the action is brought on behalf of the assignee, or for his use and benefit, that fact should be shown by appropriate language.³

6. Consideration of Assignment.—Where the thing assigned possesses no negotiable qualities, the fact that the assignment was

1. *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

Under the *Minnesota* statutes requiring actions arising on contracts to be prosecuted in the name of the real party in interest, and excepting cases of assignment made *pendente lite*, the action must proceed in the name of the original party plaintiff, or an assignee be substituted as plaintiff on motion, and hence it is manifestly necessary that the time of the assignment should be alleged in the proceedings and proved upon the trial, so that the plaintiff's right to prosecute or maintain the action may be determined. *Saint Anthony Mill Co. v. Vandall*, 1 Minn. 246.

Time will Not be Presumed.—The time of an assignment of a chose in action cannot be presumed. *Saint Anthony Mill Co. v. Vandall*, 1 Minn. 246.

2. Averment of Legal Title in Plaintiff.—In *Anderson v. Shaw*, 2 Tex. Unrep. Cas. 285, the petition alleged that the parties for whose use the plaintiffs brought the suit were respectively the legal owners and holders of the notes in question, and it thus appearing that plaintiff had no interest in the subject-matter of the suit, the action was held not maintainable, though the holding would have been otherwise if the petition had shown that the plaintiffs held the legal title to the instruments sued on, but that the parties for whose use the suit was brought were the equitable owners of the same.

Reference to Statute Authorizing Action.—Where a suit is brought by an assignee in his own name, he need not, in his declaration, refer to the statute which authorizes him to bring the suit. *Gano v. Slaughter*, Hard. (Ky.) 81.

Default as Admission of Truth of Averment.—Where the plaintiffs in an action on a note aver that they are the equitable owners thereof, a judgment

by default will be taken to establish the truth of the averment. *Guest v. Rhine*, 16 Tex. 549.

3. *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Necessity of Showing.—Though an assignment of the claim is made before suit commenced, the action may be brought in the name of the assignor, and need not state that it is for the use and benefit of the assignee. *Peters v. Gallagher*, 37 Mich. 407; *Clay F. & M. Ins. Co. v. Huron Salt, etc., Mfg. Co.*, 31 Mich. 347.

While it is advisable to state in a declaration and summons that the assignor sues for the use of the assignee, an omission to do so is immaterial, since the declaration of such use is no part of the pleading. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

Statement that Plaintiff Sues as Assignee.—The declaration in an action by the assignee of a note or bond need not state that the plaintiff sues "as assignee." *Brooks v. Whiting*, 5 Ark. 18.

Propriety of Showing.—Where a suit is brought by the assignee in the name of the assignor, there is no incongruity or improbability in expressing that fact on the face of the declaration. *Belton v. Gibbon*, 12 N. J. L. 77.

Sufficiency of Showing.—Although it be not alleged in express terms that the suit was prosecuted for the benefit of the assignee of the subject-matter of the suit, if it is apparent from the pleadings in the case that such is the fact, it is sufficient. *Stiles v. Farrar*, 18 Vt. 444.

"Assignee" as Descriptio Personæ.—The mere use of the term "assignee" following the name of the plaintiff in a declaration will not authorize a construction that the cause of action accrued prior to an assignment and passed to the plaintiff, but the word should be treated as *descriptio personæ*. *Bloom v. Sexton*, 33 Mich. 181.

for a good or a valuable consideration should sufficiently appear.¹

7. Notice to Debtor, or Promise to Pay Assignee.—Where the right to recover depends or is based on notice of the assignment to the debtor, or on a promise by him to pay the assignee, the facts relative thereto should also be properly pleaded.²

"For the Use and Benefit."—In *Clay F. & M. Ins. Co. v. Huron Salt, etc.*, Mfg. Co., 31 Mich. 346, the declaration commenced with a statement that the plaintiff, "for the use and benefit of G C M," complained, etc., but no assignment was set forth, nor was any allusion made in the declaration itself to any other interest or title than that of the plaintiff, and it was held that the issue would not have been different had the phrase "for the use and benefit," etc., been left out.

Indorsement of Writ.—Rev. Stat. Me., c. 82, §§ 128, 129, which require an assignee to indorse his name on a writ or process, was not intended for bills in equity. *Stevens v. Shaw*, 77 Me. 566.

1. *Quigley v. Mexico Southern Bank*, 80 Mo. 295; *Roberts v. Smith*, 58 Vt. 492. But see *Alston v. Whiting*, 6 Ark. 402.

Adequate Consideration.—In an action by the assignee, the fact that the assignment was for a good and adequate consideration must appear by the pleadings. *Perkins v. Parker*, 1 Mass. 117.

Promise of Debtor to Pay.—Where a plaintiff declared as assignee of a chose in action negotiable in form but not so in law by reason of contingency or condition contained in the instrument which destroyed its negotiability, and alleged a special promise to the plaintiff to pay to him as assignee or indorsee, it was held unnecessary that the consideration for the transfer should be averred. *Smilie v. Stevens*, 41 Vt. 321.

Assignment under Seal.—The recital of an assignment as having been executed under the assignor's hand and seal is sufficient to show that it was executed for a valuable consideration, without otherwise alleging that fact. *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

Action on Promissory Note.—An assignee of a promissory note need not aver nor prove that the note was assigned for value, although it has no words of negotiability. *Knight v. Holoman*, 6 Tex. 153.

Sufficiency of Denial of Consideration.—In an action brought in the name of

W, for the use of J and L M, the declaration alleged an assignment of the cause of action by W to the uses, for a valuable consideration, and defendant pleaded that W did not assign for a valuable consideration. It was held that the plea was bad and that a demurrer thereto was properly sustained. *Sammis v. Wightman*, 31 Fla. 10.

2. *DeBarry v. Withers*, 44 Pa. St. 356; *Smith v. Cottrel*, 8 Baxt. (Tenn.) 62; *Smilie v. Stevens*, 41 Vt. 321. And see *Merchants, etc., Bank v. Hewitt*, 3 Iowa 93.

Necessity of Alleging as to Promise.—Since 2 How. Anno. Stat. Mich., § 7344, allows an assignee of a chose in action to recover in his own name, a declaration by the assignee of an account for goods sold and delivered need not allege a promise by the defendant to pay the plaintiff. *Robinson v. Watson*, 101 Mich. 466.

Necessity of Allegation of Notice.—In a suit brought under 2 Rev. Stat. N. Y. 274, § 5, Laws 1835, p. 229, which provided that the assignee of any chose in action for a valuable consideration might sue and recover thereon in his own name if the assignor were dead and there were no executors appointed upon his estate, or if they had no interest, or refused to prosecute, etc., it was held that it was necessary to show that the defendant had notice of the assignment. *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

Allegation of Promise of Insurer.—The declaration in an action by the assignee of a policy of insurance, to whom the insurer has promised to pay, should set forth the original contract and policy and the assignment, as a consideration for the new promise. *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 237; *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 24; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

Sufficiency of Plea of Payment to Assignor before Notice.—A plea that the defendant paid the note to the assignor before he had notice of the assignment cannot be sustained against the assignee. The plea should aver that the

8. Pleading Defenses—*a. IN GENERAL.*—The debtor, unless he has in some manner precluded himself, may plead, in an action brought against him by the assignee, any defense which he might have pleaded against the person with whom he originally entered into the obligation, or who was originally possessed of the chose in action assigned.¹

b. DENIAL OF FACT OF ASSIGNMENT.—Thus the debtor may deny the fact of the assignment upon which the plaintiff relies.²

payment was made before the note was assigned, or before it was due; hence, where the defendant alleged that he paid a portion of the debt to the assignor before notice of the assignment, an averment that the balance was paid to the plaintiff was held defective because it failed to show that the plaintiff received it as such in discharge of the note. *Patterson v. Atherton*, 3 McLean (U. S.) 147.

Sufficiency of Allegation to Show Actual Notice.—An allegation of the official record of the assignment of a contract, and that the defendant had notice thereof, together with allegations that notice was given by filing and record, will not be construed to be a charge of actual notice. *Burck v. Taylor*, 152 U. S. 634.

Necessity of Alleging Consideration for Promise.—In a suit on an order to pay out of a particular fund, which operates as an equitable assignment, no consideration need be averred for the promise to pay of the person holding the fund. *Indiana Mfg. Co. v. Porter*, 75 Ind. 428. And see *McKernan v. Mayhew*, 21 Ind. 291; *Morton v. Naylor*, 1 Hill (N. Y.) 583.

Amendment.—A declaration which is defective in not averring a promise by the debtor to the assignee may be amended. *Page v. Danforth*, 53 Me. 174.

1. *Spinning v. Sullivan*, 48 Mich. 5; *Ewing v. Miller*, 1 Mo. 234; *Thompson v. Emery*, 27 N. H. 269; *M'Kinnie v. Rutherford*, 1 Dev. & B. Eq. (N. Car.) 14.

Where, by statute, actions should be brought in the name of the real party in interest, if the defendant can show that a person other than the party having the legal title, in whose name the action is brought, is the party beneficially interested in the debt, he may show any defense available against such party. *Farwell v. Tyler*, 5 Iowa 535.

The Assignee of a Mortgage will take it subject to the equities between the

mortgagor and the mortgagee, and with the same rights that his assignor had. *Corbett v. Woodward*, 5 Sawy. (U. S.) 403.

Fraud.—A statutory provision that fraud may be set up against a note in the hands of an innocent assignee has no application where the note was assigned before the statute went into effect. *Temple v. Hays*, Morr. (Iowa) 9.

Assignment to Third Person.—In an action between the original parties, an assignment to a third person cannot be set up to defeat the defense of illegality in the original contract which is assigned. *Fales v. Mayberry*, 2 Gall. (U. S.) 560.

An Assignment, with Notice, of a Chose in Action, Founded in Illegality, will not protect the parties from the legal consequences attached to the original contract. If a chose in action not negotiable be assigned, without notice of any fraud or illegality in its origin, the parties are not precluded from setting it up as a defense in the same manner as if there had been no assignment. *Fales v. Mayberry*, 2 Gall. (U. S.) 560.

Statutes of Limitations.—One of two assignees cannot plead the statute of limitations as against the other, for neither can have anything more by virtue of the assignment than an equitable title to the claim. *Clarke v. Hogeman*, 13 W. Va. 718.

2. *Morrison v. Ross*, 113 Ind. 186.

Specific Denial.—Under *Iowa Laws* 1853, c. 108, § 1, which require the denial of the assignment of evidence of debt to be specifically denied under oath, it was held that where the assignment of a foreign judgment was properly averred, the defendant was required to make specific denial under oath. *Edmonds v. Montgomery*, 1 Iowa 143.

Simple Denial of Specific Allegation.—Under statutory provisions requiring facts and not legal conclusions to be pleaded, an allegation of the assign-

c. DENIAL OF VALIDITY OF ASSIGNMENT.—Likewise the defendant may show that, although an assignment was attempted, it is of no validity.¹

ment in writing of a judgment, setting out the assignment *in hæc verba*, is not controverted by an answer simply denying that the judgment had been assigned. *Cottle v. Cole*, 20 Iowa 481.

Denial on Information and Belief.—The denial of an allegation of assignment made upon information and belief is sufficient to raise an issue as to the fact of assignment. *Read v. Buffum*, 79 Cal. 77.

Verification of Denial.—In *Arkansas* the execution of an assignment cannot be denied, except by a plea verified by affidavit. *Alston v. Whiting*, 6 Ark. 402; *Jordan v. Mewborn*, 8 Ark. 502.

Sufficiency of Denial.—Where a plaintiff declared upon a bond, and alleged it to have been assigned to him by the obligee, without stating the method of the assignment, a plea that the assignment was not the deed of the assignor was held to have been properly stricken out because insufficient as an answer to the declaration. *Richards v. Morris Canal, etc., Co.*, 18 N. J. L. 250.

Admission of Indebtedness.—The admission of an indebtedness as to certain claims sued for by an assignee will preclude the defendant from contending that the claim was not assigned. *Torrey v. Standish* (Supreme Ct.), 40 N. Y. St. Rep. 713.

Denial that Plaintiff is Real Party in Interest.—Under the *Iowa* Code an answer that the plaintiff is not the real party in interest, or that the defendant is not indebted, is insufficient, but facts must be alleged showing why the plaintiff is not the real party, or why the defendant is not indebted, etc. *Cottle v. Cole*, 20 Iowa 481.

1. Manner of Denial.—In *Maine* the validity of the assignment of a chose in action sued on should be put in issue by plea or by a brief statement. *Wood v. Decoster*, 66 Me. 545, *citing* *Lawrence v. Chase*, 54 Me. 106.

Right to Object for Invalidity.—Where a bill in equity alleged that the plaintiff was entitled under an assignment to a sum of money in the hands of the defendant as assignee of the effects of the debtor, and the answer made no objection as to the validity of the assignment, but stated the amount received by the assignee and denied the right

of complainant to any portion of the money because he had not made himself a party to the assignment, it was held that the defendant could not object that the assignment was void because of noncompliance with statutory provisions. *Haughton v. Davis*, 23 Me. 28.

Necessity of Pleading Facts.—In *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285, which was an action brought by an assignee of a bank account against the bank wherein the moneys were deposited, it was held that an allegation in the declaration and a denial in the answer that the bank owed the amount to the nominal plaintiffs for the benefit of the assignee, the beneficial plaintiff, were mere conclusions of law.

Denial of Consideration.—A plea which does not go to the extent of denying the assignment, but merely alleges that it was not made for a valuable consideration, is of no force, since a consideration is not essential, and a voluntary assignee may sue in the name of the assignor. *Sammis v. Wightman*, 31 Fla. 10; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272. And see *Sheridan v. New York*, 68 N. Y. 30; *Eaton v. Alger*, 57 Barb. (N. Y.) 179, *affirmed* in 47 N. Y. 345; *Allen v. Brown*, 51 Barb. (N. Y.) 86, *affirmed* in 44 N. Y. 228.

An allegation that an assignment was without sufficient consideration is not of itself sufficient to show that the plaintiff is not a beneficial owner. *Treadway v. Cobb*, 18 Ind. 36.

Issue as to Validity of Assignment between Assignor and Assignee.—In a suit in which an assignor and the assignees of an equitable interest are made plaintiffs, an issue to try the validity of the assignment is improper as being an issue between coplaintiffs, and not between them and the defendant. *Fulham v. McCarthy*, 1 H. L. Cas. 703.

Denial by Subsequent Assignee.—Where an assignee claims that an assignment to him was made for value and without notice of a prior assignment, and claims that the prior assignment is fraudulent, the onus of proving the case is upon him. *Daily v. Warren*, 80 Va. 512.

d. DENIAL OF RIGHT TO MAINTAIN ACTION.—The defendant may also deny the right of the plaintiff to maintain the action under the particular facts of the case,¹ because of his having

Right of Stranger to Deny Validity.—By a deed of assignment, all moneys then or thereafter to be standing to the credit of the assignor at a bank were assigned to a trustee, on trust for the assignor for his life, and after his death on other trusts. At the date of the assignment the assignor's balance at the bank was forty-eight pounds one shilling; at his death it was two hundred and seventeen pounds one shilling. Notice of the assignment was not given to the bank until after the assignor's death. In an action by the trustee against the bank to recover the balance of the two hundred and seventeen pounds one shilling, it was held that the bank, being a stranger to the assignment, could not set up the defense that it was voluntary and therefore invalid in equity; that the balance at the time of the assignor's death was a debt or legal chose in action within the meaning of section 25, subsection 6, of the Judicature Act 1873; that notice after the death of the assignor was sufficient, and that the plaintiff was entitled to recover. *Walker v. Bradford Old Bank*, 12 Q. B. Div. 511.

1. Averment of Equitable Interest in Third Persons.—An answer to an action on a bond which does not deny the legal interest of the plaintiffs, but insists as a defense that third persons have no equitable interest in the obligation, is insufficient. *Chadsey v. Lewis*, 6 Ill. 153; *McHenry v. Ridgely*, 3 Ill. 309.

Denial of Ownership of Beneficiary.—Where an action is brought by the legal holder of a chose in action, unless there is some defense against the equitable owners who have been made parties, an answer denying the ownership of the person for whose use the action is brought presents no material issue. *Allen v. Pannell*, 51 Tex. 165.

Denial of Interest.—In a suit by an assignee of a nonnegotiable note, the defendant pleaded a want of interest in the plaintiff, and averred that another was the real owner who had indorsed the note to the plaintiff, and that suit was brought without such indorsee's knowledge or consent, and it was held that the plea was insufficient

because, though the fact might be true, the legal title was in the plaintiff. *Knight v. Holloman*, 6 Tex. 153.

Denial that Plaintiff Is Real Party in Interest.—An answer alleging that the plaintiff prosecuting the action is not the real party in interest, nor a person authorized by statute to bring the action in the stead of the original beneficiary, must state facts upon which the defendant relies to sustain the allegation that the plaintiff has no right to sue. *Russell v. Clapp*, 4 How. Pr. (N. Y. Supreme Ct.) 347; *Cottle v. Cole*, 20 Iowa 481.

In a suit by an assignee to foreclose a mortgage given to secure a promissory note, an answer admitting the assignment by a denial that the assignee is the real party in interest, which fails to allege facts upon which the court can pass, is bad on demurrer. *Swift v. Ellsworth*, 10 Ind. 205, distinguished in *Elder v. Smith*, 16 Ind. 468.

Necessity of Verifying Denial.—Where a plea denied that the plaintiff who sued as indorsee of a bill was its legal proprietor, but affirmed that it was the property of an association of individuals, of which the plaintiff was one, and that the plaintiff filled up a blank indorsement of the company with his own name, it was held that it must be verified as required by the statute, which prescribed the manner in which the burden of proving an assignment should be thrown upon the plaintiff. *Tarver v. Nance*, 5 Ala. 712.

Early Tennessee Practice.—In *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1, decided in 1835, it was held that a plea denying the right or the authority of the holder of a sealed note not indorsed to sue in the name of the payee for his use was bad upon demurrer, and that the proper practice to question the authority of the plaintiff was to obtain a rule of court to compel him to show his authority.

Replication to Plea of Insolvency of Assignor.—Where a plea sets up the insolvency of the assignor, the proper answer in the replication is that the debt or contract, though in the name of the plaintiff, yet in substance belongs to a third party, and therefore did not pass by an assignment for the

parted with, or in some manner been deprived of, his right,¹ or he may show any other matter tending to defeat the action.²

benefit of creditors, for if not, it is still in the plaintiff for the benefit of such third person. *Parsons v. Woodward*, 22 N. J. L. 196.

1. *Gamblin v. Walker*, 1 Ark. 220; *Block v. Walker*, 2 Ark. 4; *Thomas v. Wash*, 1 Mo. 665; *Jeffs v. Day*, L. R. 1 Q. B. 372.

Dismissed on Motion.—The assignment of a cause of action is not a ground of defense, but the action may be dismissed on motion, if the defendant prove that the plaintiff has no beneficial interest in the cause of action, but that he has disposed of it, and has no authority from the assignee to bring the suit. *Moore v. Spiegel*, 143 Mass. 413.

Want of Interest of Nominal Plaintiff.—Where an action is brought in the name of an assignor by the assignee or person beneficially interested, the defendant cannot avail himself of the plaintiff's want of interest. *Labeaume v. Sweeney*, 17 Mo. 153. See also *Thomas v. Cartwright*, 1 Tex. 67.

Bankruptcy Suggested Pending Suit.—Pending a suit on an account, the bankruptcy of the plaintiff was suggested by the defendant, and the court allowed a third party to intervene and set up an assignment to him of the indebtedness sued on, made before the bankruptcy, to which intervention defendant made objection, and the court was of the opinion that although the assignee in bankruptcy of the plaintiff, and perhaps his creditors, might contest the alleged assignment, yet that the defendant could not do so. *Smalley v. Taylor*, 33 Tex. 668.

Effect of Demurrer to Answer Alleging Assignment.—In an action in the name of A on a covenant executed by B to A, the defendant pleaded that the plaintiff had assigned and transferred the covenant in suit and that the assignee was the true owner thereof, to which plea the plaintiff demurred, and it was held that as the demurrer admitted the fact that the plaintiff had no interest in the note, the suit could not be maintained, but that a replication by the plaintiff averring that the suit was brought for the benefit of the assignee would have been a good answer to defendant's plea. *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Action by Assignor after Action by Assignee.—Certain lien holders assigned their liens, and the assignee brought an action thereon in his own name and obtained a judgment, which was afterwards reversed and the cause remanded for further proceedings; whereupon one of the lien holders brought an action on his own account in his own name. It was held that the judgment of the Supreme Court was not a bar to the action. *Van Etten v. Kusters*, 31 Neb. 285.

Sufficiency of Reply.—In *Walker v. Sargeant*, 14 Vt. 247, a declaration in offset contained an averment that the debt in suit was assigned to the attorney and that the latter had a lien upon it in part. The reply alleged that no such lien existed and that no such assignment was made to the knowledge of the defendant, and it was held that as no notice of the assignment or lien was necessary to protect the attorney, the replication raised no material issue.

Cancellation of Assignment by Assignor.—In *Bristow v. Hall*, 16 Tex. 566, which was a suit upon a note, the consideration of which was the assignment of a bond, the answer was fraud and want of consideration, and defendant offered to restore the bond, upon which he had indorsed an assignment to a third person, and it was held that the defense was available, there being no evidence that the bond was ever delivered, or that any third person asserted any claim or right to the supposed assignment.

2. **Necessity of Pleading Defense Specifically.**—Where the defendant is entitled to prove the actual ownership of the thing in suit, for the purpose of letting in a defense existing between himself and the beneficiary, the defense must be specially alleged in the answer. *Thompson v. Cartwright*, 1 Tex. 87.

Former Recovery.—The defendant in an action brought by an assignee in the name of the assignor pleaded a former recovery by the assignor, to which the assignee replied setting up the assignment and notice to the defendant thereof before the former suit. It was held on demurrer that the reply was sufficient; that it was the duty of the defendant in the former suit to

XV. PLEADING AND PROOF.—From the fact that the assignment or other matters respecting the same, and from which the assignee derives his rights, should be properly averred, it follows that, in the absence of statutory regulation, the averments should be supported by adequate proof,¹ and this proof will sometimes

have pleaded the assignment, and that the suit was not prosecuted by the assignee nor for his benefit. *Dawson v. Coles*, 16 Johns. (N. Y.) 51.

Payment to the Assignor by the debtor, after notice of the assignment, is not a defense to an action by the assignee. *Field v. New York*, 6 N. Y. 179.

In *Iowa* payment to the assignor after the assignment but before suit brought is a good defense. *Wing v. Page*, 62 Iowa 87; *Zugg v. Turner*, 8 Iowa 223; *Reynolds v. Martin*, 51 Iowa 324.

Attachment of Debt.—In debt by the assignee of a bond, it is not a sufficient plea that, before notice of the assignment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, etc., and that accordingly he had made such payment—it appearing by the pleadings that the bond was assigned before the attachment was instituted, and suit brought upon it by the assignee before the payment was made. *Wilson v. Davisson*, 5 Munf. (Va.) 178.

Garnishment.—The interest of an assignee of a lease will constitute a defense to garnishment proceedings against the lessee by a creditor of the lessor. *Carr v. Waugh*, 28 Ill. 418, following *Hodson v. McConnel*, 12 Ill. 170. See also *Morris v. Cheney*, 51 Ill. 451.

Attachment of Debt before Assignment—Replication.—In a suit by the assignor, brought for the benefit of the assignee, where the defendant pleads the previous attachment of the debt sued for, a replication that the debt was assigned before the issuance of the attachment in chancery is good. *Johnson v. Irby*, 8 Humph. (Tenn.) 654.

1. *Arkansas.*—*Alston v. Whiting*, 6 Ark. 402; *Beebe v. Real Estate Bank*, 4 Ark. 124; *McLain v. Onstott*, 3 Ark. 478; *Shields v. Barden*, 6 Ark. 459.

Massachusetts.—*Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285.

Missouri.—*Quigley v. Mexico Southern Bank*, 80 Mo. 295.

New Hampshire.—*Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 237;

Barnes v. Union Mut. F. Ins. Co., 45 N. H. 24; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

Virginia.—*Cunningham v. Herndon*, 2 Call (Va.) 530; *Tennent v. Pattons*, 6 Leigh (Va.) 196.

United States.—*Conant v. Wills*, 1 McLean (U. S.) 427.

Proof of Insolvency of Assignor.—The holder of orders upon the comptroller of a city may proceed against the city in the first instance without proving the insolvency of the maker of the orders. *Hall v. Buffalo*, 2 Abb. App. Dec. (N. Y.) 301.

Sufficiency of Parol Proof of Written Assignments.—Where assignments are pleaded and the question of their sufficiency cannot be determined without an inspection of their contents, an allegation cannot be supported by parol evidence as to the contents of the assignments, without proof of their loss or destruction. *Kuhn v. Schwartz*, 33 Mo. App. 610.

Admission on Trial of Fact of Assignment.—Where the existence of the assignment is denied, but, on the trial, the fact that the assignment was executed is admitted, the denial contained in the answer is met. *Burke v. New York*, 7 N. Y. App. Div. 128.

Presumption as to Date.—Where an assignment is exhibited in evidence and read upon the hearing without objection, it will be taken to have been executed on the day of which it bears date. *Anderson v. DeSoer*, 6 Gratt. (Va.) 363.

Where the Plaintiff Suing as Assignee of a Contract Pleads the Making of the Contract with Himself, he cannot recover if the evidence shows that fact. *Horne v. Hoyle*, 28 Fed. Rep. 743.

Insufficiency of Finding to Support Allegation of Assignment by Joint Owners.—A declaration upon an assignment alleged to have been made by persons named as joint owners will not support a claim of title founded on a finding that the assignment was made by one of such persons, in the name of a copartnership composed of both after the withdrawal of the other persons from

be required, although the facts alleged are not denied in the answer.¹

XVI. PROVINCE OF COURT AND JURY.—When warranted by the evidence, it may be left to the jury to determine whether or not the transaction proved amounted to an assignment,² but when the evidence is clear as to the fact of the assignment, its validity is a question of law for the court.³

the firm. *Seeley v. Albrecht*, 41 Mich. 525.

1. *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671.

In Every Case where a Bill in Equity Asks Relief for the plaintiff as assignee of the rights of another, the assignment should be shown and proved, though it is not denied, nor proof of it called for in the answer; and the production and proof of the assignment can only be dispensed with by the admission thereof by the assignor and the parties against whom the relief is sought. *Corbin v. Emmerson*, 10 Leigh (Va.) 697.

Application of Texas Statute.—Rev. Stat. Tex., art. 271, dispensing with proof of the assignment of a written instrument unless its genuineness is denied by the plaintiff, is applicable only to written instruments emanating from the defendant, and not to an account made up as a convenient mode of proving a claim the assignment of which must be proved as at common law. *Carpenter v. Historical Pub. Co.* (Tex. Civ. App. 1894), 24 S. W. Rep. 685.

Under Rev. Stat. Tex., art. 2266, providing that when any action is founded upon an open account supported by the affidavit of the party, the same shall be taken as *prima facie* proof thereof, unless the defendant shall file a written denial under oath stating that the account was not just or true, etc., an affidavit made by the president of a corporate creditor after assignment of the account by the company is insufficient. *Carpenter v. Historical Pub. Co.* (Tex. Civ. App. 1894), 24 S. W. Rep. 685.

Where an Answer in Mortgage Foreclosure Admits the execution of the mortgage and assignment as alleged, defendant cannot thereafter complain that the assignment was not proven. *Chickering v. Fullerton*, 90 Ill. 520.

Failure to Aver Assignment—Admissibility of Proof.—In a suit on the common counts by the assignee in his own

name, the admission of proof of the assignment of the claim is not erroneous, since the admission of a bill of particulars would have furnished all the necessary information, and if it had been meant to rely on the want of averment of assignment in the declaration, an amendment would have been allowed as a matter of course. *Kelly v. Waters*, 31 Mich. 404.

Where Proof of the Assignment is Admitted, although the declaration does not aver the assignment, a judgment in favor of the assignee is valid if not appealed from. *Webster v. Williams*, 69 Mich. 135.

2. *Haas v. Old Nat. Bank*, 91 Ga. 307.

Though an order on an agent of the debtor may not be a legal assignment of a portion of the indebtedness, yet, if there is evidence from which the conclusion may be drawn that that was the intention of the parties, the question whether or not it was an equitable assignment should be left to the jury. *Collins v. U. S. Insurance Co.*, 7 Tex. Civ. App. 579.

3. **Written Assignment.**—Where a plaintiff in a petition claims to be an assignee by a written instrument, whether he is so or not is a question of law for the court, not a fact to be submitted to a jury. *Clark v. Edney*, 6 Ired. (N. Car.) 50.

Written Evidence of Assignment.—Where all the evidence of an assignment is written and is uncontradicted, the validity of the assignment is for the court and not for the jury. *Snyder v. Kurtz*, 61 Iowa 593.

Refusal to Instruct as to Effect of Assignment.—In assumpsit on an account brought in the name of the assignor for the use of the assignee, the refusal to instruct the jury that the assignee acquired no title to maintain the action, by reason of the transfer, is not erroneous, nor is it error to refuse a charge which assumes that the assignee must have a right to maintain the suit as plaintiff. *Saltmarsh v. Bower*, 22 Ala. 221.

EQUITABLE ATTACHMENT.

BY JOHN LEHMAN.

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CROSS-REFERENCES.

As to Attachments at Law, see article ATTACHMENTS, vol. 3, p. 1.
Proceedings by Creditors to Reach Assets of Insolvent Debtors and to Set Aside Fraudulent Conveyances, see article CREDITORS' BILLS AND FRAUDULENT CONVEYANCES, vol. 5, p. 388.
Attachment for Contempt, see article CONTEMPT, vol. 4, p. 764.
Attachment to Enforce Answer in Equity, see article ANSWERS IN EQUITY PLEADING, vol. 1, p. 894.
Garnishment, see article GARNISHMENT.

I. INTRODUCTORY STATEMENT.—In so far as equitable attachment imports an attachment of the person, as for a contempt, to

compel appearance and answer, or to enforce a decree of a court of equity, it will not be so treated herein, but this article will be confined to attachment in equity as process for the seizure of property.

II. NATURE OF THE PROCEEDING.—An attachment is strictly a legal proceeding, resting entirely upon statutory creation, and is not a proceeding of an equitable nature.¹ It is a proceeding *in rem*, operating against the *res* and not against the person,² from which it is apparent that, as equity acts *in personam* and not *in rem*, it has no jurisdiction for the attachment of property, except when that jurisdiction is expressly conferred by statute.³

1. *May v. Baker*, 15 Ill. 90. See also article ATTACHMENT, vol. 3, p. 1.

Trustee Process.—In *Maine* it has been held that under the proceeding known as "trustee process," the court, in determining whether the trustee has in his hands goods, effects, etc., of the debtor, under an alleged fraudulent conveyance, sits as a court of equity, and if the trustee denies fraudulent design, such denial will be taken with the same force as an answer to a bill in equity charging him with fraud. *Page v. Smith*, 25 Me. 256.

Trustee process is an equitable proceeding. *Jenness v. Wharff*, 87 Me. 307; *Stedman v. Vickery*, 42 Me. 132.

See, for a treatment of this subject, article GARNISHMENT.

2. *Coward v. Dillinger*, 56 Md. 61.

3. *Allen v. Montgomery*, 48 Miss. 110; *Statham v. New York L. Ins. Co.*, 45 Miss. 581; *Graham v. Merrill*, 5 Coldw. (Tenn.) 632.

Court of Issuance and Return.—In *Tennessee* it was held that an attachment as auxiliary process to a case pending cannot issue out of and be returned to a court other than the one in which the action is pending. *Isaacks v. Edwards*, 7 Humph. (Tenn.) 465; *Fisher v. Cummings*, 7 Humph. (Tenn.) 232.

But if while a suit is pending at law an attachment bill is filed as auxiliary to the suit at law, and the defendant compels the plaintiff to elect by which he will stand, and the complainant elects to proceed in the chancery cause, the defendant cannot thereafter object to the jurisdiction of the chancery court. *Isaacks v. Edwards*, 7 Humph. (Tenn.) 465.

In *Rutland v. Cummings*, 7 Humph. (Tenn.) 279, the clerk and master held a note which had been executed for the benefit of creditors in a suit in the

chancery court. Suit was brought on this note in the Circuit Court, and afterwards the clerk and master filed an attachment bill in the chancery court, upon the ground that one of the makers of the note was about to remove his property beyond the state, etc. The court held this was a different case from those in which it was sought to impound property by attachment in aid of an action at law, for the reason that in this case the attachment bill might be considered as nothing more than a petition upon oath in the original case in which the note of the debtor was taken, and that the chancery court in that suit had a right to protect the property for the satisfaction of its decree. The jurisdiction of the chancery court was primary.

Order for Attachment.—Under Code Ala., §§ 2956, 2963, an equitable attachment can issue on a legal demand, but an order for its issuance is necessary, and, although the bill might be sufficient to justify the order, an attachment cannot be sustained upon the allegations of the bill without the previous order. *McKenzie v. Bentley*, 30 Ala. 139.

Issuance by Clerk.—When an attachment may issue as an incident to the right of foreclosing a deed of trust for the purpose of preserving the property in the custody of the law until foreclosure, it is an extraordinary process, and not an ordinary attachment under the provisions of the code, and can only be granted by order of the court, and such an attachment issued on the fiat of the clerk is void and confers no authority on the officer. *Dillin v. O'Donnell*, 4 Baxt. (Tenn.) 216.

An attachment issued under a bill to set aside a fraudulent conveyance is not a leading process and cannot be

III. WHEN ATTACHMENT IN EQUITY LIES—1. General Rules.—Being purely a creation of statute, the specific grounds justifying a resort to this process of attachment in equity are fixed by the respective statutes under which it may be issued. The reason and necessity for the proceeding seem to rest upon grounds analogous to the foundation of equity jurisdiction itself.

Nature of Debtor's Estate and Creditor's Claim.—Thus at law an execution will not reach an equitable estate, and such an estate is only subject to the levy of an attachment under statutes creating this process.¹ But the right to sue out an attachment in equity to reach equitable estates is sometimes enlarged by statute to cover

issued by the clerk. *August v. Sees-kind*, 6 Coldw. (Tenn.) 167.

Where Filed.—Under an act authorizing a bill to be filed for the purpose of attaching effects of a nonresident debtor in the hands of a resident, the bill must be filed in the county wherein the resident lives or in which he may be served with process, or where the effects may be situated. *Milward v. Lair*, 13 B. Mon. (Ky.) 207; *Roberts v. Walker*, 7 B. Mon. (Ky.) 75.

An attachment against a nonresident debtor must be filed in the county where the land of such debtor is situated, where it is sought to subject real estate to the payment of debts. *Milward v. Lair*, 13 B. Mon. (Ky.) 207.

In Different Counties.—The fact that an attachment bill is filed in one county, and property of the debtor there subjected, will not preclude the filing of an attachment bill in another county for the purpose of subjecting property of the debtor therein. *Savary v. Taylor*, 10 B. Mon. (Ky.) 334.

1. Construction of General Statute.—A statute providing that "attachments may be levied upon any real or personal property of either a legal or equitable nature, debts, or choses in action, whether due or not due, in which the defendant has an interest," was held not to confer upon the courts of law jurisdiction to attach equitable estates. "The object of the legislature was to give courts of law power to enforce the remedy by attachment, as to all property of a legal nature, and to give to courts of equity the power to enforce the remedy by attachment, as to all property, real and personal, either of a legal or equitable nature, debts or choses in action, whether due or not due, in which the defendant has an interest. By this construction we carry out the object of the legislature in ex-

tending and encouraging the remedy by attachment, and at the same time preserve the jurisdiction of each court within its appropriate sphere." *Lane v. Marshall*, 1 Heisk. (Tenn.) 34. See also *Graham v. Merrill*, 5 Coldw. (Tenn.) 632; *May v. Baker*, 15 Ill. 90.

Surplus in Hands of Mortgagee.—A suit at law would not furnish a creditor an adequate remedy to reach a fund in the hands of a mortgagee in excess of the amount secured by the mortgage, and a creditor of the mortgagor may, for the purpose of subjecting such surplus, file a bill in the chancery court and be subrogated to the rights of the mortgagor to such surplus, and the mortgagee may be summoned in such suit in equity as trustee. *Judge v. Herbert*, 124 Mass. 332.

Under the Code System.—Where the law and equity jurisdictions are blended, mere equitable rights cannot be reached in a court of law by this process; but where the debtor is the owner of an equitable claim only, his creditors can reach it only by appropriate proceedings in a court of equity. *Hassie v. God Is With Us Cong.*, 35 Cal. 388.

A complaint which prays for a judgment setting aside deeds, for an accounting, for an injunction and receiver, is purely of an equitable nature, and the attachment given under section 227 of the code, "in actions for the recovery of money only," does not extend thereto. *Ebner v. Bradford*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 248.

But in *American Land Co. v. Grady*, 33 Ark. 556, it was held that the code provisions of *Arkansas* were broad enough to authorize an attachment in an equitable suit, as that method had been adopted and used by the practice of the bar, and had theretofore passed

legal estates as well,¹ though it is also sometimes restricted to the equitable right to come into a court of equity in the first instance,² and in some jurisdictions the complainant's demand must be an equitable one.³

sub silentio under the notice of the court; and that although it did not belong to the traditionary system of equity, it commended itself to the court as proper under a statutory provision embracing all civil actions. See also *Baldwin v. Buchanan*, 10 Iowa 278; *Crouch v. Crouch*, 9 Iowa 270; *Curry v. Allen*, 55 Iowa 318.

Every Equitable Proceeding for the purpose of applying the debt of a third person to the payment of plaintiff's demand against his debtor is a suit for an equitable garnishment. *Riggin v. Hilliard*, 56 Ark. 482.

Action at Law Transferred to Equity Docket.—An action of attachment at law will be transferred to the equity docket of the court without a motion by either party, where it is necessary to adjust priority and marshal securities between the different claimants of the property. *Hammond v. Harper*, 39 Ark. 248.

Actions for the Recovery of Money.—Under section 191 of the *Ohio Code of Civ. Pro.* a remedy by attachment may be had in equitable actions for the recovery of money. The distinction between actions at law and suits in equity is abolished by the code. *Goble v. Howard*, 12 Ohio St. 165.

But an attachment cannot be issued in an action of an equitable nature which is not an action for the recovery of money. *Guilhon v. Lindo*, 9 Bosw. (N. Y.) 603.

1. **In Alabama**, before the Act of 1846, the chancery court assumed jurisdiction for the purpose of enforcing demands out of equitable estates by analogy to the attachment laws which were applicable only to the enforcement out of a legal estate, and the object of the Act of 1846 was to enable a creditor to reach, by attachment in chancery, any property that might be attached at law, and also to reach effects of the debtor in the hands of third persons which were not liable to seizure at law. *Flake v. Day*, 22 Ala. 132; *Hartley v. Bloodgood*, 16 Ala. 237. See also *Lane v. Marshall*, 1 Heisk. (Tenn.) 34; *Graham v. Merrill*, 5 Coldw. (Tenn.) 632.

Under Ala. Code 1886, § 3500, "courts of chancery may issue writs

of attachment on legal demands, founded on any judgment or contract, express or implied, as attachments may issue from courts of law; which attachments operate only on the effects of the defendant held by an equitable title, or on demands owing by other persons, to which the defendant against whom the attachment issues is in equity entitled, whether due or not." *Ware v. Seasongood*, 92 Ala. 154.

In Massachusetts.—Under Gen. Stat. c. 113, § 2, conferring upon the chancery court jurisdiction of "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor," a bill seeking to apply to the payment of a debt property which may be attached at law cannot be maintained. *Schlesinger v. Sherman*, 127 Mass. 208.

But by section 3, chapter 151, Mass. Pub. Stat. "the court shall also have jurisdiction in equity to reach and apply, in payment of a debt, any property, right, title, or interest, real or personal, of a debtor, liable to be attached or taken on execution in a suit at law against him and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors, or purchased or directly or indirectly paid for by him, the record or other title to which is retained in the vendor, or is conveyed to a third person with intent to defeat, delay, or defraud the creditors of the debtor." And under this statute the nature of the property will not affect the jurisdiction of the chancery court. *Stratton v. Hernon*, 154 Mass. 312; *Bernard v. Barney Myroleum Co.*, 147 Mass. 356.

2. **The Mere Nonresidence of the Debtor** is not sufficient to justify a simple contract creditor without a judgment or lien to subject equitable assets in the chancery court. *Smith v. Moore*, 35 Ala. 76.

3. **Jurisdiction in Analogy to That at Law.**—In *Kirkman v. Vanlier*, 7 Ala. 227, the court said that "the statute gives to one nonresident the remedy by attachment for the collection of a

2. Existence of Grounds—Allegation and Proof.—But whatever ground may justify an attachment in equity, under the statute, that

legal demand against another, which may be levied by garnishment in the hands of a third person; and by analogy courts of equity must afford the same facility of collection to a creditor whose claim is of an equitable nature."

But a chancery court will not take jurisdiction in analogy to an attachment proceeding at law, unless the plaintiff's demand is an equitable one. *Smith v. Moore*, 35 Ala. 77.

Simple Contract Creditor.—A simple contract creditor cannot resort to a court of equity for the enforcement of his purely legal demand. *Hartley v. Bloodgood*, 16 Ala. 237.

Nulla Bona Return.—A simple contract creditor could not come into a court of chancery and attach the property of his debtor upon the ground of fraud, but in such a case jurisdiction in equity would depend upon the inability to collect at law, which must be shown by an execution and *nulla bona* return. *Monroe v. Cutter*, 9 Dana (Ky.) 98.

Prior Judgment at Law.—The general rule is that where the complainant's demand is merely legal, and his resort to equity is for the purpose of setting aside fraudulent conveyances of his debtor's property, he must, before filing his bill, obtain a judgment at law. *Scott v. M'Millen*, 1 Litt. (Ky.) 302. See also *Skeele v. Stanwood*, 33 Me. 309.

But this rule does not apply, in this country, to cases where the debtor resides or has removed out of the commonwealth, so that no judgment can be obtained against him. In all such cases, resort may be had to chancery in the first instance. *Scott v. M'Millen*, 1 Litt. (Ky.) 302. And see, in general, upon this subject, article CREDITORS' BILLS AND FRAUDULENT CONVEYANCES, vol. 5, p. 465 *et seq.*

Unliquidated Damages—West Virginia.—A statute (Code W. Va. 1887, c. 106, § 1) providing for the issuance of an attachment in equity for the recovery of unliquidated damages for personal injury is constitutional. This was held against the objection that the constitution provides that "in suits at common law * * * the right of trial by jury, if required by either party, shall be preserved;" the court holding

that it was a sufficient reply to the objection, that the suit in hand was one in equity and that the parties in an equity suit have the right to a trial by jury under another statute where there is a conflict of evidence or an inquiry of damages. Code 1887, c. 131, §§ 4 and 5. *McKinsey v. Squires*, 32 W. Va. 41.

Legal Demand against Resident.—Under Code W. Va. of 1860, c. 151, p. 645, the only remedy by attachment in equity is in a suit against a non-resident debtor, unless the claim is an equitable one. If the demand is of a purely legal nature, it cannot be enforced against a resident by attachment. *Sims v. Charleston Bank*, 3 W. Va. 420.

Legal Remedy against Nonresidence.—The fact that a legal remedy by requisition of bail may be as efficient as an attachment is not an available objection, because the statute gives the attachment, not upon the ground of an actual defect of the legal remedy, but on the ground of the nonresidence of the debtor alone and the presence of his property within the state. *Jackson v. Perry*, 13 B. Mon. (Ky.) 231.

Prima Facie Sufficiency of Allegation.—An allegation of nonresidence of a debtor will *prima facie* authorize an attachment in chancery against his property within the state. *Montgomery v. Tilley*, 1 B. Mon. (Ky.) 158; *Wilcox v. Carey*, 9 Dana (Ky.) 297.

Absent by Reason of War.—The fact that the defendant was absent from the state as a soldier, in the army of either the Northern or the Southern states, was held in *Tennessee* not sufficient to sustain a charge of nonresidence or absconding from the state. *Haynes v. Powell*, 1 Lea (Tenn.) 347.

Property of Nonresident within the State.—A bill in chancery cannot be maintained against a nonresident defendant who has no property within the state. *Hopkirk v. Bridges*, 4 Hen. & M. (Va.) 413.

Fraud.—In *Mississippi* an attachment cannot be sued out in chancery except where the debtor is absent from the state or is absconding, having effects belonging to or debts due to him in the state, or owning lands and tenements in the state, and fraud alone will

ground must exist at the time the attachment issues,¹ must be shown by proper allegations in the bill, and must be supported by proof of its existence at that time.²

IV. PARTIES—1. Necessary and Proper Parties—Defendants.—All persons interested in the subject-matter of the suit should be made parties to the bill, so that they may have an opportunity to protect their rights.³ A bill for the attachment of an equitable estate should make the holder of the legal title a party,⁴ and a

not give a court of equity jurisdiction over attachment cases. *Allen v. Montgomery*, 48 Miss. 110. See also *McNeill v. Roache*, 49 Miss. 436.

Insolvency.—An attachment cannot be issued in a chancery suit against a resident defendant simply upon the allegation of insolvency, but such an attachment will depend upon the execution and *nulla bona* return at law. *Rich v. Catterson*, 2 J. J. Marsh. (Ky.) 135.

1. *Warner v. Everett*, 7 B. Mon. (Ky.) 265.

Construction of Statute.—Under a statute providing the remedy in the case of removal of property with the intention to hinder, delay, and defraud creditors, etc., a bill will not lie to attach a steamboat about to leave a port in one state for a port in another state in the due course of her business between such states. The removal contemplated by such an act is a permanent one. In such a case the bill must show the fraudulent intention on the part of the debtor, or the extent or valuation of the property owned by him in the state, so as to show that there is cause to apprehend that the complainant will be hindered or delayed in the collection of his debts, or that there is an intention to hinder or delay the creditor in the collection of his debts. *Montgomery v. Tilley*, 1 B. Mon. (Ky.) 158.

2. **When an Attachment Bill Is Fatally Defective**, the attachment will be dissolved without leave to amend so as to perfect the grounds for the attachment, because the attachment must be properly issued in the first instance. It is the attachment properly issued which gives the plaintiff standing in court. *Saunders v. Cavett*, 38 Ala. 56; *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144; *Sanders v. Watson*, 14 Ala. 198; *Buford v. Francisco*, 3 Dana (Ky.) 68.

Allegations in Amended Petition.—Grounds for the attachment must exist

at the time it is sued out, and allegations in an amended petition will not be sufficient to sustain an attachment issued under the original petition. *Crouch v. Crouch*, 9 Iowa 270.

Fraudulent Intention—Proof.—Where an attachment is sued out in chancery upon the ground of fraudulent intention on the part of the debtor, the fraudulent intention must be shown to have existed at the time the bill was filed, and proof of such an intention after the attachment issued is not sufficient to sustain such a bill. *Warner v. Everett*, 7 B. Mon. (Ky.) 265.

3. *Hartley v. Bloodgood*, 16 Ala. 237.

Attachment against Boat—Owner as Party.—When a pilot of a steamboat files a bill of attachment for wages due him under a statute creating a lien for such services, the action is one purely *in rem* against the boat, and the owner of the boat need not be made a party. In such an action the process may issue against the "owners of the steamboat (naming the steamboat)," and is sufficiently returned and executed upon the master (naming him) who is a part owner. The presumption is that the parties in charge of the boat are the agents or owners thereof, and an order of the chancery court for its seizure would be sufficient notice to the owners to afford them an opportunity to resist the attachment. *Page v. Long*, 4 B. Mon. (Ky.) 122.

4. *Blackburn v. Clarke*, 85 Tenn. 506; *Lane v. Marshall*, 1 Heisk. (Tenn.) 30.

Absence of Trustee—Decree for Sale.—When an equitable estate is levied upon, the trustees are necessary parties, and in their absence a decree against the property will not be rendered. A personal decree will be rendered against the nonresident where he appears in the cause. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 193.

The Lessee is not a necessary party to an attachment bill filed against the

garnishee cannot be held unless he is a party.¹

Joinder of Plaintiffs.—Where several plaintiffs have separate and distinct debts against one person, they cannot join in one attachment bill.²

Multifariousness.—But a bill for attachment is not objectionable as multifarious because it seeks to subject different funds belonging to the debtor in the hands of several persons.³

2. How Defendants Brought in.—Parties to an attachment bill should be served with process, or, if nonresidents, publication should be made as in other cases.⁴ But if a nonresident appears, a personal decree can be rendered against him.⁵ It is not necessary that the order of publication should contain the facts necessary to be set out in the publication itself.⁶

V. FRAME OF BILL—1. Allegations—*a*. GROUNDS OF ATTACHMENT.—An attachment bill should allege one or more of the grounds of attachment provided by statute, either in the language of the statute or in language which imports the same charge.⁷

lessor. *Chapman v. Pittsburgh, etc.*, R. Co., 18 W. Va. 193.

1. *Chilicothe Oil Co. v. Hall*, 4 W. Va. 705.

Trustee Process—Necessity for Summoning Trustee.—A bill in the nature of an equitable trustee process, under Rev. Stat. Maine 77, § 6, will not lie unless there is some third party summoned as equitable trustee. *Lord v. Collins*, 79 Me. 227; *Donnell v. Portland, etc.*, R. Co., 73 Me. 567.

2. *Corrothers v. Sargent*, 20 W. Va. 351.

Fraudulent Conveyances.—Where several persons obtain judgments against the same debtor at different times, they may join in one action in equity to set aside a fraudulent conveyance by such debtor and to subject his equitable interest in the property to the payment of their debts by enjoining payment of proceeds of sale without joining therein other creditors of the debtor. In such an action the party through whom the fraudulent conveyance passes is not a necessary party to the action, because he has no legal or equitable interest in the subject-matter. *Bomar v. Means*, 37 S. Car. 520. See also article CREDITORS' BILLS, vol. 5, p. 536.

3. *Alexander v. Taylor*, Phil. Eq. (N. Car.) 36. See also article MULTIFARIOUSNESS.

4. *Chapman v. Pittsburgh, etc.*, R. Co., 18 W. Va. 193.

5. *Chapman v. Pittsburgh, etc.*, R. Co., 18 W. Va. 193.

Levy upon Property Necessary.—An attachment was sued out on a legal demand and was returned, "no property found." The ground of the attachment was the fraudulent intention on the part of the defendants to remove their property out of the commonwealth, whereby the complainant would be defrauded and hindered in the collection of his debt. It was held that the jurisdiction of the chancery court in such a case is purely *in rem*, and no authority exists to decree against the defendant *in personam*. *Farmer v. Bascom*, 9 B. Mon. (Ky.) 23.

6. *Gilliland v. Cullum*, 6 Lea (Tenn.) 534.

The record sufficiently shows the fact that publication was made when the judgment *pro confesso* recites that "publication had been made according to law." *Gilliland v. Cullum*, 6 Lea (Tenn.) 532. And see generally article PUBLICATION.

7. *Haynes v. Powell*, 1 Lea (Tenn.) 347. As to relief based on statute, see article BILLS IN EQUITY, vol. 3, p. 355.

Allegations in the Alternative.—Where several grounds of attachment exist under a statute, the bill may charge several grounds in the alternative. *Haynes v. Powell*, 1 Lea (Tenn.) 347. But when a bill charges one of the grounds of attachment and some other fact not provided by the statute in the alternative, the allegations are not sufficient to support the attachment. *Haynes v. Powell*, 1 Lea (Tenn.) 347. And see in general, as to allegations

b. NATURE OF ESTATE SOUGHT TO BE REACHED.—While equitable estates may be subjected by attachment in equity, it is held that the bill must be framed with that view, otherwise the attachment is taken to have been levied upon the legal estate.¹

c. AMOUNT OF INDEBTEDNESS.—The amount of indebtedness to be satisfied should be made certain by a specific allegation.²

2. Prayer.—As a general rule, no relief can be granted under a bill in chancery if none be asked;³ but in attachment bills, not being according to the usual chancery practice, and under statutes making provision for that particular class of cases, when the bill shows a ground for attachment the court may order a sale of the property levied upon without a prayer to that effect.⁴

3. Affidavit.—An attachment bill should be sworn to in conformity with the statute,⁵ but the matters necessary to be sworn

in the alternative in attachment cases, article ATTACHMENT, vol. 3, p. 22.

1. Hillman v. Werner, 9 Heisk. (Tenn.) 586.

Effect upon Title to Property Sold.—An attachment levied upon property as that of the defendant, unless the bill is framed with a particular view of reaching an equitable title, will be taken to attach only the legal interest, and if the defendant's title therein is only an equitable one, a sale under a levy would convey no title. *Lane v. Marshall,* 1 Heisk. (Tenn.) 30.

2. Kirksey v. Fike, 27 Ala. 383.

Under a statute providing for attachment "in an action for the recovery of money," an attachment is improvidently granted in an action of an equitable nature, where, from the character of the action, no averment in the affidavit or complaint is made as to the amount due the plaintiff, as where the ascertainment of such amount depends upon an accounting. *Guilhon v. Lindo,* 9 Bosw. (N. Y.) 603.

Evidence of Nulla Bona Return.—Where a bill is filed on a *nulla bona* return of an execution at law, such return is *prima facie* evidence that the demand is still unpaid. *Lewis v. Quinker,* 2 Metc. (Ky.) 286.

Amendment as to Indebtedness.—If it is material to aver in the bill for attachment upon a *nulla bona* return that the debt demanded is still due and unpaid, such an averment may be made by amendment after attachment. *Lewis v. Quinker,* 2 Metc. (Ky.) 286.

Waiver of Insufficient Allegation.—Under a statute providing for an attachment where a person liable for a debt and residing out of the state dies

leaving property within the state, if the bill does not sufficiently allege an indebtedness the defendant administrator by answering waives the insufficient allegation. *Johnson v. Luckado,* 12 Heisk. (Tenn.) 273.

Proof of Debt.—In an attachment suit in equity against a nonresident, the complainant must prove his debt whether the absent defendant appears or not. *Platt v. Howland,* 10 Leigh (Va.) 531.

3. Lewis v. James, 8 Humph. (Tenn.) 537. See also articles BILLS IN EQUITY, vol. 3, p. 346; PRAYER FOR RELIEF.

4. Lewis v. James, 8 Humph. (Tenn.) 537.

Prayer for Injunction Sufficient.—Under Act Ala. 1846, an attachment bill may be filed against a nonresident debtor, and where the bill only prays an injunction it is sufficient to bring the property of the nonresident debtor under the control of the court. *Hartley v. Bloodgood,* 16 Ala. 237.

5. Webb v. Read, 3 B. Mon. (Ky.) 119; *McGown v. Sprague,* 23 Ala. 524; *Sims v. Charleston Bank,* 3 W. Va. 420.

Nonresidence.—It is error to proceed to decree in an attachment suit in chancery against a nonresident defendant without affidavit, as required by statute, of the nonresidence of such defendant. *Brien v. Pittman,* 12 Leigh (Va.) 382.

Waiver by Appearance of Nonresident.—When a nonresident defendant answers an attachment bill and admits his nonresidence, such an admission dispenses with the necessity of the affidavit required by statute. *Brien v. Pittman,* 12 Leigh (Va.) 382.

to need not be set out in a separate affidavit when they are fully set out in the bill which is sworn to,¹ or when they appear in the affidavit attached to the bill.²

VI. THE BOND—1. Indemnity Bond.—A usual condition precedent to the granting and issuance of an attachment either at law or in equity is the execution of the indemnity bond prescribed by statute, and a bill filed for an attachment must be supported by the required bond.³ Such bond need not, however, literally conform to the words of the statute.⁴

2. Delivery Bond.—A bond is also sometimes provided which may stand in lieu of the property attached and the operation of which is to leave the property in the possession of the party in whose hands it is found. The object of such a bond is to secure the property attached to the satisfaction of the demand in the event the attachment prevails.⁵

Affidavit as at Law.—Under the Ala. Act of 1856, providing for attachments in chancery courts in certain cases, and, further, that “the provisions of the statutes now in force in reference to attachments at law must be observed in the issuance of such attachments,” the complainant must make affidavit as in cases at law that the writ of attachment is not sued out for the purpose of vexing or harassing the defendant. *Saunders v. Cavett*, 38 Ala. 55.

As to Amount Due.—In *Alabama* it was held that an attachment bill is not sustainable where there is no affidavit as to the amount due. *Kirksey v. Fike*, 27 Ala. 383.

Affidavit by Agent or Attorney.—The affidavit required by Act Ala. 1846 in attachments in equity may be made by an agent or attorney. *Flake v. Day*, 22 Ala. 132.

1. Scott v. Doneghy, 17 B. Mon. (Ky.) 324.

Amount of Indebtedness.—When the amount of the indebtedness is set out in the bill it need not be repeated in the affidavit. *Foster v. Hall*, 4 Humph. (Tenn.) 346.

2. St. Marys' Bank v. St. John, 25 Ala. 613.

3. McGown v. Sprague, 23 Ala. 524.

Where No Indemnity Bond is Required by statute, the court may in its discretion, upon issuing the order for the attachment, require such bond to be given. But in such a case the discretion of the court will not be reviewed where the bond required was for the indemnity of only a part of the defendants. *Knox v. Atterberry*, 3 Dana (Ky.) 580.

Bond before Decree for Sale.—In an attachment suit in equity the court should not decree a sale of the lands of the nonresident debtor until bonds with good security in double the value of the land are given. The law which requires the valuation of the land decreed to be sold and that a bond be given is intended to furnish the court with the evidence by which a complete indemnity can be provided for the defendant in the event the decree is afterwards set aside. *Brien v. Pittman*, 12 Leigh (Va.) 382.

Substitution of Good for Bad Bond.—The fact that the indemnity bond is not good will not make an attachment issued thereon void, but the court may permit a good bond to be given. *Nutter v. Connet*, 3 B. Mon. (Ky.) 201.

4. Nutter v. Connet, 3 B. Mon. (Ky.) 201.

Unauthorized Conditions.—But no conditions can be inserted in such a bond which are not imposed by the statute, and such unauthorized conditions will not be binding, though the bond will be valid and binding as to the conditions authorized. *Ranning v. Reeves*, 2 Tenn. Ch. 263.

5. Bell v. Pearce, 1 B. Mon. (Ky.) 73.

Order of Surety's Liability.—When a steamboat is attached to enforce a lien of the pilot under a statute, and the master of the boat enters into a replevy bond for the forthcoming of the boat, upon final decree for the complainant the court should not order a rule made and served upon the surety in such replevy bond to pay the amount of the decree, although the bond is

VII. LIEN OF ATTACHMENT.—Process of attachment issued in a suit in equity is served in the same manner as in actions at law,¹ and the lien of attachment in equity, as at law, is fixed upon the property attached from the time the levy is made. See, for a treatment of the law upon this subject, article Attachment, Am. and Eng. Encyc. of Law, second edition.

VIII. PROCEEDINGS AFTER BILL FILED—1. Defense to Bill—Matters in Abatement.—Where the nonexistence of the alleged ground of attachment is held to be matter in abatement, it must be specially pleaded as in other cases. Pleading to the merits will waive such matters.² But upon overruling a plea in abatement to an attachment bill, the defendant is entitled to leave to answer the bill.³

By Garnishee.—A garnishee in an attachment bill against a non-resident may set up an equitable defense to show that in equity he is not indebted to the absent defendant.⁴

joint and several and the principal and surety are severally liable thereupon, but if both are within the jurisdiction of the court the rule should be made upon both. *Page v. Long*, 4 B. Mon. (Ky.) 122.

Discharge of Surety.—Where goods are attached under a bill of one creditor, a delivery bond executed, and a subsequent attachment levied by another creditor, and, by consent of the parties to both suits, the goods are sold, the surety on the delivery bond in the first suit is discharged. *Bell v. Pearce*, 1 B. Mon. (Ky.) 73.

Attachment against Executor or Administrator—Effect of Official Bond.—An attachment may be discharged on motion of an administrator or executor without security, upon the principle that his official bond as executor or administrator stands in the place of such bond. *Wilson v. Wilson*, 1 Hen. & M. (Va.) 16.

1. *Squire v. Lincoln*, 137 Mass. 403.

Duty of Officer—Order of Levy.—When several attachment bills are filed by different creditors, it is the duty of the officer to levy the attachments in the order in which they come into his hands. *Clay v. Scott*, 7 B. Mon. (Ky.) 554.

2. *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 311; *Foster v. Hall*, 4 Humph. (Tenn.) 346; *Haynes v. Powell*, 1 Lea (Tenn.) 347.

Defenses Embraced in Answer.—Code Tenn., § 3456, authorizing the incorporation in an answer of all matters of defense, does not embrace matters in abatement; but they must be specially pleaded, as an answer to the merits

will waive matters in abatement. *Kendrick v. Davis*, 3 Coldw. (Tenn.) 524.

Sufficiency of Plea.—A plea in abatement to an attachment bill which denies *seriatim* each allegation in the bill upon which the attachment is based is sufficient. *Klepper v. Powell*, 6 Heisk. (Tenn.) 503.

Affidavit by Agent.—A plea in abatement may be sworn to by an agent, and the plea need not affirmatively show the fact of the agency. *Klepper v. Powell*, 6 Heisk. (Tenn.) 503.

3. *Kendrick v. Davis*, 3 Coldw. (Tenn.) 524.

Remedy of Absent Defendant—Virginia.—When a complainant in an attachment suit takes a decree without proving his debt, though it is not regular, the absent defendant cannot attack the decree by appealing, but must come in and file his answer, upon which issue may be joined and witnesses examined, and proceed to have the cause reheard and the decree rescinded if it should prove to be erroneous; this is his only remedy under the statute. *Platt v. Howland*, 10 Leigh (Va.) 531.

4. *Glassell v. Thomas*, 3 Leigh (Va.) 127. And see in general article GARNISHMENT.

Appeal by Garnishee.—In an attachment suit brought against a nonresident debtor and against a resident as garnishee, a decree was rendered against the nonresident debtor for the amount of the debt and against the garnishee for the amount in his hands due such debtor. It was held that an appeal by the garnishee did not bring up the case as to the nonresident defendant, and upon

2. Dissolution of Attachment.—The circumstances under which an attachment in equity may be dissolved are also largely regulated by statute.¹

3. Order for Sale and Distribution.—The court should not under one attachment order real estate to be sold subject to another attachment when the amount for which the land is liable under such other attachment has not been ascertained and it does not appear that such other attachment has been sustained;² and when money arising from the sale of attached goods is sought to be withdrawn by the party in whose favor the decree is rendered, notice should be given to the opposite party, and an opportunity afforded him to appear and resist such an order or to pray an appeal.³

such appeal the garnishee could not question the merits of the decree against the absent defendant, but only so much of the decree as affected his own rights. *Heffernan v. Grymes*, 2 Leigh (Va.) 512.

Interpleaders.—When a suit in the nature of a foreign attachment is begun by a bill in equity against a nonresident debtor owning land within the state, interpleaders who come into the cause by petition setting up that they have an interest in the debtor's property within the state, cannot by plea set up for the absent debtor that he is a resident of the state in which the suit is brought, until, by their answers, they have shown their interest in the litigation. *Smith v. Hunt*, 2 Rob. (Va.) 205.

1. Appearance and Execution of Bond.—Where a nonresident debtor appears in an attachment suit in chancery and gives the bond required by the statute and answers, the attachment levied on his property is discharged. *Tiernans v. Schley*, 2 Leigh (Va.) 28.

Appearance without Bond by Consent.—Under a statute discharging an attachment upon the coming in of a nonresident and filing the required bond, the attachment will be discharged where the complainants consent that such nonresident defendant may appear and answer without executing such a bond. *Tiernans v. Schley*, 2 Leigh (Va.) 28.

Service of Subpœna.—The fact that after an attachment upon the property of a nonresident debtor such nonresident is casually within the jurisdiction of the court and is served with process, will not discharge the attachment. *Lewis v. Quinker*, 2 Metc. (Ky.) 286.

Death of Nonresident Debtor.—When the estate of a nonresident debtor is levied upon by attachment in an equity suit, his death subsequent to the levy will not operate to dissolve the attachment. *White v. Sheriff*, 7 W. Va. 324.

2. Such action appears prejudicial to the rights of the complainant because no prudent man would bid for land subject to a lien for an unknown amount. *Davidson v. Simmons*, 11 Bush (Ky.) 334.

Sale of Land—Prospective Rents and Profits.—It is not necessary or proper in an attachment suit in equity to direct an inquiry whether the rents and profits of the real estate attached will pay the debt within a reasonable time. *Curry v. Hale*, 15 W. Va. 879.

Personalty Sold First.—Upon an attachment bill filed on a return of *nulla bona* on an execution at law, it was held error for the court to order the sale of real estate without first subjecting the personal assets of the debtor, or ascertaining that there were none. *Davidson v. Simmons*, 11 Bush (Ky.) 334.

Attachment by Surety.—The object of the Act Ky. 1828 was to prevent a removal of the property of the principal debtor, and where the bond is given for the forthcoming of the property the court cannot render a decree ordering the sale of the property before the debt is paid by the surety. Where there is an allegation that the debt has been paid by the surety he may have a personal decree against a principal debtor or a decree for the surrender of the property. *Buford v. Francisco*, 3 Dana (Ky.) 68.

3. *Morrow v. Smith*, 4 B. Mon. (Ky.) 99.

4. Wrongful Attachment—Motion for Damages.—The court in which the attachment bond is executed has the power to ascertain and assess the damages accruing by reason of a wrongful attachment, and when an attachment bill is dismissed it is held that the defendant may move in that proceeding against the complainant for damages.¹ Upon such a motion for damages upon the dismissal of an attachment bill, the burden of proof is upon the defendant to show the damage.²

1. It is not necessary that the defendant should proceed in a separate action for this purpose. The motion is a substitute for a separate action. The court in which the attachment bond is executed has power to ascertain and assess the damages. *Macheca v. Panesi*, 4 Lea (Tenn.) 544.

Appeal from Judgment on Motion.—Upon dismissal of an attachment bill and assessment of damages by the chancellor on defendant's motion, an appeal from the judgment on the motion to assess damages will bring up the decree dismissing the attachment bill. *Macheca v. Panesi*, 4 Lea (Tenn.) 544.

2. *Ranning v. Reeves*, 2 Tenn. Ch. 263. In this case the court said: "The only claim, therefore, of the defendant Dean, if he have any at all, against the surety on the bond is for damages

sustained for the wrongful suing out of the attachment and injunction, and the reference was properly confined to such damages. Upon such a reference the burden is upon the party claiming them to show that damages have been sustained. No evidence was offered, and the master reported that he could find nothing in the papers to render the surety liable for damages. This was all he could do. It would be absurd to ask him, under the rule of court, to refer to any part of the record to support a negative statement of this character. But, if there is evidence in the record to show that the master was in error in his conclusion, it would be easy for the defendant to call attention to it. This has not been done, either by exception or in the oral argument."

EQUITABLE DEFENSES.

BY JOHN LEHMAN.

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CROSS-REFERENCES.

As to Setting up Counterclaims as a Defense, see article *SET-OFF AND COUNTERCLAIM*.

Pleading Estoppel, see article *ESTOPPEL*.

I. DEFINITION.—An equitable defense in an action at law is a defense based upon equitable grounds, that is, grounds which, under the separate administration of law and equity, were formerly cognizable only in courts of equity.¹

1. 1 Abbott's Law Dict. 433; 1 Anderson's Law Dict. 330; 1 Brown's Law Dict. 595.

Judicial Construction.—Any state of facts which would entitle the defendant, in a proper case, to a reformation

II. THE RIGHT TO PLEAD EQUITABLE DEFENSE—1. At Common Law.—At common law the defendant could not set up as a defense in an action matters which were purely cognizable in a court of equity, but was under the necessity of resorting to the latter court for the purpose of making such a defense effectual.¹ This is still the rule in some jurisdictions in the United States where it has not been provided otherwise by statute.²

of the instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of the court of chancery for relief against the claim or title put forward by the plaintiff, constitutes an equitable defense. *East v. Peden*, 108 Ind. 94.

The provision of the code which allows a defendant to set up as many defenses or counterclaims as he may have in an action at law, whether they be such as are denominated legal or equitable under the former system, in its enlarged sense means nothing less than such a state of facts as would induce a court of equity, in the exercise of its general jurisdiction, to interfere with and restrain the action at law. *Cramer v. Benton*, 60 Barb. (N. Y.) 225.

Whatever would have been a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge will now constitute a good equitable defense to an action on the covenant itself. *McCreery v. Day*, 119 N. Y. 1.

In *Prothero v. Phelps*, 2 Jur. N. S. 175, Turner, L. J., said: "The expression 'equitable grounds,' as I understand this enactment [section 83 of the Common Law Procedure Act], means grounds depending on the laws by which courts of equity are governed, and not on the course of practice of those courts."

The Test—Pennsylvania.—Where a defendant interposes an equitable defense, the test is, would a court of chancery, if there were such a court in Pennsylvania, grant the relief to the defendant upon the facts set up in his defense? If the chancellor would refuse the relief and leave the defendant to his remedy at law, then the facts set up will not be available as an equitable defense. *Murphy v. Hubert*, 16 Pa. St. 57.

1. *Doe v. Wroot*, 5 East 132; *Scholey v. Mearns*, 7 East 148; *Braddick v. Thompson*, 8 East 344; *O'Kelly v.*

Sparkes, 10 East 369; *Britten v. Perrott*, 2 Crompt. & M. 597.

2. *Illinois*.—*Johnson v. Watson*, 87 Ill. 540; *Wheeler v. Frankenthal*, 78 Ill. 127; *Warner v. Hale*, 65 Ill. 395; *Blake v. Fash*, 44 Ill. 302; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 519; *Baltimore, etc., R. Co. v. Illinois Cent. R. Co.*, 137 Ill. 9; *Finlon v. Clark*, 118 Ill. 34; *McGinnis v. Fernandes*, 126 Ill. 228; *Kirkpatrick v. Clark*, 132 Ill. 342; *Oldham v. Pfleger*, 84 Ill. 102; *Mills v. Graves*, 38 Ill. 466; *Wales v. Bogue*, 31 Ill. 464.

Michigan.—*Whiting v. Butler*, 29 Mich. 122; *Buell v. Irwin*, 24 Mich. 149; *Harrett v. Kinney*, 44 Mich. 457; *Ryder v. Flanders*, 30 Mich. 336; *Conrad v. Long*, 33 Mich. 78; *Jeffery v. Hursh*, 42 Mich. 563; *Hayes v. Livingston*, 34 Mich. 384; *McKay v. Williams*, 67 Mich. 547; *Geiges v. Greiner*, 68 Mich. 155; *Michigan Land, etc., Co. v. Thoney*, 89 Mich. 232.

New Jersey.—*Den v. Dimon*, 10 N. J. L. 158; *Mulford v. Peterson*, 35 N. J. L. 129. Under Act New Jersey, 1871 (Revision 380, §16), "in any action upon any instrument in writing, under seal, the defendant in such action may plead, and set up as a defense therein, fraud in the consideration of the contract," and in 1875 it was further enacted that in every action upon a sealed instrument, the seal should be only presumptive evidence of a sufficient consideration. The modifications are only operative in the specified instances, viz.: first, when the suit is founded upon the sealed instrument, and second, when it is resorted to for the purposes of a set-off. *Dundee Chemical Works v. Conner* (N. J.), 12 Atl. Rep. 714; and before the act of 1871 fraud in the consideration of a sealed instrument could not be set up in an action at law. *Lord v. Brookfield*, 37 N. J. L. 553, citing *Rogers v. Colt*, 21 N. J. L. 19; *Stryker v. Vanderbilt*, 25 N. J. L. 482.

Tennessee.—*Ferguson v. Coward*, Volume VII.

In the United States Courts.—The common-law rule is still adhered to in the United States courts, notwithstanding the state statutes to the contrary.¹

2. Under Statute—*a.* THE GENERAL RULE.—The right to plead an equitable defense in an action at law is generally conferred by legislative enactment, and there are very few jurisdictions at this day where such statutes are not in force. This is true in most of the United States, not only in those where the law and equity jurisdiction are blended under the code,² but also in those which

12 Heisk. (Tenn.) 573; Langford v. Love, 3 Sneed (Tenn.) 311; Campbell v. Campbell, 3 Head (Tenn.) 328. See also, under a statute in Tennessee, McLean v. Houston, 2 Heisk. (Tenn.) 37, as to pleading failure of consideration by reason of fraud. For pleading failure of consideration, see also article CONTRACTS, vol. 4, p. 948.

See also, before the statutes permitting defenses of this nature: Smith v. Allen, 1 Blackf. (Ind.) 23; Page v. Cole, 6 Iowa 153; Jackson v. Roberts, 7 Wend. (N. Y.) 83; Smith v. Pierce, 2 Johns. (N. Y.) 221; Jackson v. Deyo, 3 Johns. (N. Y.) 422; Faulkner v. Brockenbrough, 4 Rand. (Va.) 245; Taylor v. King, 6 Munf. (Va.) 358; Wyche v. Macklin, 2 Rand. (Va.) 426. See also article FALSE REPRESENTATIONS AND DECEIT.

1. Gibson v. Chouteau, 13 Wall. (U. S.) 102; Burnes v. Scott, 117 U. S. 586; Bacon v. Howard, 20 How. (U. S.) 22; Foster v. Mora, 98 U. S. 428; Greer v. Mezes, 24 How. (U. S.) 275; Bennett v. Butterworth, 11 How. (U. S.) 669; Thompson v. Central Ohio, etc., R. Companies, 6 Wall. (U. S.) 134; Robinson v. Campbell, 3 Wheat. (U. S.) 212; Van Norden v. Morton, 99 U. S. 380; Northern Pac. R. Co. v. Paine, 119 U. S. 563; Montejo v. Owen, 14 Blatchf. (U. S.) 325; Parsons v. Denis, 7 Fed. Rép. 317; Church v. Spiegelburg, 24 Blatchf. (U. S.) 541; Doe v. Aiken, 31 Fed. Rep. 393; Doe v. Roe, 31 Fed. Rep. 97; Buller v. Sidell, 43 Fed. Rep. 116; Snyder v. Pharo, 25 Fed. Rep. 398; Butler v. Young, 1 Flipp. (U. S.) 276.

Necessity of Repleading upon Removal of Cause.—Where an answer in an action at law in a state court prays for equitable relief, although such an answer is regular under the state statute, if the case is removed to the United States court it is necessary to replead. LaMothe Mfg. Co. v. National Tube Works Co., 15 Blatchf. (U. S.) 432.

2. See the statutes and codes of the various states, in addition to the following authorities:

Arizona.—Houghtaling v. Ellis, 1 Arizona 384.

California.—Spencer v. Vigneaux, 20 Cal. 448; Willis v. Wozencraft, 22 Cal. 616; Hough v. Waters, 30 Cal. 311; Dorn v. Baker, 96 Cal. 207; Hyde v. Mangan, 88 Cal. 319; Central Pac. R. Co. v. Mudd, 59 Cal. 590; Meeker v. Dalton, 75 Cal. 154; Arguello v. Bours, 67 Cal. 450; Morrison v. Wilson, 13 Cal. 494.

Colorado.—Salsbury v. Ellison, 7 Colo. 304.

Georgia.—Clewiss v. Hartman, 71 Ga. 810; Turner v. Rives, 75 Ga. 608; Cook v. Pridgen, 45 Ga. 331; Allison v. Elder, 45 Ga. 17.

Idaho.—Wa Ching v. Constantine, 1 Idaho 266.

Indiana.—Vail v. Jones, 31 Ind. 468; East v. Peden, 108 Ind. 95; Cox v. Ratcliffe, 105 Ind. 376.

Iowa.—Rosierz v. Van Dam, 16 Iowa 177; Van Orman v. Spafford, 16 Iowa 186; Thompson v. Hurley, 19 Iowa 335; Penny v. Cook, 19 Iowa 541; Shawhan v. Long, 26 Iowa 491.

Kansas.—Goodman v. Nichols, 44 Kan. 22.

Kentucky.—Dorsey v. Reese, 14 B. Mon. (Ky.) 127; Morton v. Dickson, 90 Ky. 572.

Minnesota.—Gates v. Smith, 2 Minn. 32; McClane v. White, 5 Minn. 178.

Missouri.—Clyburn v. McLaughlin, 106 Mo. 521; Schuster v. Schuster, 93 Mo. 438; Allen v. Logan, 96 Mo. 591; St. Louis v. Schulenburg, etc., Lumber Co., 98 Mo. 613; Barlow v. Elliott, 56 Mo. App. 377; Sebree v. Patterson, 92 Mo. 458; Tibeau v. Tibeau, 19 Mo. 78.

Nebraska.—Blazier v. Johnson, 11 Neb. 406; Stalnaker v. Morrison, 6 Neb. 365; Wanser v. Lucas, 44 Neb. 759.

Nevada.—Rose v. Treadway, 4 Nev.

are not strictly code states, though they have adopted a reformed procedure,¹ as well as in others where the jurisdictions of law and equity are preserved,² though the scope of the statutory right is not the same in every state.³

459; *South End Min. Co. v. Tinney* (Nev. 1894), 35 Pac. Rep. 90.

New York.—*Carpenter v. Ottley*, 2 Lans. (N. Y.) 455; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 538; *Kenyon v. Youlan* (Supreme Ct.), 25 N. Y. St. Rep. 300; *Auburn City Bank v. Leonard*, 20 How. Pr. (N. Y. Supreme Ct.) 193; *Haire v. Baker*, 5 N. Y. 362; *Crary v. Goodman*, 12 N. Y. 266; *Phillips v. Gorham*, 17 N. Y. 275; *Hudson v. Hudson*, 1 Sheld. (N. Y.) 387; *Hunt v. Farmers' L. & T. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 416; *Foot v. Sprague*, 12 How. Pr. (N. Y. Supreme Ct.) 355; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Burget v. Bissell*, 5 How. Pr. (N. Y. Supreme Ct.) 193; *Dobson v. Pearce*, 12 N. Y. 164; *Hicksville, etc., R. Co. v. Long Island R. Co.*, 48 Barb. (N. Y.) 360; *Cramer v. Benton*, 60 Barb. (N. Y.) 225; *Dodson v. Pearce*, 12 N. Y. 157; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 90; *Meyer v. Lathrop*, 73 N. Y. 315; *Siemon v. Schurck*, 29 N. Y. 613; *Murray v. Walker*, 31 N. Y. 399; *McCreery v. Day*, 119 N. Y. 8.

North Carolina.—*Ten Broeck v. Orchard*, 74 N. Car. 409; *Turner v. Lowe*, 66 N. Car. 413; *Farmer's Bank v. Glenn*, 68 N. Car. 35; *Johnson v. McArthur*, 64 N. Car. 676; *Clark v. Clark*, 65 N. Car. 660; *Farmer v. Daniel*, 82 N. Car. 158; *Tuttle v. Harrill*, 85 N. Car. 462; *Stith v. Lookabill*, 76 N. Car. 465.

South Carolina.—*McAliley v. Barber*, 4 S. Car. 48.

South Dakota.—*Goldberg v. Kidd*, 5 S. Dak. 169.

Washington.—*Ryan v. Fergusson*, 3 Wash. 356.

Wisconsin.—*Prentiss v. Brewer*, 17 Wis. 642; *Fisher v. Moolick*, 13 Wis. 321; *Quinn v. Quinn*, 27 Wis. 172; *Wilson v. Jarvis*, 19 Wis. 601; *Mariner v. Milwaukee, etc., R. Co.*, 26 Wis. 88.

See also article ANSWERS IN CODE PLEADING, vol. 1, p. 837.

Effect of Statute of Limitations.—Where a right to demand relief in a court of equity is barred by the statute of limitations, the equitable defense upon such facts cannot be set up in an action at law. *Cramer v. Benton*, 60

Barb. (N. Y.) 225. See also *Keckley v. Union Bank*, 79 Va. 464. But it is also held to the contrary, that is, that where the answer sets up a good equitable defense and neither sets up, nor attempts to set up, a cause of action, nor asks for affirmative relief, a statute of limitations applied to the "cause of action" cannot be pleaded against such a defense. The office and purpose of the statute is to bar actions and not to suppress or exclude mere matters of defense. *Sebree v. Patterson*, 92 Mo. 458. See also *Dutertre v. Shalenberger*, 21 Nev. 507.

Before Justice of the Peace.—In *Arkansas* it is held that no jurisdiction is vested in a justice of the peace to administer equitable remedies. *Nattin v. Riley*, 54 Ark. 32; *Whitesides v. Kershaw*, 44 Ark. 380. But if the justice have jurisdiction of the subject-matter, he may apply and enforce equitable principles, and in a replevin suit the defendant may show that the bill of sale under which the plaintiff claims the right of possession of the personalty was intended as a mortgage. *Nattin v. Riley*, 54 Ark. 32.

1. *Fisher v. Burdett*, 21 W. Va. 630; *Grayson v. Buchanan*, 88 Va. 256; *Davis v. Teays*, 3 Gratt. (Va.) 275; *Watkins v. Hopkins*, 13 Gratt. (Va.) 743; *Dobson v. Culpepper*, 23 Gratt. (Va.) 352; *Burners v. Keran*, 24 Gratt. (Va.) 71.

2. *Walls v. Endel*, 20 Fla. 86; *Marshall v. Bumby*, 25 Fla. 623; *Johnston v. Allen*, 22 Fla. 225; *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 61; *Williams v. Peters*, 72 Md. 585. So, also, where the two jurisdictions are exercised in the same form. *Cake v. Peet*, 49 Conn. 505; *Light v. Stoeve*, 12 S. & R. (Pa.) 431; *Murphy v. Hubert*, 16 Pa. St. 57; *Morgan v. Bank of North America*, 8 S. & R. (Pa.) 87; *Steigleman v. Jeffries*, 1 S. & R. (Pa.) 478; *Peavy v. Hurt*, 32 Tex. 154; *Herrington v. Williams*, 31 Tex. 463; *Hays v. Bonner*, 14 Tex. 629; *Neil v. Keese*, 5 Tex. 23; *Mitchell v. Zimmerman*, 4 Tex. 78; *Fitzhugh v. Custer*, 4 Tex. 391; *Smith v. Doak*, 3 Tex. 218; *McCarty v. Moor*, 50 Tex. 287.

3. **Where a Legal Defense Is Available.**

In England the statutory rule permitting equitable defenses in actions at law has existed for some time.¹

Equitable Title in Ejectment.—Under statutes making equitable defenses available in actions at law, an equitable title may be set up in defense against the plaintiff's legal title, and many of the adjudications touching the right to plead equitable defenses in actions at law under such statutes have arisen in actions of ejectment, upon the question of the availability of an equitable title as a defense.²

—It is held in *Oregon* that if the defendant has a good defense at law he cannot be heard to set up an equitable defense. *White v. Allen*, 3 *Ore-*
gon 107.

In *Maryland*, section 83 of article 75 of the code allows the defendant to plead as an equitable defense in an action at law such facts as would entitle him to relief in a court of equity against the judgment for recovery, and unless the facts pleaded are such that a court of equity would restrain the execution of the judgment, they cannot be set up as an equitable defense in an action at law. *Williams v. Peters*, 72 *Md.* 585.

In *Massachusetts*.—Under the Statute of 1883, c. 223, § 14, "the defendant shall be entitled to allege as a defense any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such action." *Barton v. Radclyffe*, 149 *Mass.* 279; *Roberts v. White*, 146 *Mass.* 258; *Mason v. Mason*, 140 *Mass.* 65; *Sherman v. Galbraith*, 141 *Mass.* 442.

In *Rhode Island* the statute only enables the defendant at law to avail himself of any such defense as without the statute he could have availed himself of by suit in equity. If the defense set up is one which should not have been made available by a suit in equity, it is not a proper subject for an equitable plea. *Newport Hospital v. Carter*, 15 *R. I.* 285.

1. The right exists under section 83 of the Common Law Procedure Act (*Prothero v. Phelps*, 2 *Jur. N. S.* 175), and also under the Judicature Act of 1873 (*Gibbs v. Guild*, 9 *Q. B. Div.* 62).

2. See the cases cited in the preceding notes under this section. See also article EJECTMENT, *ante*, p. 260.

Estoppel in Pais.—In Ejectment.—Under the statutory right to plead equi-

table defenses, estoppel *in pais* may be pleaded in relation to land. *Clarke v. Huber*, 25 *Cal.* 594; *Clyburn v. McLaughlin*, 106 *Mo.* 524; *St. Louis v. Schulenburg*, etc., *Lumber Co.*, 98 *Mo.* 613; *Schuster v. Schuster*, 93 *Mo.* 438; *Allen v. Logan*, 96 *Mo.* 591; *Roeder v. Fouts*, 5 *Wash.* 136; *Moore v. Brownfield*, 10 *Wash.* 443; *Mariner v. Milwaukee*, etc., *R. Co.*, 26 *Wis.* 88. But under the statute permitting an equitable title to prevail over a legal title where there is written evidence of the contract, the terms of the statute must be complied with, that is, there must be a written contract, and estoppel *in pais* cannot be pleaded. *Suttle v. Richmond*, etc., *R. Co.*, 76 *Va.* 290.

In *Illinois* it is said that though there is considerable conflict of authority upon the subject, and while the tendency of modern decisions is to give effect to equitable estoppels affecting real estate in the legal forum as well as in courts of equity, yet the decided preponderance of authority is the other way, and that to allow such estoppels to avail in a court of law is a wide departure from the fundamental principles which distinguish legal from equitable rights. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 *Ill.* 519; *Baltimore*, etc., *R. Co. v. Illinois Cent. R. Co.*, 137 *Ill.* 9; *Blake v. Fash*, 44 *Ill.* 302.

In *Michigan* the rule is the same as in *Illinois*, and the equitable estoppel cannot be pleaded in ejectment. *Whiting v. Butler*, 29 *Mich.* 122; *Ryder v. Flanders*, 30 *Mich.* 336.

In the United States Courts.—In *Kirk v. Hamilton*, 102 *U. S.* 76, it was held that the defendant might show an equitable estoppel to defeat the plaintiff's legal title, the court saying that the doctrine originated in courts of equity, but that it had been applied in cases of law, *citing* with approval, *Dickerson v. Colgrove*, 100 *U. S.* 578.

b. AFFIRMATIVE RELIEF IN ADDITION TO NAKED DEFENSE.—In some of the states the defendant is entitled to use his equitable defense for the purpose of defeating the plaintiff's cause of action¹ and at the same time may seek thereunder any affirmative relief which under the facts he would formerly have been entitled to have under an appropriate pleading in a court of chancery.² In some states permitting equitable defenses, on the other hand, the use of such defenses is not permitted for the purpose of obtaining affirmative relief in any event, but it is restricted to the purpose of a mere defense.³

c. EQUITY IN PARTY UNCONNECTED WITH THE PLEADER.—A defendant cannot avail himself of an equity in another party with whom he fails to connect himself.⁴

But in the latter case the defense was allowed for the reason, as stated by Mr. Justice Swayne, that estoppel *in pais* had always been a good defense in actions at law.

1. *Suessenbach v. First Nat. Bank*, 5 Dak. 499; *Vail v. Jones*, 31 Ind. 469; *Woodruff v. Garner*, 27 Ind. 4; *East v. Peden*, 108 Ind. 95; *Thompson v. Hurley*, 19 Iowa 335; *Rogers v. Gwinn*, 21 Iowa 59; *Goodman v. Nichols*, 44 Kan. 22; *McAliley v. Barber*, 4 S. Car. 48; *Estes v. Fry*, 94 Mo. 266; *McClane v. White*, 5 Minn. 178; *Gates v. Smith*, 2 Minn. 32.

2. See cases cited in the preceding note.

Specific Performance.—A defendant in ejectment who is in possession under an executory contract may set up his equitable title as a defense in an action brought by the holder of the legal title, and may seek and obtain a specific performance of said contract. *Love v. Watkins*, 40 Cal. 548; *Dempsey v. Rhodes*, 93 N. Car. 127; *Turner v. Rives*, 75 Ga. 608; *Rosierz v. Van Dam*, 16 Iowa 177; *Cythe v. La Fontaine*, 51 Barb. (N. Y.) 190; *Friess v. Rider*, 24 N. Y. 367; *Bartlett v. Judd*, 21 N. Y. 200; *Pearsall v. Mayers*, 64 N. Car. 551; *Corrigan v. Bell*, 73 Mo. 57; *Barker v. Circle*, 60 Mo. 264.

Reformation of Deed.—The power of reforming instruments may be exercised by the court under the right to entertain equitable defenses as fully as a court of chancery could formerly have exercised that power. *Andrews v. Gillespie*, 47 N. Y. 487; *Bartlett v. Judd*, 21 N. Y. 202; *Hoppough v. Struble*, 60 N. Y. 430; *McClane v. White*, 5 Minn. 178; *Cake v. Peet*, 49 Conn. 501.

3. *Massachusetts.*—*Barton v. Radcliffe*, 149 Mass. 279; *Roberts v. White*, 146 Mass. 258; *Mason v. Mason*, 140 Mass. 65; *Sherman v. Galbraith*, 141 Mass. 442.

Oregon.—*Spaur v. McBee*, 19 Oregon 80.

Rhode Island.—*Hawkins v. Baker*, 14 R. I. 139; *American Bldg. Loan, etc., Co. v. Booth*, 17 R. I. 736.

In England, under the Common Law Procedure Act, no affirmative relief could be granted. *Wakley v. Froggatt*, 2 H. & C. 669; *Wodehouse v. Farebrother*, 5 El. & Bl. 277, 85 E. C. L. 277; *Phelps v. Prothero*, 16 C. B. 370, 81 E. C. L. 370; *Mines Royal Soc. v. Magnay*, 10 Exch. 489; *Perez v. Oleaga*, 11 Exch. 506; *Vorley v. Barrett*, 1 C. B. N. S. 225, 87 E. C. L. 225. And under the Judicature Act of 1873, it was held that the setting aside or the cancellation of deeds is assigned to the chancery division alone, but that under another section of that act jurisdiction is conferred upon the common pleas division to the extent that while the common pleas division cannot actually reform or cancel the instrument, it may treat the instrument as reformed and give judgment accordingly. *Mostyn v. West Mostyn Coal, etc., Co.*, 1 C. B. Div. 150. But in *Gibbs v. Guild*, 9 Q. B. Div. 67, it was held that under the Judicature Act of 1873, the Queen's Bench would administer every equity which a court of equity would formerly have administered and would grant every relief which such a court would formerly have granted under the old system.

4. *Wing v. De La Rionda*, 131 N. Y. 429; *Cagger v. Lansing*, 64 N. Y. 417; *Swink v. Motley*, 78 Tex. 580.

d. EFFECT OF WANT OF INTERESTED PARTIES—(1) *When Affirmative Relief is Sought*.—When the defendant seeks affirmative relief under the facts constituting an equitable defense, all parties whose rights may be affected by such affirmative relief should be before the court.¹

(2) *When Naked Defense is Pleaded*.—But when the equities are set up as a simple defense, without asking for affirmative relief, it is not necessary that all parties should be before the court who would be affected by affirmative relief.²

e. STATUTES APPLIED TO REPLICATIONS.—The rule created by the statutes allowing equitable defenses has also been extended to the plaintiff, and he has been permitted to set up an equitable reply to the defendant's plea.³

III. PLEADING EQUITABLE DEFENSES—1. *Necessity for Setting up Equities*—*a. THE RULE*.—As a general rule the defendant must plead an equitable defense or he cannot take advantage of it,⁴

In Indiana an outstanding equity in a third person must be such an equity as the defendant would have the right, by making proper parties, to invoke in a court of chancery for enforcement in his favor. *East v. Peden*, 108 Ind. 96.

1. *Hamilton v. Williford*, 90 Ga. 210; *Harris v. Vinyard*, 42 Mo. 571; *Gillespie v. Torrance*, 25 N. Y. 306; *Hicks v. Sheppard*, 4 Lans. (N. Y.) 335; *Schierloh v. Schierloh*, 72 Hun (N. Y.) 153.

In Georgia.—Under the code (section 3480) new parties cannot be made by the defendant in an action at law, and therefore a defendant cannot set up an equitable defense where it is necessary to introduce such parties. *Holliday v. Strickland*, 60 Ga. 152. See also *Webster v. Bond*, 9 Hun (N. Y.) 439; *Auburn City Bank v. Leonard*, 20 How. Pr. (N. Y. Supreme Ct.) 193.

2. *Seiberling v. Tipton*, 113 Mo. 373; *Harris v. Vinyard*, 42 Mo. 568; *Webster v. Bond*, 9 Hun (N. Y.) 439.

3. *Gibbs v. Guild*, 9 Q. B. Div. 59; *Vorley v. Barrett*, 1 C. B. N. S. 238, 87 E. C. L. 238.

In an action against a railroad company for damages for personal injuries, the railroad company pleaded a release. A reply was upheld which alleged that the release was obtained by fraud, unfairness, undue advantage in taking consideration, while the plaintiff was suffering great pain and mental anguish, and while he was ignorant of and unable to comprehend the meaning and purpose of the papers. *Bean v.*

Western North Carolina R. Co., 107 N. Car. 743.

In Ejectment—Equitable Title of Plaintiff.—The rule that the defendant may interpose an equitable defense to the plaintiff's legal title in ejectment does not extend to a plaintiff setting up a legal title in reply to a defense; in such case the plaintiff cannot meet the defendant's legal title with an equitable title. *Kahn v. Old Tel. Min. Co.*, 2 Utah 174. But it is held that the plaintiff may attack, upon equitable grounds, the deed under which the defendant claims. *Phillips v. Gorham*, 17 N. Y. 270; *Sheehan v. Hamilton*, 2 Keyes (N. Y.) 304.

4. **California**.—*Downer v. Smith*, 24 Cal. 124; *Blum v. Robertson*, 24 Cal. 129; *Clarke v. Huber*, 25 Cal. 594; *Cadiz v. Majors*, 33 Cal. 288; *McCauley v. Fulton*, 44 Cal. 356; *Manly v. Howlett*, 55 Cal. 97.

Colorado.—*Salsbury v. Ellison*, 7 Colo. 304.

Georgia.—*Gormerly v. Chapman*, 51 Ga. 422; *Wofford v. Wyly*, 72 Ga. 863.

Massachusetts.—*Sherman v. Galbraith*, 141 Mass. 442.

Missouri.—*Kennedy v. Daniels*, 20 Mo. 104; *LeBeau v. Armitage*, 47 Mo. 138; *Biffle v. Pullam*, 125 Mo. 114.

Montana.—*Lamme v. Dodson*, 4 Mont. 560; *Reece v. Roush*, 2 Mont. 590.

Nebraska.—*Colvin v. Republican Valley Land Assoc.*, 23 Neb. 76; *Upfalt v. Nelson*, 18 Neb. 533.

Nevada.—*Brady v. Husby*, 21 Nev. 455.

though under some circumstances the strict rule is relaxed in its application.¹ See also article ESTOPPEL.

b. **NAKED DEFENSE UNDER GENERAL DENIAL.**—In some of the states an equitable defense need not be specially pleaded where no affirmative relief is sought, but may be shown under the general denial in such a case.²

New York.—*Carpenter v. Ottley*, 2 Lans. (N. Y.) 455.³

North Carolina.—*Anderson v. Logan*, 105 N. Car. 266; *Hinton v. Pritchard*, 102 N. Car. 94.

Ohio.—*Stewart v. Hoag*, 12 Ohio St. 623.

South Carolina.—*Barber v. McAliley*, 4 S. Car. 52.

Wisconsin.—*Quinn v. Quinn*, 27 Wis. 172.

Virginia.—At common law, though fraud may be given in evidence to vacate a deed, if the fraud relates to the execution of the instrument, where the fraud was procured by fraudulent misrepresentation before its execution, relief could only be obtained in a court of equity. Under the fifth section of chapter 172 of the Code of 1860, the defendant might allege and show such fraud in the procurement of the contract as would entitle him to relief in equity. And in order to have such relief in an action at law, the fraud must be pleaded and cannot be shown under a plea of *non est factum*, or covenants performed, or covenants not broken. *Burtner v. Keran*, 24 Gratt. (Va.) 71. See also *Howell v. Cowles*, 6 Gratt. (Va.) 397. And see in general article FRAUD.

Verification.—Under the Va. Code of 1873, c. 168, § 5, a plea setting up as an equitable defense a mistake in the execution of notes for the amount thereof must be sworn to. *Keckley v. Union Bank*, 79 Va. 458.

Technicality of Plea—Florida.—Under the Florida Practice Act of 1861, a plea upon equitable grounds may be pleaded, but such a plea must begin with the words, "for defense on equitable grounds," or words to the like effect. *Walls v. Endel*, 20 Fla. 86.

Leave to Plead.—In *Garbutt v. Fawcus*, 1 Ch. Div. 155, it was held under the Judicature Act of 1873 that in order to plead an equitable defense at law, leave should be obtained from the judge of the common-law division.

1. Statement in Agreed Case—Waiver of Averments in Pleading.—While it is

necessary to set up an equitable defense in order that it should be available, yet where the defendant denies the right of possession in the plaintiff, and the action is decided upon an agreed case wherein facts are set forth which constitute the equitable defense, the court will treat the defense set up in the agreed case as authorized by and within the scope of the pleadings. *Farmer v. Daniel*, 82 N. Car. 159, citing *McRae v. Battle*, 69 N. Car. 98.

Defense Established by Plaintiff.—If the defense does not set up any equity, yet, if it is fully established by the plaintiff in attempting to make out his case in the first instance, the plaintiff will be deemed to have waived the absence of specific averment. *Salsbury v. Ellison*, 7 Colo. 304.

Amendment to Conform to Proof.—In *House v. Howell* (Supreme Ct.), 25 N. Y. St. Rep. 279, which was an action of ejectment, the court held that while the answer was not as full and complete as it might have been, it was sufficient to uphold the recovery, as no question was raised on the trial of the cause as to its sufficiency; and further that if the answer was insufficient, the referee had power to permit it to be amended so as to conform to the proof.

2. In California it was held that in an action of ejectment, where the defendant does not seek affirmative relief, his general denial of the plaintiff's ownership is sufficient to entitle him to show that the plaintiff's title consists only of a mortgage, though the deed is in form absolute, in order to defeat the plaintiff's action. *Hyde v. Mangan*, 88 Cal. 319, *disapproving Hughes v. Davis*, 40 Cal. 120; *Bruck v. Tucker*, 42 Cal. 352; *Pico v. Gallardo*, 52 Cal. 206, upon the ground that the contrary theory had been discarded by section 2925 of the Civil Code of California, and for the reason that a mortgage does not now convey the legal title. To the same effect, see *Smith v. Smith*, 80 Cal. 329.

Indiana.—*East v. Peden*, 108 Ind. 94.

2. How Equitable Defenses should be Pleaded—*a.* IN GENERAL.—

It is further held under statutes permitting equitable defenses that the pleading must set up such a defense with the same particularity as would be required if the facts were set up for affirmative relief in a bill in equity.¹

b. PRAYER FOR RELIEF—(1) *When Affirmative Relief is Sought.*—If the defendant wishes to obtain relief under the facts stated in his equitable defense, he should pray therefor.²

(2) *Naked Defense without Prayer for Relief.*—But a failure to ask for affirmative relief will not, as a general rule, preclude the defendant from relying upon the facts set up in his answer as a defense simply to defeat the plaintiff's cause of action,³ although

Kansas.—Clayton *v.* School Dist. No. 1, 20 Kan. 257; Hall *v.* Dodge, 18 Kan. 277; Wicks *v.* Smith, 18 Kan. 508.

Nebraska.—Dale *v.* Hunneman, 12 Neb. 221; Walton Plow Co. *v.* Campbell, 35 Neb. 175.

1. *California.*—Thayer *v.* White, 3 Cal. 229; Downer *v.* Smith, 24 Cal. 124; Blum *v.* Robertson, 24 Cal. 129; Davis *v.* Davis, 26 Cal. 23; Carpentier *v.* Oakland, 30 Cal. 443; Kentfield *v.* Hayes, 57 Cal. 411; Miller *v.* Fulton, 47 Cal. 147; McCauley *v.* Fulton, 44 Cal. 363; Bruck *v.* Tucker, 42 Cal. 352; Thomas *v.* Lawlor, 53 Cal. 405; Swasey *v.* Adair, 88 Cal. 179; Meador *v.* Parsons, 19 Cal. 295; Hartley *v.* Brown, 51 Cal. 467; Estrada *v.* Murphy, 19 Cal. 273; Bruck *v.* Tucker, 42 Cal. 352.

Georgia.—Ward *v.* Winn, 42 Ga. 323; Lowery *v.* Davidson, 44 Ga. 38; Holliday *v.* Strickland, 60 Ga. 151.

Missouri.—Carman *v.* Johnson, 20 Mo. 108; Ells *v.* Pacific R. Co., 51 Mo. 204.

Montana.—Ming *v.* Foote, 9 Mont. 222.

Utah.—Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

In England.—In Heap *v.* Marris, 2 Q. B. Div. 633, it is said that under the Judicature Act of 1873 a defendant may state his equitable defense in the same manner as was formerly permissible in stating such facts in a bill for relief. Grove, J., said: "In my opinion, it was the intention of the legislature, in introducing a new practice and procedure, to follow as guides the practice and procedure previously existing in the court of chancery."

Irrelevant and Redundant Matter.—Under the practice permitting equitable defenses, the court will follow the

rules of equity pleading as to irrelevant and redundant matter, unless it would have been liable to exceptions for impertinence. Burget *v.* Bissell, 5 How. Pr. (N. Y. Supreme Ct.) 193.

2. Crecelius *v.* Mann, 84 Ind. 147; Campbell *v.* Jones, 25 Minn. 158; Rose *v.* Treadway, 4 Nev. 459.

In Cythe *v.* La Fontain, 51 Barb. (N. Y.) 194, however, the court held that a prayer for affirmative relief was not necessary because, even in a complaint, the plaintiff is entitled to relief under the code as though he had prayed therefor in terms, though the complaint contains no such prayer, and further, because the ground of defense could be clearly understood by the answer, and the parties went to trial and actually tried the very question on which their rights depended, without objection.

3. *Indiana.*—East *v.* Peden, 108 Ind. 95.

Minnesota.—Campbell *v.* Jones, 25 Minn. 158.

Missouri.—Harris *v.* Vinyard, 42 Mo. 571; Barker *v.* Circle, 60 Mo. 264; Seiberling *v.* Tipton, 113 Mo. 373; Barlow *v.* Elliott, 56 Mo. App. 377; Leitensdorfer *v.* Delphy, 15 Mo. 160.

New York.—Cramer *v.* Benton, 60 Barb. (N. Y.) 225; Cavalli *v.* Allen, 57 N. Y. 508; Glacken *v.* Brown, 39 Hun (N. Y.) 298.

South Carolina.—McAliley *v.* Barber, 4 S. Car. 48.

Wisconsin.—Prentiss *v.* Brewer, 17 Wis. 642; Fisher *v.* Moolick, 13 Wis. 321.

In Wilson *v.* Hawthorne, 14 Colo. 530, the defendant interposed an equitable defense and sought affirmative relief by way of cross-complaint; the court held that "the plaintiff not hav-

in some cases it has been held necessary that affirmative relief should be asked before the defendant can avail himself of his equitable defenses.¹

3. Effect of Failure to Plead upon Subsequent Litigation.—In some

ing made answer or reply to the cross-complaint, his action should have been dismissed, * * * unless said defendant desired to have the case heard for the purpose of obtaining the affirmative relief sought by the cross-complaint."

In *Bridwell v. Brown*, 48 Ga. 179, the defendant in ejectment set up as an equitable defense a mistake in a deed, and a verdict for the defendant was upheld, though no formal reformation was asked or decreed.

1. In *Kenyon v. Quinn*, 41 Cal. 329, the court held that in order to make an equitable title available as a defense in an action of ejectment, it must be set up and appropriate relief must be asked. But in *Central Pac. R. Co. v. Mudd*, 59 Cal. 590, it was held that a defendant in ejectment might defend his possession by an equitable defense, if its continuance was not dependent on the performance of any condition of the contract under which the defendant entered. And in *Meeker v. Dalton*, 75 Cal. 154, it was held that the fact that the defendant called his pleading, in which he set up an equitable defense, a cross-complaint, would not make it such, and if such pleading contained a good equitable defense to the action, a judgment for the defendant would not be disturbed. Again in *Carpentier v. Oakland*, 30 Cal. 443, it was held that an answer setting up an equitable defense must be as fully pleaded as if the defendant were bringing a suit in equity, the court adding: "By this we do not desire to be understood as holding that he must conclude with a prayer for affirmative relief in order to make his defense available. If he is satisfied with a bare repulse of his adversary, there may be no good reason why he should be compelled to ask for more."

In *Indiana* it was held that equitable defenses predicated on mistakes in written instruments, and other defenses of like character, can only be made available as such by a prayer for affirmative relief. *Conger v. Parker*, 29 Ind. 380; *King v. Enterprise Ins. Co.*, 45 Ind. 43. But these cases were discussed in *East v. Peden*, 108 Ind. 95,

where it was said that it was doubtful whether the construction given to the statute authorizing equitable defenses in the cases cited was not too strict to subserve the purposes of equity.

In *Montana* it was contended, upon the authority of *Kenyon v. Quinn*, 41 Cal. 329, that the equitable title of the defendant should have been set up in a cross-bill demanding affirmative relief. The court held that the prayer for costs after the statement of an equitable defense was sufficient, and that the plaintiff could not complain of any injury by reason of the fact that the defendant had asked for less relief than he was entitled to, though it was not decided whether or not it was necessary that any relief should have been asked. *Reece v. Roush*, 2 Mont. 590.

In *Wisconsin* it has been held that affirmative relief must be asked. See *Weld v. Johnson Mfg. Co.*, 86 Wis. 552; *Lombard v. Cowham*, 34 Wis. 486; *DuPont v. Davis*, 35 Wis. 631; *Lawe v. Hyde*, 39 Wis. 345; *Stowell v. Eldred*, 39 Wis. 614; *Fuchs v. Treat*, 41 Wis. 404.

But in *Dobbs v. Kellogg*, 53 Wis. 452, while the general rule was stated to be as indicated above, it was held that the defendant might set up the equitable defense that the deed under which the plaintiff claimed was in fact a mortgage, without asking affirmative relief, because, under the law in Wisconsin, a mortgagee could not maintain ejectment, and if the fact were established on the trial, either before the court or a jury, it would be final and conclusive upon the title of the plaintiff, and the same reasons would not apply as control the cases above cited; to wit, that equitable defenses must be tried by the court and cannot be submitted to the jury, and also, that a court sitting in equity ought not to step aside from the jury trial of a strictly legal action of ejectment to try an equitable issue for no other purpose than merely to defeat the action, when by so doing the whole matter would be left open for future litigation in equity.

jurisdictions it is held that subsisting equitable defenses must be pleaded or they will be waived, and the party will be precluded from bringing another suit to obtain the relief which he might have had by setting up the equitable defense,¹ while in others it is held that the defendant is not compelled to plead his equitable defense, but may proceed by a separate suit to have his equities enforced.²

1. *Nichols v. Shearon*, 49 Ark. 80; *Reeve v. Jackson*, 46 Ark. 272; *Utah, etc., R. Co. v. Crawford*, 1 Idaho 771; *Tuttle v. Harrill*, 85 N. Car. 460; *Witte v. Lockwood*, 39 Ohio St. 143.

In *Georgia* it was held that while a party must interpose his equitable defense or he will be concluded by the judgment (*citing Field v. Price*, 52 Ga. 469), yet, where good reason exists why he should not set up such equitable defense, he will not be precluded; the court of equity will interpose and give him the aid necessary, and no better reason can exist than that from want of proper parties he could not set up his equitable defense in the action. *Radcliffe v. Varner*, 56 Ga. 224. See also *Auburn City Bank v. Leonard*, 20 How. Pr. (N. Y. Supreme Ct.) 196. But see *Allison v. Elder*, 45 Ga. 18.

In *Wisconsin* it was held that where the defendant in an action of ejectment was the complainant in an equitable suit begun before the action of ejectment for the purpose of establishing his equity, his remedy in the ejectment suit is to answer setting up the pendency of the equity suit at the time the action was commenced and then to apply to the court for a stay of proceedings until the equity suit can be tried; or, not choosing to apply for such a stay, he might proceed in the action at law with his equitable defense and leave his former equitable suit to be discontinued. *Quinn v. Quinn*, 27 Wis. 172; *Wilson v. Jarvis*, 19 Wis. 601.

Restraining Process.—In *Hunt v. Farmers' L. & T. Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 416, it was held that the defendant must avail himself of his equitable defense by interposing it in the legal action, if he wishes to do so at all, because it is no longer permissible to bring an action for the purpose of restraining the prosecution of another action pending in the same court. See also *Winfield v. Bacon*, 24 Barb. (N. Y.) 155; *Mordecai v. Stewart*, 37 Ga. 364.

Conflict between Old and New Practice.

—In *North Carolina* it was held that in an action brought before the code the defendant must be governed by the old practice; to wit, submit to a judgment and then invoke the equitable jurisdiction of the court for relief under his equitable defense. *Johnson v. McArthur*, 64 N. Car. 676.

2. *McCreary v. Casey*, 45 Cal. 128; *Lorraine v. Long*, 6 Cal. 452; *Hough v. Waters*, 30 Cal. 311.

The Field of Remedy is Enlarged and pre-existing remedies are not taken away by the practice under the code. *St. Louis v. Schulenburg, etc.*, *Lumber Co.*, 98 Mo. 616; *Elder v. Allison*, 45 Ga. 16; *Spaur v. McBee*, 19 Oregon 80; *Hill v. Cooper*, 6 Oregon 182; *Douglas v. Hastings First Nat. Bank*, 17 Minn. 35; *Knott v. Seamands*, 25 W. Va. 104.

Set-off and Counterclaim.—In *Witte v. Lockwood*, 39 Ohio St. 144, it is said that while a party must set up every defense which he has, both legal and equitable, there is an exception to the rule in the case of a counterclaim or set-off, in which event the defendant may bring a separate suit, and in a suit for the recovery of land the defendant has his election to plead his equitable title as a counterclaim or a defense, or to reserve it for a separate action. *Citing Halsey v. Carter*, 1 Duer (N. Y.) 667.

In *Kentucky*, under the statute, it was held that an ordinary judgment could not be annulled or modified by any order in an action by an equitable proceeding, except for a defense arising or discovered after the judgment was rendered, but such a judgment would not prevent a recovery of any claim, though such claim might have been used as a defense by way of a set-off or counterclaim in the action on which the judgment was recovered. *Emmerson v. Herriford*, 8 Bush (Ky.) 235; *Ross v. Ross*, 3 Metc. (Ky.) 274; *Chinn v. Mitchell*, 2 Metc. (Ky.) 92;

4. **Effect of Pleading as Concluding the Defendant.**—When the defendant sets up his equitable defense and the same is adjudicated, he is thereby precluded from bringing another suit to establish the same equities.¹

IV. DISPOSITION OF EQUITIES ON THE TRIAL—1. How Determined.—When an equitable defense is presented, it is to be decided by the court as if it were an equitable proceeding, before other issues are determined,² because the determination of the equitable issues in

Dorsey v. Reese, 14 B. Mon. (Ky.) 127. See also article SET-OFF AND COUNTER-CLAIM.

New York.—In *Siemon v. Schurck*, 29 N. Y. 613, the court said that although a defendant might have successfully defended an ejectment suit upon an equitable title, yet he would not be precluded from resorting to an equitable suit for more comprehensive relief.

In England the defendant may pursue either method under the statute. *Kingsford v. Swinford*, 5 Jur. N. S. 261; *Gompertz v. Pooley*, 5 Jur. N. S. 261; *Evans v. Bremridge*, 2 Kay & J. 174; *Waterlow v. Bacon*, L. R. 2 Eq. 514; *Ochsenbein v. Papelier*, L. R. 8 Ch. 697.

1. *St. Louis v. Schulenburg, etc.*, *Lumber Co.*, 98 Mo. 616; *Swope v. Weller*, 119 Mo. 556; *Preston v. Rickets*, 91 Mo. 323. See also *Knott v. Seamands*, 25 W. Va. 103; *Penn v. Reynolds*, 23 Gratt. (Va.) 523; *Sanders v. Branson*, 22 Gratt. (Va.) 364; *Kingsford v. Swinford*, 5 Jur. N. S. 261; *Gompertz v. Pooley*, 5 Jur. N. S. 261; *Evans v. Bremridge*, 2 Kay & J. 174; *Waterlow v. Bacon*, L. R. 2 Eq. 514.

Choice of Remedies—Election Conclusive.—Where the defendant in an ejectment suit elects to move after judgment in that suit for a rule to show cause why a writ of possession should issue, instead of filing a bill of injunction, he cannot afterwards litigate the same equitable questions under a bill in equity. *Gordinier's Appeal*, 89 Pa. St. 528. See also article ELECTION OF REMEDIES, *ante*, p. 360.

2. **California.**—*Downer v. Smith*, 24 Cal. 124; *Blum v. Robertson*, 24 Cal. 129; *Thayer v. White*, 3 Cal. 229; *Estrada v. Murphy*, 19 Cal. 248; *Arguello v. Edinger*, 10 Cal. 150; *Weber v. Marshall*, 19 Cal. 448; *Martin v. Zellerbach*, 38 Cal. 319; *Swasey v. Adair*, 88 Cal. 179; *Fish v. Benson*, 71 Cal. 434; *Lestrade v. Barth*, 19 Cal.

660; *George v. Silva*, 68 Cal. 273; *Smith v. Smith*, 80 Cal. 329; *Thomas v. Lawlor*, 53 Cal. 407.

Dakota.—*Suessenbach v. First Nat. Bank*, 5 Dak. 477.

Iowa.—*Van Orman v. Spafford*, 16 Iowa 186.

Kansas.—*Goodman v. Nichols*, 44 Kan. 22.

Kentucky.—*Smith v. Moberly*, 15 B. Mon. (Ky.) 73.

Missouri.—*Allen v. Logan*, 96 Mo. 598; *Wolff v. Schaeffer*, 4 Mo. App. 367, affirmed in 74 Mo. 154; *Jones v. Moore*, 42 Mo. 419.

Nevada.—*South End. Min. Co. v. Tinney* (Nev. 1894), 35 Pac. Rep. 90. **Oregon.**—*Delay v. Chapman*, 2 Oregon 245.

South Carolina.—*Cooper v. Smith*, 16 S. Car. 333; *Smith v. Bryce*, 17 S. Car. 539; *Adickes v. Lowry*, 12 S. Car. 108; *Gadsden v. Whaley*, 9 S. Car. 147; *Sloan v. Westfield*, 11 S. Car. 447.

Utah.—*Steele v. Boley*, 7 Utah 64; *Kimball v. McIntyre*, 3 Utah 81; *Kahn v. Old Tel. Min. Co.*, 2 Utah 174.

Wisconsin.—*Lombard v. Cowham*, 34 Wis. 486; *Cornelius v. Kessel*, 58 Wis. 243; *Dobbs v. Kellogg*, 53 Wis. 448.

Character of Defense to Which the Rule Applies.—In *California* it has been held that the only equitable defense which is required to be decided before the issues of law is such an equitable defense as would entitle the defendant to bring a separate action thereon. *Swasey v. Adair*, 88 Cal. 179. See also *Smith v. Smith*, 80 Cal. 329; *Lombard v. Cowham*, 34 Wis. 486.

Equitable Issues to Jury.—In the trial of an action of ejectment, wherein the defendant resists the recovery under an equitable title against a clear legal title, the judge becomes a chancellor and the jury are simply his advisors, and if the evidence on which the allegations of the equities rest is such as to leave his right to relief in doubt, or is

favor of the defendant would put an end to the litigation and obviate the necessity of trying the legal issues involved.¹

2. Burden of Proof.—When the defendant in a legal action relies upon an equitable defense to defeat the plaintiff's claim, the burden of proof is upon him to establish his defense.²

such as a chancellor would not regard as sufficient to justify a decree, it ought not to be left for the jury to pass upon. *Wylie v. Mansley*, 132 Pa. St. 67, citing *Moore v. Small*, 19 Pa. St. 461; *Piersol v. Neill*, 63 Pa. St. 420; *Burger v. Dankel*, 100 Pa. St. 113; *Hess v. Calender*, 120 Pa. St. 138.

Verdict of Jury Not Conclusive upon Court.—The verdict of the jury is only for the enlightenment of the court, *Adickes v. Lowry*, 12 S. Car. 108; *Gadsden v. Whaley*, 9 S. Car. 147; *Sloan v. Westfield*, 11 S. Car. 447; *Weber v. Marshall*, 19 Cal. 447, and is not conclusive upon the court. *Wallace v. Maples*, 79 Cal. 433; *Freeman v. Stephenson*, 63 Cal. 499; *Tabor v. Sullivan*, 12 Colo. 136. And see in general, article ISSUES TO THE JURY.

1. See cases cited in preceding note.

In *Van Orman v. Spafford*, 16 Iowa 186, the court states the rule to be that equitable issues should first be disposed of, and if they are found for the defendant, the case at law is terminated; if they are found against the defendant and there are legal issues pending, then such legal issues should next be disposed of, but if there are no such legal issues, and the equitable issues are found against the defendant, then the case is terminated in favor of the plaintiff.

Effect upon Legal Rights.—Pendency of an equitable issue will not so change the nature of the action as to prevent the plaintiff from having legal issues tried in the ordinary way. *Webster v. Bond*, 9 Hun (N. Y.) 439; *Wolff v. Schaeffer*, 4 Mo. App. 367; *Jones v.*

Moore, 42 Mo. 419; *Swasey v. Adair*, 88 Cal. 179; *Weber v. Marshall*, 19 Cal. 448; *Smith v. Moberly*, 15 B. Mon. (Ky.) 73.

Waiver of Error in Manner of Trial.—The defendant having been silent when he should have spoken, and having assented to the trial of the whole cause together, cannot be heard after the trial to urge that his equitable defense should first have been tried. *George v. Silva*, 68 Cal. 273; *Van Orman v. Merrill*, 27 Iowa 481; *Jones v. Moore*, 42 Mo. 419.

But in *South Carolina* a cause was submitted to the jury without objection, and a judgment was entered by the clerk upon the verdict of the jury. This judgment was set aside upon the ground that it was unauthorized, because the defense was an equitable one and should have been passed upon by the judge, and the finding of the jury was simply to aid the conscience of the court. In this case there was no objection to the trial of the whole case together. *Cooper v. Smith*, 16 S. Car. 333.

2. California.—*McCauley v. Fulton*, 44 Cal. 356; *Wallace v. Maples*, 79 Cal. 433.

Missouri.—*Ledbetter v. Ledbetter*, 88 Mo. 62; *Schuster v. Schuster*, 93 Mo. 443.

New York.—*Dyke v. Spargur*, 143 N. Y. 653; *Carpenter v. Ottley*, 2 Lans. (N. Y.) 455; *Schierloh v. Schierloh*, 72 Hun (N. Y.) 153.

Pennsylvania.—*Waln v. Smith*, 1 Phila. (Pa.) 362; *Wylie v. Mansley*, 132 Pa. St. 67.

EQUITY PLEADING AND PRACTICE.

I. SOURCE OF EQUITY PLEADING AND PRACTICE, 813.

II. CONSTRUCTION OF STATUTES REGULATING PRACTICE, 815.

CROSS-REFERENCES.

As to Want of Jurisdiction Generally, see articles *DEMURRERS IN CHANCERY*, vol. 6, p. 399; *JURISDICTION*.

Want of Equity, or Adequate Remedy at Law, see articles *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 883; *DEMURRERS IN CHANCERY*, vol. 6, p. 391; *DISMISSAL, DISCONTINUANCE, AND NONSUIT*, vol. 6, p. 823; *JURISDICTION; PLEAS IN EQUITY; REMEDY AT LAW*.

Federal Practice in Equity. Pleading and practice in the federal courts will be treated in the article *UNITED STATES COURTS* so far as it shall not have been sufficiently noticed in the general pleading and practice titles. Thus, the relation of federal chancery practice to the chancery practice in the state courts is considered to some extent in the article *DECREES*, vol. 5, p. 1004.

Parties in Chancery. The general principles governing the subject of parties will be found in the article *PARTIES*, but the application of those principles to bills for particular purposes receives attention under the titles of the various bills or proceedings. See, for instance, articles *ACCOUNTS AND ACCOUNTING*, vol. 1, p. 104; *ASSIGNMENT FOR BENEFIT OF CREDITORS*, vol. 2, p. 865; *BILLS OF EXCEPTIONS*, vol. 3, p. 381; *BILLS OF REVIEW*, vol. 3, p. 590; *FORECLOSURE; SPECIFIC PERFORMANCE*.

Capacity of Parties to Sue and be Sued, see articles *INFANTS; LUNATICS; MARRIED WOMEN*.

Process for Appearance, and Appearance, see articles *APPEARANCES*, vol. 2, p. 588; *PROCESS FOR APPEARANCE*.

Chancery Pleadings Generally, see articles *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 863; *BILLS IN EQUITY*, vol. 3, pp. 336, 338, *et seq.*, and the cross-references there given to particular kinds of bills; *CROSS-BILLS*, vol. 5, p. 624; *DEMURRERS IN CHANCERY*, vol. 6, p. 391; *DISCLAIMERS*, vol. 6, p. 721; *INFORMATIONS IN EQUITY; PLEAS IN CHANCERY; REPLICATIONS; SUPPLEMENTAL PLEADINGS*.

Petitions and Motions, see articles *MOTIONS; PETITIONS*, and the articles on proceedings in which petitions or motions are commonly resorted to, such as *ASSISTANCE, WRIT OF*, vol. 2, p. 982, *et seq.*; *BILLS OF REVIEW*, vol. 3, p. 587; *DECREES*, vol. 5, p. 1022; *INTERVENTION; RECEIVERS*.

Decrees and Orders, see articles *DECREES*, vol. 5, pp. 946, 949, and the cross-references there given, and *ORDERS*.

Fraudulent Conveyances, see article *CREDITORS' BILLS AND FRAUDULENT CONVEYANCES*, vol. 5, p. 388.

Discovery, Production, and Inspection of Books and Papers in Chancery, see article *DISCOVERY, PRODUCTION, AND INSPECTION*, vol. 6, p. 728.

Miscellaneous. For other matters relating to equity pleading and practice, see the articles *ABATEMENT IN PLEADING*, vol. 1, p. 40; *ACCOUNTS AND ACCOUNTING*, vol. 1, p. 83; *AFFIDAVITS*, vol. 1, p. 309; *AMENDMENTS*, vol. 1, p. 458; *ANOTHER SUIT PENDING*, vol. 1, p. 750; *APPEALS*, vol. 2, p. 1; *ASSIGNMENT FOR BENEFIT OF CREDITORS*, vol. 2, p. 865; *ASSIGNMENT OF ERRORS*, vol. 2, p. 930; *ASSISTANCE, WRIT OF*, vol. 2, p. 975; *AWARDS*, vol. 3, p. 126; *BILLS OF PARTICULARS*, vol. 3, p. 518; *CHAMBERS AND VACATION*, vol. 4, p. 336; *CHattel MORTGAGES*, vol. 4, p. 507; *CONSOLIDATION OF ACTIONS*, vol. 4, p. 673; *CONSTRUCTION OF PLEADINGS*, vol. 4, p. 741; *COPYRIGHT*, vol. 5, p. 16; *COSTS*, vol. 5, p. 100; *DEFAULTS*, vol. 6, p. 1; *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 246; *DEPOSITIONS*, vol. 6, p. 471; *DISCOVERY, PRODUCTION, AND INSPECTION*, vol. 6, p. 728; *DISMISSAL, DISCONTINUANCE, AND NONSUIT*, vol. 6, p. 823; *DISTRINGAS, WRIT OF*, ante, p. 33; *DIVORCE*, ante, p. 49; *DOWER*, ante, p. 148; *ELECTION OF REMEDIES*, ante, p. 360; *EQUITABLE ASSIGNMENTS*, ante, p. 730; *EQUITABLE ATTACHMENT*, ante, p. 787; *EXECUTORS AND ADMINISTRATORS*; *FINDINGS OF COURT*; *FORECLOSURE*; *FRAUD*; *FRAUDS, STATUTE OF*; *GUARDIAN AND WARD*; *HEARING*; *HEIRS AND DEVISEES*; *INFANTS*; *INJUNCTIONS*; *INSOLVENCY*; *INTERPLEADER*; *INTERVENTION*; *ISSUES TO THE JURY*; *JUDICIAL SALES*; *LACHES*; *LEGACIES*; *LIENS*; *LOST PAPERS AND INSTRUMENTS*; *LUNATICS*; *MANDATE*; *MARRIED WOMEN*; *MARSHALING ASSETS*; *MECHANICS' LIENS*; *MISTAKE*; *MULTIFARIOUSNESS*; *MULTIPLICITY OF SUITS*; *NE EXEAT*; *NEW TRIAL*; *NUISANCES*; *PARTITION*; *PARTNERSHIP*; *PATENTS*; *PRAYERS FOR RELIEF*; *PUBLICATION*; *RECEIVERS*; *RECORDS*; *REDEMPTION*; *REFERENCES*; *RESCISSION, REFORMATION AND CANCELLATION*; *REHEARING*; *REVIVOR*; *SCANDAL AND IMPERTINENCE*; *SEQUESTRATION*; *SERVICE OF PROCESS AND PAPERS*; *SHAM AND FRIVOLOUS PLEADINGS*; *SPECIFIC PERFORMANCE*; *STOCK AND STOCKHOLDERS*; *SUBROGATION*; *SUPERSEDEAS*; *SURCHARGING AND FALSIFYING*; *TRADE-MARKS*; *TRUSTS AND TRUSTEES*; *USURY*; *VARIANCE*; *VERIFICATION*; *WASTE*; *WILLS*.

I. SOURCE OF EQUITY PLEADING AND PRACTICE—High Court of Chancery.—In those states where the equity jurisprudence derived from England is administered, the practice of the English High Court of Chancery prevails, so far as it is reasonably applicable, unless that practice has been modified by statutes or rules of court, or blended with the common-law practice in codes of procedure;¹

1. In Alabama the 7th Rule of Chancery Practice provides that "in all cases where the statutes of this state, the decisions of this court, or the rules

and the practice in the High Court of Chancery of England has been expressly declared by the rules in the federal courts to be

prescribed by it, do not apply, the practice in chancery shall be regulated by the rules, orders, and practice of the English court of chancery (prior to and including those of May, 1845, but not afterwards), so far as the same may reasonably be applied, consistently with the institutions of this country, not as positive rules, but as furnishing proper analogies to regulate the practice." That the English practice is not peremptory but merely advisory, see *Goodrich v. Goodrich*, 44 Ala. 670; *Childress v. Harrison*, 47 Ala. 556.

"Neither the English practice of setting down a cause for hearing at the term after publication is made and issuing a subpoena *ad audiendum judicium*, nor that in respect to speeding causes, etc., has ever been adopted or followed in this state." *Hodges v. Wise*, 16 Ala. 512.

In *Arkansas* it was said in a chancery case that "the rigid application of the rules of English practice to our courts would in many cases be wholly impracticable, and if allowed would work most manifest injustice and wrong." *Nicks v. Rector*, 4 Ark. 275.

In *Florida*, Rev. Stat., § 1425, provides that "in the absence of provisions of the law or rules of practice of this state, the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court thereof under the act of Congress of the 8th of May, 1792, shall be rules for the practice of the courts of this state when exercising equity jurisdiction; and when the rules of practice so directed by the Supreme Court do not apply, the practice of the courts shall be regulated by the practice of the High Court of Chancery of England." See *Bellamy v. Bellamy*, 4 Fla. 248.

In *Illinois*, Rev. Stat., c. 22, § 1, provides that the circuit courts of the state and the superior court of Cook county, "in all causes of which they may have jurisdiction as courts of chancery, shall have power to proceed therein, * * * where no provision is made by this act, according to the general usage and practice of courts of equity." See *National Park Bank v. Halle*, 41 Ill. App. 21.

"The practice in chancery in this

state is understood to be substantially the same as in the English chancery, modified and changed in some particulars by our statute." *Fulton County v. Mississippi*, etc., R. Co., 21 Ill. 365. See also *Mahar v. O'Hara*, 9 Ill. 427.

In *Greenup v. Porter*, 3 Ill. 417, it was said: "The principles in relation to the chancery practice in England have no application to cases of appeals here," and it was held that by the uniform practice of the court from its first organization a writ of error would lie to the Circuit Court sitting as a court of chancery.

In *Maryland* "the constitution and principles of the court of chancery, * * * as in New York, originally emanated from the court of chancery in England, from which source we derive our principal stock of information in chancery jurisprudence; and the general rules governing the court of chancery there, so far as they are applicable, have been adopted here, and are constantly practised upon." *Thompson v. M'Kim*, 6 Har. & J. (Md.) 332.

"It is well known that the court of chancery of Maryland had, from the very outset, and always, governed itself according to the principles and rules of its prototype, the court of chancery of England." *Per* Chancellor Bland in *Ringgold's Case*, 1 Bland. (Md.) 18.

"The English course of proceeding * * * has been, and unless repealed is now, the rule of this court." *Carroll v. Waring*, 3 Gill & J. (Md.) 501.

"The chancery or equity pleadings of this state are not held to a rigid compliance with the rules of English practice." *Ridgely v. Bond*, 18 Md. 450. See also *Chase v. M'Donald*, 7 Har. & J. (Md.) 198.

Massachusetts.—In *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 510, it was said that "by establishing a court of equity with general jurisdiction, without prescribing the forms of process or the manner of proceeding, such a court would necessarily adopt the principles and rules of practice of courts of a like character in England, because that always has been the source to which the courts here have been obliged to apply for principles and rules of practice in all cases in which

the foundation of the equity practice in those courts.¹

House of Lords.—In the Court of Errors and Appeals of New Jersey, the practice of the House of Lords in England has been substantially adopted.²

II. CONSTRUCTION OF STATUTES REGULATING PRACTICE.—Where separate courts of chancery exist, it has been held that statutes regulating matters of practice or the course of proceeding were not to be considered as applying to those courts unless they were

our legislature have granted judicial power and authority without limiting or prescribing the form, manner, and extent in which it shall be exercised," and that the chancery courts of Great Britain "without doubt are the prototypes of chancery tribunals in the United States and in the several states wherein such tribunals exist."

In *New Jersey*, "by both the ordinance of Lord Cornbury and that of Governor Franklin, the ordinances of Lord Bacon were made the law of this court. Those ordinances both ordain that the court of chancery established in the province or colony of New Jersey shall hear and determine all causes and suits which come before it as near as may be according to the usage and custom of the High Court of Chancery in the Kingdom of England." *Jones v. Davenport*, 45 N. J. Eq. 82.

In *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, touching the practice in chancery the court said: "In absence of any statutory regulation or established practice or court rule of our own, the English practice has always prevailed in this court." *Citing West v. Paige*, 9 N. J. Eq. 203; *Schenck v. Conover*, 13 N. J. Eq. 33; *Ratzer v. Ratzer*, 29 N. J. Eq. 162; *Hitchcock v. Rhodes*, 42 N. J. Eq. 495, to which may be added *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398; *Jones v. Davenport*, 45 N. J. Eq. 82, and *Morris v. Taylor*, 23 N. J. Eq. 134.

North Carolina.—"The existing law and rules of practice in this state * * * for the review or rehearing of decrees in the court of equity were the same as in the English chancery." *Runnion v. Ramsay*, 80 N. Car. 63.

In *Pennsylvania* equitable relief is granted only in the courts of law, and the procedure is regulated rather by the rules prescribed by the Supreme Court than by the practice in the English chancery.

In the **Territorial Courts** the chancery practice is primarily governed by the

United States Process Act of 1792, which is still in force and provides that the forms of writs, executions, and other process, and the forms and modes of proceeding in suits in equity, shall be "according to the principles, rules, and usages which belong to courts of equity * * * as contradistinguished from the courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." In *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648, *disapproving* some earlier cases, it was held that "in case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper." See further *Palmer v. Cowdrey*, 2 Colo. 1; *Garrison v. Cheeney*, 1 Wash. Ter. 489.

1. See Supreme Court Rule 3, Equity Rule 90, Circuit Court of Appeals Rule 8, and article UNITED STATES COURTS.

2. *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398; *Newark, etc., R. Co. v. Newark*, 23 N. J. Eq. 515, where the court said: "In the absence of modifications arising from statute or an established course of proceeding, the practice of this court is in conformity with that of the House of Lords. On all unsettled points this is the model to which we recur. With the exceptions just mentioned, the established English routine is the law of this court, and such law is as obligatory, until altered by statute, as are any of the general principles of the common law."

specially mentioned.¹ But provisions in the codes of procedure, so far at least as the codes have abolished the distinction between legal and equitable forms of proceeding, are applicable alike to legal and equitable actions.²

1. *Marsh v. Grist*, Phil. Eq. (N. Car.) 350, *quoting* from *Sandridge v. Spurgen*, 2 Ired. Eq. (N. Car.) 269.

Courts with Law and Equity Sides.—In *Smith v. Newland*, 40 Ill. 100, it was said that the twentieth section of the Practice Act, relating to bills of exceptions, had been always understood to

apply only to the common-law side of the court.

2. In *Blatchley v. Coles*, 6 Colo. 82, it was held that a section of the code in relation to appeals, which provided for the preservation of matter *dehors* the record by a bill of exceptions, was applicable to cases of an equitable as well as to those of a legal nature.

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CROSS-REFERENCES.

As to Writ of Error Coram Nobis or Coram Vobis, see article CORAM NOBIS AND CORAM VOBIS, vol. 5, p. 26.

Certiorari as a Substitute for Writ of Error, see article CERTIORARI, vol. 4, p. 1.

Writ of Error as a Remedy to Review Judgments and Decisions in Particular Cases, see also the special articles in this work upon the various subjects involved, as CONSPIRACY, vol. 4, p. 736; CONTEMPT, vol. 4, p. 809, etc.

For other Articles Dealing with Appellate Procedure to be Considered in Connection with this Subject, see AMOUNT IN CONTROVERSY, vol. 1, p. 702; APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 963; APPEALS, vol. 2, p. 1; ASSIGNMENT OF ERRORS, vol. 2, p. 920; BILLS OF EXCEPTIONS, vol. 3, p. 374; BRIEFS, vol. 3, p. 710; CASE MADE ON APPEAL, vol. 3, p. 879; CERTIFIED CASES, vol. 3, p. 918; CERTIORARI, vol. 4, p. 1; EXCEPTIONS AND OBJECTIONS; SUPERSEDEAS AND STAY OF PROCEEDINGS.

I. DEFINITION.—A writ of error is a writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require.¹

1. Black's Law Dictionary.

MacLachlan v. McLaughlin, 126 Ill. 427; Allen v. Savannah, 9 Ga. 293; Beatty v. Chapline, 2 Har. & J. (Md.) 31.

"What is a writ of error? A commission from the government to certain judges, * * * enabling them to revise the proceedings of an inferior court." Foute v. State, 3 Hayw. (Tenn.) 98.

At Common Law.—A writ of error at common law was a process issued out of chancery to remove the record from an inferior to a superior court, with a commission to the judges of the reversing tribunal to examine the proceedings and to affirm or reverse the judgment according to law. Gibson v. Rogers, 2 Ark. 334. See also Jaques v. Cesar, 2 Saund. 100.

"A commission by which the judges

II. PURPOSE.—A writ of error answers a twofold purpose. It acts as a certiorari to remove the record from the inferior court,¹

of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law." Cohens v. Virginia, 6 Wheat. (U. S.) 409.

Distinguished from Writ of Error Coram Nobis.—"A writ of error is an original writ, and in England issues out of the court of chancery, and runs in the name of the king. With us it issues from this court, and under our present judicial organization can issue from no other. It is 'in the nature, as well of a certiorari to remove a record from an inferior into a superior court, as of a commission to the judges of the superior court to examine the record, and to affirm or reverse it according to law.' 2 Saund. 101, *a*. The writs *coram nobis* and *coram vobis* differ from a writ of error in two particulars: (1) They contain no certiorari clause, for there is no record to be certified. (2) They have no return day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact and for errors in the process, or through the default of the clerks. 1 Arch. Prac. 234. They do not lie when the error is in the judgment of the court itself, and not in the process. 1 Arch. Prac. 235. The writ is called a writ of error *coram nobis* in the King's Bench because the record and proceedings are stated in the writ to remain *before us* (*coram nobis*); that is, in the Court of King's Bench. 1 Arch. Prac. 234; Jaques v. Cesar, 2 Saund. 101, *a*. The king, by a fiction of law, is supposed to preside in person in that court. In the Common Pleas, where the king is not supposed to preside, it is called a writ of error *coram vobis*, because the record and proceedings are stated in the writ to remain *before you* (*coram vobis*); that is, the king's justices. 2 Tidd Prac. 1056, note y. See a writ of error *coram vobis* in the Common Pleas in Arch. Forms, 243; 2 Dunlap's Prac. 1125. In the King's Bench the writ *coram nobis* also lies on the judgment of an inferior court after the record has been removed into that court by a writ of error that has been quashed, or has abated, the writ in that court, in such

case, answering all the purposes of a second writ of error. The reason of this is that the record of the inferior court, and not a transcript of the record, is returned, or is supposed to be, although a transcript only is sent up. Saunders says: 'The record itself is supposed to be removed, that it may remain as a precedent and evidence of the law in similar cases.' 2 Saund. 101, *m*. But a writ *coram vobis* will not lie in the Exchequer Chamber on the abatement of a writ of error there. 'If a writ of error brought in the Exchequer Chamber upon a judgment in the King's Bench abate by death or otherwise, no writ *coram nobis* (*vobis*) lies there, for the record itself is not removed there by the writ of error, but only a transcript, and therefore there must be a new writ of error.' Jaques v. Cesar, 2 Saund. 101, *b*. The judgment for plaintiff for an error of fact on a writ *coram nobis* or *coram vobis* is that the judgment be *revoked*; on a writ of error, that it be *reversed*. Camp v. Bennett, 16 Wend. (N. Y.) 48." Teller v. Wetherell, 6 Mich. 49. Compare, for a further dissertation on this subject, U. S. v. Plumer, 3 Cliff. (U. S.) 59; and see article CORAM NOBIS AND CORAM VOBIS, vol. 5, p. 26. 1. Welsh v. Brown, 42 N. J. L. 323; Ex p. Ralston, 119 U. S. 613; State Bank v. Ruddell, 10 Ark. 126.

Distinguished from Certiorari.—At common law "a certiorari is said to lie in all cases where a writ of error does not. * * * It lies to remove indictments from inferior jurisdictions to the Court of King's Bench for trial; also to reverse the doings of inferior jurisdictions, whose powers are given them by statute, whose mode of proceeding is unknown to the common law, and who render their doings effectual, not by a judgment, technically called, but by orders to be executed in a summary way, such as orders for the laying out of highways and for the removal of paupers." Huse v. Grimes, 2 N. H. 210.

A certiorari may remove the record in any stage of the proceedings at the discretion of the court; error is of right, and lies only after judgments. Drowne v. Stimpson, 2 Mass. 441. See, in general, article CERTIORARI, vol. 4, p. 1.

and as a commission to the superior court to examine into the record and to affirm or reverse according to law.¹

III. NECESSITY.—The issuance of the writ is accordingly almost universally held essential to vest jurisdiction of the cause in the court of error.²

Cannot be Waived.—It is matter of substance, and not of form,³

Quashal does Not Affect Certiorari.—If the record be properly described, the certiorari part of the writ is good and the record is removed, and will remain in the superior court though the writ is quashed. *Welsh v. Brown*, 42 N. J. L. 324.

1. *Welsh v. Brown*, 42 N. J. L. 323.

2. *Alabama*.—*Koin v. McIlvaine*, 1 Port. (Ala.) 285.

Colorado.—*Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.

Florida.—*Rabon v. State*, 7 Fla. 9.

Georgia.—*Pendley v. State*, 87 Ga. 186.

Missouri.—*State v. Kanooster*, 12 Mo. App. 589; *Lynch v. Kelley*, 6 Mo. App. 601.

New Mexico.—*Chisum v. Ayers*, 4 N. Mex. 48.

Wisconsin.—*Rolke v. State*, 12 Wis. 570.

United States.—*Washington County v. Durant*, 7 Wall. (U. S.) 694; *Hodge v. Williams*, 22 How. (U. S.) 87; *Mussina v. Cavazos*, 6 Wall. (U. S.) 356; *Edmonson v. Bloomshire*, 7 Wall. (U. S.) 306; *Carroll v. Dorsey*, 20 How. (U. S.) 207; *U. S. v. Curry*, 6 How. (U. S.) 113; *Stevens v. Clark*, 62 Fed. Rep. 323; *Brooks v. Norris*, 11 How. (U. S.) 204; *Bondurant v. Watson*, 103 U. S. 278; *Ex p. Ralston*, 119 U. S. 613; *Stevens v. Clark*, 62 Fed. Rep. 321; *Smith v. Ferst*, 66 Fed. Rep. 798.

In *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173, it was said: "The Supreme Court of the United States has uniformly held that the issuance of a writ of error is essential to the exercise of its appellate jurisdiction."

In the case of *Rolke v. State*, 12 Wis. 570, the court says: "Suppose an inferior court should send up a record of a cause to the Supreme Court without any writ whatever. No one would insist, because the papers were filed with the clerk of the Supreme Court, that *ipso facto* the Supreme Court had jurisdiction; the court of review must issue its writ, running to the inferior court, and by

means of its process bring the cause before it in a proper manner."

So, where a writ of error is so defective as to be void, as where no power to amend exists by statute, parties cannot amend by consent. *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 174; *Carroll v. Dorsey*, 20 How. (U. S.) 204. See also *infra*, XXIII. *Amendment of the Writ*.

In *Pendley v. State*, 87 Ga. 186, it was said of the jurisdiction of the Supreme Court of Georgia: "Save by writ of error it has no jurisdiction whatever. The Act of 1889 (Pamphlet, p. 114) declares 'that no case shall be taken to the Supreme Court by bill of exceptions except in the following manner.' It proceeds to specify the manner, and in so doing says that the judge 'shall require the clerk to send up only so much of the record as he may certify is material.' It prescribes the form of the certificate, and, according to that form, one of the facts to which the judge must certify is that the bill of exceptions 'specifies all of the record material to a clear understanding of the errors complained of.' The order which is to be given to the clerk in the certificate is 'to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted,' etc. The certificate of the judge to the bill of exceptions is the only writ of error provided for by the law, and consequently if the certificate does not substantially comply with the requirements of the statute there is no writ of error at all, and this court has no jurisdiction of the case, unless defects in the writ are waived, either expressly or by acquiescence."

3. *Hodge v. Williams*, 22 How. (U. S.) 87.

Contra.—In *Illinois* the rule was modified in the case of *Birkby v. Solomons*, 15 Ill. 122, the court saying: "Where the record is brought up by the party and filed, properly certified, in the first instance, the writ of error:

and the parties cannot, by stipulation, in the absence of the writ, confer jurisdiction,¹ or dispense by consent with the writ of error entirely in a case where it properly lies, as it is directed to the court below, and not to the parties.²

On Motion of the Court.—Nor can the appellate court assume jurisdiction of the case of its own motion in the absence of the required writ.³

IV. CHARACTER OF THE PROCEEDING—1. As a New Action—Prevailing Rule.—It is a well-established principle of appellate procedure that a writ of error is an independent action in the nature and with the general characteristics of a new and original suit.⁴

is unnecessary, or at most is but matter of form.”

1. *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.

2. *Colorado*.—*Molandin v. Colorado Cent. R. Co.*, 3 Colo. 175; *Harvey v. Travelers Ins. Co.*, 18 Colo. 354; *Crane v. Farmer*, 14 Colo. 294; *Meyer v. Brophy*, 15 Colo. 572; *Sons of America Bldg., etc., Assoc. v. Denver*, 15 Colo. 592; *Peabody v. Thatcher*, 3 Colo. 275; *Thorne v. Ornauer*, 6 Colo. 39; *Hall v. Pay Rock Consol. Min. Co.*, 6 Colo. 81; *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.

Michigan.—*Watts v. Tittabawassee Boom Co.*, 47 Mich. 543.

Minnesota.—*Rathburn v. Moody*, 4 Minn. 364.

Ohio.—*Vance v. Goudy*, *Wright (Ohio)* 307.

Wisconsin.—*Rolke v. State*, 12 Wis. 570.

United States.—*Stevens v. Clark*, 62 Fed. Rep. 323; *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Ballance v. Forsyth*, 21 How. (U. S.) 389; *Walker v. Drevelle*, 12 Wall. (U. S.) 440; *Washington County v. Durant*, 7 Wall. (U. S.) 694.

Contra.—In *Illinois* it seems that a joinder in error is a waiver of the objection that the case is brought before the court by appeal instead of by writ of error. *De Beukelaer v. People*, 25 Ill. App. 460.

3. *Carroll v. Dorsey*, 20 How. (U. S.) 207.

4. *Alabama*.—*Gregg v. Bethea*, 6 Port. (Ala.) 9.

California.—*Widber v. Superior Ct.*, 94 Cal. 430.

Colorado.—*Webster v. Gaff*, 6 Colo. 475; *Wise v. Brocker*, 1 Colo. 550; *Western Union Tel. Co. v. Graham*, 1 Colo. 183; *Willoughby v. George*, 5 Colo. 80.

Florida.—*State v. Mitchell*, 29 Fla. 307; *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 215.

Georgia.—*Allen v. Savannah*, 9 Ga. 286.

Illinois.—*Ripley v. Morris*, 7 Ill. 381; *Hickman v. Haines*, 10 Ill. 20; *Roberts v. Fahs*, 32 Ill. 474; *International Bank v. Jenkins*, 104 Ill. 143; *Smith v. Robinson*, 11 Ill. 119; *Lequatte v. Drury*, 6 Ill. App. 389; *International Bank v. Jenkins*, 107 Ill. 291; *Kingsbury v. Sperry*, 119 Ill. 279; *Goforth v. Adams*, 11 Ill. 52; *Robinson v. Magarity*, 28 Ill. 426; *Eldridge v. Walker*, 80 Ill. 270.

Indiana.—*McCormick v. McClure*, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441.

Michigan.—*Van Valkenburg v. Rogers*, 17 Mich. 324.

Missouri.—*Macklin v. Allenberg*, 100 Mo. 337; *Pierce v. Stinde*, 11 Mo. App. 364; *Mathewson v. St. Louis, etc.*, R. Co., 44 Mo. App. 99.

New York.—*Gormly v. McIntosh*, 22 Barb. (N. Y.) 273; *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Fenno v. Dickinson*, 4 Den. (N. Y.) 85.

North Carolina.—*Binford v. Alston*, 4 Dev. L. (N. Car.) 354; *Smith v. Cheek*, 5 Jones L. (N. Car.) 214.

Ohio.—*Taylor v. Boyd*, 3 Ohio 337, 17 Am. Dec. 603.

Tennessee.—*Spurgin v. Spurgin*, 3 Head (Tenn.) 23; *Squibb v. McFarland*, 11 Heisk. (Tenn.) 563; *Mowry v. Davenport*, 6 Lea (Tenn.) 82; *Woolbridge v. Boyd*, 13 Lea (Tenn.) 154; *Hawkins v. Thornton*, 1 Yerg. (Tenn.) 146.

Vermont.—*Barlow v. Burr*, 1 Vt. 488.

Wisconsin.—*U. S. v. Salter*, 1 Pin. (Wis.) 278.

England.—*Batchelor v. Ellis*, 7 T. R. 333; *Jaques v. Cesar*, 2 Saund. 100, note (1.).

In *Taylor v. Boyd*, 3 Ohio 354, the Volume VII.

The Contrary Rule.—In some jurisdictions, however, the writ of error is regarded rather as a continuation of the original suit than as a new proceeding.¹

court said: "In the obvious nature and character of the proceeding, a writ of error is a new and original suit. Original process issues in it and must be served to bring the adverse party into court. The relative character of the parties is changed; new pleadings are made up, and a final judgment upon it, though it may operate upon the original cause, is nevertheless a termination of the new suit or process in error. * * * We adhere to the doctrine that the writ of error is a new suit, and can only affect parties or strangers from the service of the citation."

A Writ of Error Is an Independent Proceeding and may be brought in vacation as well as during the session of the court. *Per* Park, C. J., in *Tyler v. Hamersley*, 44 Conn. 418.

Action.—So a release of all actions is a good bar to the writ of error. *Ulshafer v. Stewart*, 71 Pa. St. 170. See *infra*, XI. *Release of Error*.

Statute of Limitations.—So a general statute of limitations affecting suits between an assignee in bankruptcy and persons claiming adverse interest in the property assigned applies to writs of error sued out in such proceedings, although they are not named in the statute. *Webster v. Gaff*, 6 Colo. 475.

Effect on Remedy.—And it also follows that the law of remedy in force at the time of issuing the writ determines the jurisdiction of the court to issue it. *Lequatte v. Drury*, 6 Ill. App. 389.

Effect on Liability of Surety.—A surety for prosecution of a suit taken on the issuance of a writ is not bound for the costs of the appellate court, in case the plaintiff below obtains judgment of the court in which the suit is instituted, and that judgment is afterwards reversed on error to an appellate court, and the cause remanded for a new trial. *Hawkins v. Thornton*, 1 Yerg. (Tenn.) 146.

Appeal in Nature of Writ of Error.—An appeal in the nature of a writ of error will be regarded in the appellate court as a new suit. *Maskall v. Maskall*, 3 Sneed. (Tenn.) 208. See also article APPEALS, vol. 2, p. 1.

1. United States.—*Nations v. Johnson*, 24 How. (U. S.) 205, where the court said: "Plainly * * * there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action, and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens v. Virginia*, 6 Wheat. (U. S.) 410; *Clarke v. Mathewson*, 12 Pet. (U. S.) 170." In this case notice by publication to bring in a defendant in error was held to be valid, although it would not have been sufficient in the original proceeding.

Texas.—*Harle v. Langdon*, 60 Tex. 555; *Hickcock v. Bell*, 46 Tex. 613; *Moore v. Moore*, 59 Tex. 54; *Texas Trunk R. Co. v. Jackson*, 85 Tex. 608; *Hart v. Mills*, 38 Tex. 513, where the court, referring to an argument of counsel that the prosecution of a writ of error was a new and original suit, and not a continuation of the original cause, said: "This doctrine should not be recognized in the state of Texas, where the affirmance of a judgment in the Supreme Court recognizes the vitality of the judgment from the date of its rendition in the District Court."

Washington.—Under the statutes of 1873 a writ of error was not the beginning of a new action, but a proceeding in a pending action. *Garrison v. Cheeney*, 1 Wash. Ter. 489.

In New Jersey, in the case of *Hinchman v. Rutan*, 31 N. J. L. 499, a writ of error was said not to be, "either in the popular or technical signification of the terms, a writ or original process by which a suit is commenced. The peculiar office of the writ of error is to remove a suit which has not only been commenced but also carried to judgment. By it the proceedings, but not the suit, are commenced in the appellate court."

Connecticut.—A motion in error in Connecticut is a proceeding in its nature and operation precisely like a writ of error, differing from it only in the mode in which it is instituted. The writ of error is a separate suit, served like any other. The motion in error is filed in court at the same term

New Process.—Original process in error must accordingly be issued and served to bring the adverse parties before the court of errors.¹

New Parties.—Although the parties in interest are always substantially identical with the parties to the record below, their relative character is changed.²

New Pleadings.—And new pleadings must be made up to present the appropriate issues.³ The assignment of errors is in the nature and in the place of a declaration setting forth the cause of action of the plaintiff in error,⁴ to which the defendant may join in error by an appropriate plea or demurrer.⁵

Effect on Subject-matter.—The principle that a writ of error is a new suit is also important as affecting the subject-matter of the action below.⁶

in which the judgment is rendered, and is therefore a continuance of the proceeding already in court and not the commencement of a new suit. A motion in error is purely a statutory proceeding. It lies in no cases where a writ of error would not have lain, unless it be expressly provided as the sole remedy by statute, as in the case of motions for judgment as upon a nonsuit. Gen. Stat. 1875, tit. 19, c. 13, § 4, where the decision of the court refusing to set aside a nonsuit may be reviewed upon a motion in error, in which case it would seem that a writ of error would not lie. Zaleski v. Clark, 45 Conn. 405, note.

1. Taylor v. Boyd, 3 Ohio 354.

2. Taylor v. Boyd, 3 Ohio 354.

Substitution of Attorneys.—The writ may therefore be sued out by a new attorney without obtaining a rule for change of attorneys. U. S. v. Salter, 1 Pin. (Wis.) 278; Batchelor v. Ellis, 7 T. R. 333; Clement v. Crossman, 8 Johns. (N. Y.) 287; Bendernagle v. Cocks, 19 Wend. (N. Y.) 152. See, in general, article SUBSTITUTION OF ATTORNEYS.

Change of Next Friend.—And so the complainant, where an infant, is not required to prosecute a writ of error in the appellate court by the next friend prosecuting below, but may substitute a new one to the writ of error. Ames v. Ames, 148 Ill. 321.

Deceased Party.—As a new suit cannot be commenced against a dead man, an attorney who sues out a writ of error to reverse a judgment against his client, who has died without his knowledge, cannot be saved, on defendant's motion to dismiss, by an offer of decedent's administrator to revive, as his intestate

has no suit in court, and in such case the writ of error will be dismissed. Squibb v. McFarland, 11 Heisk. (Tenn.) 565.

3. Taylor v. Boyd, 3 Ohio 354.

4. State Bank v. Ruddell, 10 Ark. 123.

5. A proceeding in error is an action, and the assignment of errors is in the nature and in the place of a declaration. The defendant cannot plead until the declaration is filed, nor can he plead in error until after assignment of errors. A plea in abatement of a writ in error is therefore properly filed after assignment of errors. State Bank v. Ruddell, 10 Ark. 123.

6. Wooldridge v. Boyd, 13 Lea (Tenn.) 151.

Lis Pendens.—A writ of error does not act as a *lis pendens*, affecting purchasers with notice that the subject-matter involved in the trial below is in litigation, until the process in error is served upon the defendant in error. Macklin v. Allenberg, 100 Mo. 337; Wooldridge v. Boyd, 13 Lea (Tenn.) 151. Compare Harle v. Langdon, 60 Tex. 555.

Supersedeas.—The writ does not set aside, vacate, or affect the judgment of the court below pending the proceeding in error, unless a statute makes it a supersedeas. Oregon R. Co. v. Oregon R., etc., Co., 28 Fed. Rep. 505.

Effect on Judgment.—Therefore, where it abates the judgment sought to be reviewed remains in full force as though it had never been brought. Maskall v. Maskall, 3 Sneed (Tenn.) 208; Furber v. Carter, 2 Sneed (Tenn.) 1; Kimbrough v. Mitchell, 1 Head (Tenn.) 539; Thomasson v. Kercheval, 10 Humph. (Tenn.) 322; Ragsdale v. State, 2 Swan (Tenn.) 416.

2. **Construction of General Statutes Affecting Actions.**—Important decisions hold that the proceeding in error is not included within the purview of general statutes affecting "suits" or "actions," unless expressly made applicable.¹

3. **As a Writ of Right**—*a.* **AT COMMON LAW**—**In Civil Cases.**—A writ of error is said to be prosecuted as of right at common law,² and may be sued out in all cases where it is applicable, irrespective of the age of the plaintiff in error,³ the nature of the relief

1. *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11; *McDonald v. Savings Bank*, 2 How. Pr. (N. Y. Supreme Ct.) 35; *Moore v. Cooley*, 2 Hill (N. Y.) 412.

In *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11, it was held that a writ of error was not a "suit" or "action" within the meaning of a statute providing that no suit commenced by or against certain public officials should be abated or discontinued by their death, removal, or resignation, and providing for the substitution of their successors in office. And in *McDonald v. Savings Bank*, 2 How. Pr. (N. Y. Supreme Ct.) 35, it was decided that a writ of error was not a "suit" within the meaning of an act relating to the bringing of "suits" by poor persons. And in *Moore v. Cooley*, 2 Hill (N. Y.) 412, that "an error on which a writ lies is not a cause of action."

Security for Costs.—In *Ripley v. Morris*, 7 Ill. 381, it was held that a statute relative to costs, requiring the court to dismiss the suit whenever a nonresident commenced an action in the Circuit or Supreme Court without filing security for costs, applies to a writ of error.

2. *Arkansas.*—*Gibson v. Rogers*, 2 Ark. 334.

California.—*Ex p. Thistleton*, 52 Cal. 224.

Florida.—*Weiskoph v. Dibble*, 18 Fla. 22; *McIver v. Marshall*, 24 Fla. 42. And see *Orlando First Nat. Bank v. King*, 36 Fla. 25.

Illinois.—*Haines v. People*, 97 Ill. 161; *Bowers v. Green*, 2 Ill. 42; *McClay v. Norris*, 9 Ill. 370; *Peak v. People*, 76 Ill. 290; *Unknown Heirs v. Baker*, 23 Ill. 484; *Hall v. Thode*, 75 Ill. 173; *Harding v. Larkin*, 41 Ill. 419.

Iowa.—*Burge v. Burns*, Morr. (Iowa) 287.

Maryland.—*Ringgold's Case*, 1 Bland (Md.) 7.

Massachusetts.—*Drowne v. Stimpson*, 2 Mass. 441; *Thayer v. Com.*, 12 Met. (Mass.) 10; *Cooke, Petitioner*, 15 Pick. (Mass.) 234.

Mississippi.—*Wells v. Woodley*, 5 How. (Miss.) 484.

Missouri.—*Calloway v. State*, 1 Mo. 211.

New Hampshire.—*Tandy v. Rowell*, 54 N. H. 388; *Rochester v. Roberts*, 25 N. H. 502.

New Jersey.—Anonymous, 16 N. J. L. 271.

New York.—*Craig v. Scott*, 1 Wend. (N. Y.) 35; *Yates v. People*, 6 Johns. (N. Y.) 335; *Hartshorne v. Sleght*, 3 Johns. (N. Y.) 554; *Van Antwerp v. Newman*, 4 Cow. (N. Y.) 82; *People v. Tweed*, 67 Barb. (N. Y.) 496.

Tennessee.—*Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *Spurgin v. Spurgin*, 3 Head (Tenn.) 23; *Mowry v. Davenport*, 6 Lea (Tenn.) 80; *Caldwell v. Hodsden*, 1 Lea (Tenn.) 305.

Texas.—*Doty v. Moore*, 16 Tex. 591.

Utah.—*Reece v. Knott*, 3 Utah 436.

England.—2 Tidd's Pr. 1134; Reg. v. Paty, 2 Salk. 503; *Crosby's Case*, 3 Wils. 193; *Jaques v. Cesar*, 2 Saund. 100, note 1.

Bond Not Required.—Accordingly, no bond can be required of the plaintiff in error as prerequisite to suing out the writ of error, unless a statute so prescribes. *Florida Orange Hedge Fence Co. v. Branham*, 27 Fla. 526; *McIver v. Marshall*, 24 Fla. 42; *Tombigbee R. Co. v. Bell*, 4 Smed. & M. (Miss.) 685; *Stephens v. Hood*, 9 Smed. & M. (Miss.) 75.

Superseding.—So, where it is of right the writ cannot be revoked or superseded after it has been once formally granted. *Yates v. People*, 6 Johns. (N. Y.) 335.

3. In *McClay v. Norris*, 9 Ill. 370, where it was objected that the writ did not lie at the suit of an infant, it was said: "Our opinion of the right

sought,¹ or the amount involved,² nor is a formal allowance required, unless a statute so provides as a condition precedent to its issuance.³ See *infra*, XV. *Allowance of the Writ*.

In Criminal Cases the writ lay as of right in all cases brought for a misdemeanor upon probable cause shown, but could not be sued out to reverse a conviction for treason or felony except upon allowance.⁴

b. UNDER MODERN PRACTICE.—Under modern practice the writ of error is a writ of right when expressly granted by the written constitution of the state⁵ or by a statute made in accordance therewith, on compliance with the statutory requirements,⁶ or where a right of review is given in actions at law by the constitution, but no express mode of review is provided.⁷

Legislative Conditions.—But it is never a writ of right in the sense that a legislature cannot restrict, regulate, and attach conditions

of any person, whether infant or adult, to prosecute a writ of error in this court is founded upon the fact that it is a 'writ of right,' and lies in all cases unless prohibited by some statute or inflexible rule of law." See also *Haines v. People*, 97 Ill. 161; *Ridgely v. Bennett*, 13 Lea (Tenn.) 206.

1. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *Caldwell v. Hodsdon*, 1 Lea (Tenn.) 305.

2. *Haines v. People*, 97 Ill. 167; *Bowers v. Green*, 2 Ill. 42, *overruling Clark v. Ross*, 1 Ill. 334.

3. **Notice of Application Unnecessary.**—Nor need a notice of the application for the writ be given to the adverse party unless a statute so requires. *Mowry v. Davenport*, 6 Lea (Tenn.) 83; *Spurgin v. Spurgin*, 3 Head (Tenn.) 23; *Caldwell v. Hodsdon*, 1 Lea (Tenn.) 305.

4. *Illinois*.—*Haines v. People*, 97 Ill. 161; *Hammond v. People*, 32 Ill. 446.

Maryland.—*State v. Buchanan*, 5 Har. & J. (Md.) 362; *Anderson v. State*, 5 Har. & J. (Md.) 174.

New York.—*Lavett v. People*, 7 Cow. (N. Y.) 339; *Colt v. People*, 1 Park. Cr. Rep. (N. Y.) 611; *People v. Restell*, 3 How. Pr. (N. Y. Supreme Ct.) 251; *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370.

Pennsylvania.—*Com. v. Profit*, 4 Binn. (Pa.) 424; *Miles v. Rempubli-cam*, 4 Yeates (Pa.) 320.

United States.—*U. S. v. Plumer*, 3 Cliff. (U. S.) 60.

England.—*Rex v. Wilkes*, 4 Burr. 2551; *Crosby's Case*, 3 Wils. 188; *Reg. v. Paty*, 2 Salk. 503. Compare *Crawle v. Crawle*, 1 Vern. 170.

See *infra*, XV. *Allowance of the Writ*.

In *Haines v. People*, 97 Ill. 166, it was said: "By the common law of England a writ of error is grantable *ex debito justitiæ* in all cases, either civil or criminal, except in treason and felony."

In *People v. Cancemi*, 5 Abb. Pr. (N. Y. Supreme Ct.) 491, it was held that a writ of error to bring the proceedings resulting in a capital conviction before the Supreme Court and Court of Appeals for review issued (under laws of 1855, 613) as matter of right.

How Granted.—In criminal cases it was grantable of course in cases of misdemeanor on probable cause shown to the attorney-general. In cases of felony it was grantable unless by statute only on consent of the attorney-general or judge of the Supreme Court. *Com. v. Profit*, 4 Binn. (Pa.) 426.

5. *Martin v. Simpkins*, 20 Colo. 438; *People v. Richmond*, 16 Colo. 280; *Haley v. Elliott*, 20 Colo. 199.

6. *Monti v. Bishop*, 3 Colo. 607; *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 13; *Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *Spurgin v. Spurgin*, 3 Head (Tenn.) 23; *Mowry v. Davenport*, 6 Lea (Tenn.) 80; *Ex p. Virginia Com'rs*, 112 U. S. 177.

7. *Ex p. Thistleton*, 52 Cal. 224; *Middleton v. Gould*, 5 Cal. 190; *Adams v. Town*, 3 Cal. 247; *Sacramento, etc., R. Co. v. Harlan*, 24 Cal. 334; *State v. Reed* (Idaho 1893), 32 Pac. Rep. 202; *Reece v. Knott*, 3 Utah 436.

to its exercise, although these may often defeat the remedy in an individual case.¹

V. TO WHAT TRIBUNAL THE WRIT LIES—1. In General.—The remedy by writ of error is confined to the review of judgments rendered in courts of record whose proceedings follow the course of the common law,² unless there is special statutory provision to the

1. *Martin v. Simpkins*, 20 Colo. 438; *People v. Richmond*, 16 Colo. 280; *Peak v. People*, 76 Ill. 291; *Unknown Heirs v. Baker*, 23 Ill. 484; *Rochester v. Roberts*, 25 N. H. 502.

Regulations by Supreme Court.—The Supreme Court may, in the absence of statutory regulations, devise regulations for the issuance of the writ in cases where the right to the writ is preserved by the constitution of the state. *Harrison v. Tradee*, 27 Ark. 59.

2. *Alabama*.—*Taylor v. Powers*, 3 Ala. 285; *Ex p. Tarlton*, 2 Ala. 37; *Earle v. Juzan*, 7 Ala. 474; *Cawthorne v. Weisinger*, 6 Ala. 714.

Arkansas.—*Gibson v. Rogers*, 2 Ark. 334.

Colorado.—*Vance v. Rockwell*, 3 Colo. 240; *Hadley v. Fish*, 3 Colo. 51.

Connecticut.—*Williams v. Hartford, etc.*, R. Co., 13 Conn. 110.

Delaware.—*Rowland v. Hickman*, 4 Harr. (Del.) 478.

Illinois.—*Kingsbury v. Sperry*, 119 Ill. 279.

Maryland.—*Savage Mfg. Co. v. Owings*, 3 Gill (Md.) 497; *State v. Mister*, 5 Md. 15; *Cecil v. Rose*, 14 Md. 69; *George's Creek Coal, etc., Co. v. New Central Coal Co.*, 40 Md. 433; *Taylor v. Baltimore*, 45 Md. 578; *Warfield v. Latrobe*, 46 Md. 130; *Margraff v. Cunningham*, 57 Md. 589; *Wilmington, etc., R. Co. v. Condon*, 8 Gill & J. (Md.) 443; *Swann v. Cumberland*, 8 Gill (Md.) 150; *Lammott v. Maulsby*, 8 Md. 5; *Baltimore, etc., Turnpike Co. v. Northern Cent. R. Co.*, 15 Md. 194; *Meyer v. Steuart*, 48 Md. 425; *Rundle v. Baltimore*, 28 Md. 362; *Worthington v. Herron*, 39 Md. 145; *Webster v. Cockey*, 9 Gill (Md.) 94; *Rayner v. State*, 52 Md. 376; *Williams v. Williams*, 5 Gill (Md.) 89; *Carter v. Dennison*, 7 Gill (Md.) 173; *Crockett v. Parke*, 7 Gill (Md.) 240.

Massachusetts.—*Edgar v. Dodge*, 4 Mass. 671; *Cooke et al., Petitioners*, 15 Pick. (Mass.) 234; *Drowne v. Stimpson*, 2 Mass. 445; *Melvin v. Bridge*, 3

Mass. 305; *Winslow v. Anderson*, 4 Mass. 376; *Martin v. Com.*, 1 Mass. 389; *Ball v. Brigham*, 5 Mass. 406; *Smith v. Rice*, 11 Mass. 507; *Com. v. Ellis*, 11 Mass. 462; *Vandusen v. Comstock*, 3 Mass. 184; *Pratt v. Hall*, 4 Mass. 239.

Michigan.—*Cameron v. Bentley*, 28 Mich. 520; *In re Sanborn* (Mich. 1895), 65 N. W. Rep. 209; *Holbrook v. Cook*, 5 Mich. 225; *Conrad v. Button*, 28 Mich. 365; *Fletcher v. Clark*, 39 Mich. 374; *Parker v. Copland*, 4 Mich. 528; *Cross v. People*, 8 Mich. 113; *Faust v. Judge*, 30 Mich. 266; *Churchill v. Burt*, 32 Mich. 490; *Brinsmade's Appeal*, 52 Mich. 537; *Knorr v. Millard*, 52 Mich. 542; *Jackson v. People*, 8 Mich. 262; *Gore v. Ray*, 69 Mich. 114; *Gray v. York*, 44 Mich. 415.

New Hampshire.—*Tandy v. Rowell*, 54 N. H. 386; *Rochester v. Roberts*, 25 N. H. 510; *Huse v. Grimes*, 2 N. H. 208.

New Jersey.—*Den v. Fen*, 21 N. J. L. 700.

New Mexico.—*Clancey v. Clancey* (N. Mex. 1894), 37 Pac. Rep. 1105.

New York.—*Matter of Negus*, 10 Wend. (N. Y.) 39.

Ohio.—*Ewing v. Hollister*, 7 Ohio (pt. 2) 138; *Baxter v. Columbia Tp.*, 16 Ohio 56; *Stemle v. Hewling*, 2 Ohio St. 228; *Duncan v. Ferguson*, Wright (Ohio) 740; *Walpole v. Ink*, 9 Ohio 142.

Pennsylvania.—*Com. v. Haas*, 57 Pa. St. 443; *Ruhlman v. Com.*, 5 Binn. (Pa.) 24; *Kittanning Ins. Co. v. Scott*, 13 W. N. C. (Pa.) 54; *McLean v. Bindley*, 114 Pa. St. 559; *Barnes v. Com.*, 11 W. N. C. (Pa.) 375; *Loop v. Haycock*, 4 Kulp (Pa.) 463; *Pennsylvania Pulp, etc., Co. v. Stoughton*, 106 Pa. St. 458; *Wetherald v. Shupe*, 109 Pa. St. 389; *Lewis v. Wallick*, 3 S. & R. (Pa.) 410; *Miller v. Miller*, 3 Binn. (Pa.) 30; *Mohney v. School-Dist.* (Pa. 1888), 15 Atl. Rep. 891; *In re Gest*, 9 S. & R. (Pa.) 317; *Barnes's Appeal*, 2 Penn. (Pa.) 506; *Com. v. Beaumont*, 4 Rawle (Pa.) 366; *Com. v. Kryder*, 1 Penn. (Pa.)

contrary.¹ And the rule applies alike to civil² and criminal cases.³

Whenever a new jurisdiction is created, and the court or judge who exercises this jurisdiction acts as a court or judge of record according to the course of the common law, a writ of error lies on the judgment; but when they act in a summary method, or in a new course different from the common law, a writ of error does not lie, but a certiorari.⁴ In *England*—and in some of our states—

143; *Davenport v. Jones*, 24 W. N. C. (Pa.) 43.

Tennessee.—*Bob v. State*, 2 Yerg. (Tenn.) 176.

Vermont.—*Beckwith v. Houghton*, 11 Vt. 602; *Stiles v. Windsor*, 45 Vt. 520; *Courser v. Vermont Cent. R. Co.*, 25 Vt. 476.

West Virginia.—*Morgan v. Ohio River R. Co.*, 39 W. Va. 17; *Ridgway v. Hinton*, 25 W. Va. 554; *Poe v. Marion Mach. Works*, 24 W. Va. 517; *Dryden v. Swinburn*, 15 W. Va. 234; *Swinburn v. Smith*, 15 W. Va. 483; *Dryden v. Swinburne*, 20 W. Va. 104.

Wisconsin.—*Buttrick v. Roy*, 72 Wis. 164; *Crocker v. State*, 60 Wis. 553.

United States.—*Campbell v. Strong*, Hempst. (U. S.) 195.

England.—*Jaques v. Cesar*, 2 Saund. 100, note (1); *Rex v. West Riding of Yorkshire*, 7 T. R. 373.

Justices of the Peace.—As to the use of the writ of error or other appellate proceedings to review judgments of justices, see article JUSTICES OF THE PEACE.

1. **Maine.**—In Maine, by virtue of statutory provisions, the Supreme Court has power to issue writs of error to courts of inferior jurisdiction proceeding according to the common law, though not technically courts of record. *Barnett v. State*, 36 Me. 199; *Standish v. Gray*, 18 Me. 92.

Delaware—*Mandamus*.—In Delaware a writ of error will lie to an order of the Superior Court awarding a peremptory writ of mandamus, though not a judgment at common law, under the provision of the constitution conferring upon the Court of Errors and Appeals "jurisdiction to issue writs of error to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court," which extends and applies to judgments and decisions in any proceedings in the latter court of a final character. *Union Church v. Sanders*, 1 Houst. (Del.) 100.

In *New Jersey*, proceedings summary in their character are reviewable on writ of error issued out of the Court of Errors to the Supreme Court. But similar proceedings in the Pleas are reviewable in the Supreme Court not by writ of error but by writ of certiorari. *Den v. Fen*, 21 N. J. L. 702; *In re Highway*, 16 N. J. L. 345; *Stansbury v. Squier*, 5 N. J. L. 996; *Taylor v. Griswold*, 14 N. J. L. 222; *Kline v. Pemberton*, 7 N. J. L. 438; *Lawrence v. Dickey*, 12 N. J. L. 368; *Evans v. Adams*, 15 N. J. L. 378; *Atkinson v. Prine*, 46 N. J. L. 33; *Eames v. Stiles*, 31 N. J. L. 490; *Adams v. Disston*, 44 N. J. L. 662.

Award in Eminent Domain.—So a writ of error may be maintained to bring up to the New Jersey Court of Errors and Appeals a judgment of a Circuit Court rendered under a statute upon a verdict of a jury given on appeal from an award of damages by commissioners in condemnation proceedings. *Sullivan v. North Hudson County R. Co.*, 51 N. J. L. 518.

West Virginia—*Construction of Statute*.—A statute providing that "any party thinking himself aggrieved by the judgment of said courts [circuit] may obtain a writ of error thereto," etc., includes a judgment rendered in a statutory proceeding and not according to common law, and applies as well to judgments reviewable at common law only on certiorari as to those reviewable by writ of error. *Dryden v. Swinburn*, 15 W. Va. 253.

2. See cases cited in the preceding note.

3. *Com. v. Beaumont*, 4 Rawle (Pa.) 368; *Haines v. People*, 97 Ill. 161.

Municipal Court.—So a writ of error does not lie to a judgment of a mayor of a town, acting as a magistrate without a jury, and imposing a fine for the violation of a town ordinance. *Ridgway v. Hinton*, 25 W. Va. 554.

4. *Groenvelt v. Burwell*, 1 Salk. 263; *Co. Lit.* 288 *b.*; *Anonymous*, 1

every court which had jurisdiction to fine and imprison was a court of record, and the erection of a new jurisdiction, with power to fine and imprison, made "instantly a court of record."¹ But it has been said that "as such power may be given by special statute, or otherwise, it is no certain test," and that "the power of proceeding according to the course of the common law, though the jurisdiction be newly given by statute, seems to be a more certain one."² The fact that a court has a seal, or even that a permanent record is kept of its proceedings, does not of itself, in modern law, stamp its character as a court of record.³

2. Applications of the Rule—Judgment of Probate Court.—A writ of error will not ordinarily lie to any decree or judgment rendered by the judge of a probate court in the exercise of his ordinary jurisdiction, for the reason that proceedings before him are not usually according to the course of the common law.⁴ Nor

Vent. 33; *Ruhlman v. Com.*, 5 Binn. (Pa.) 27; *Com. v. Ellis*, 11 Mass. 466; *Haines v. People*, 97 Ill. 167. See also article CERTIORARI, vol. 4, p. 87 *et seq.*

1. *Ex p. Thistleton*, 52 Cal. 224.

2. *Thayer v. Com.*, 12 Met. (Mass.) 10.

3. *Ex p. Thistleton*, 52 Cal. 225.

In the instructive case of *Thayer v. Com.*, 12 Met. (Mass.) 9, it was said, in holding a judgment rendered in a criminal proceeding by a justice of the peace reviewable by writ of error, as to whether a court of a justice of the peace was a court of record within the meaning of the common law: "Perhaps it is impossible to decide this as an abstract question according to any ancient and established definition of a court of record. The legislature may make laws—in fact, we think they have made laws—vesting in magistrates and tribunals some of the powers and qualities of a court of record, accompanied also with a special and peculiar jurisdiction which cannot be carried into effect in the course of the common law. They may erect new tribunals, with enumerated powers, some of a general and common-law character and some of a peculiar character requiring proceedings other than those of the common law. In such cases we must rather look at the character of the jurisdiction conferred on such tribunal than at the name or description by which it may be designated. A court may be so constituted by statute as to be a court of record, a court proceeding strictly according to the course of the common law for some purposes, and not for

others; and so the form of the process, error or certiorari, must be adapted rather to the nature of the proceeding than to the supposed designation of the tribunal."

Process.—The fact that the process by which the subject is brought before the court, and which is adapted to the nature of it, is new and directed by statute is not a final test of whether the court so follows the common law as to authorize a writ of error to its judgments. If the issue is tried by a jury in the known and ordinary course of common law, as practiced by the tribunals of the jurisdiction, a writ of error lies. *Martin v. Com.*, 1 Mass. 387.

Quarter Sessions.—The Court of Quarter Sessions of Pennsylvania was held a court of record according to the course of common law. *Com. v. Haas*, 57 Pa. St. 445.

4. *Fitzgerald v. Com.*, 5 Allen (Mass.) 510; *Smith v. Rice*, 11 Mass. 512; *Tandy v. Rowell*, 54 N. H. 386; *Cameron v. Bentley*, 28 Mich. 520; *Clancey v. Clancey* (N. Mex. 1894), 37 Pac. Rep. 1105.

Decisions Relating to Estates of Deceased Persons and Care of Minors.—A decision of the District Court, on appeal from the decision of the Probate Court, is reviewable by an appeal and not by writ of error. At common law in *England*, jurisdiction relating to the estates of deceased persons and the care of minors is vested in the spiritual courts; in *America*, courts of equity have succeeded to this jurisdiction. *Clancey v. Clancey* (N. Mex. 1894), 37 Pac. Rep. 1105.

Appointment of Guardian.—A writ

does it lie to a judgment in a contested election case, unless special provision is made therefor by statute,¹ nor to a judgment in proceedings to compel the support of illegitimate children,² nor in proceedings under a statute to compel support of a dependent person,³ nor in proceedings on an inquisition of lunacy,⁴ nor to reverse a judgment rendered upon a petition for a new highway.⁵ So it does not lie to a judgment in proceedings to secure the revocation of a license,⁶ nor in proceedings to award damages for the condemnation of land under the exercise of eminent domain,⁷ nor in proceedings to recover possession of land in an action of forcible entry and detainer,⁸ nor in proceedings to obtain the dissolution

of error will not lie to review proceedings in the Circuit Court upon an appeal from an order of the Probate Court denying a petition for the appointment of the mother as guardian of her minor children; the proceeding is not one according to the course of the common law. *Cameron v. Bentley*, 28 Mich. 520.

Proceedings to Remove Administrator.—A proceeding in the Probate Court to remove an administrator is not one according to the course of the common law, and a writ of error does not lie to review a decision therein. *Conrad v. Button*, 28 Mich. 365; *Holbrook v. Cook*, 5 Mich. 225.

Judgment in Orphans' Court.—In *Alabama* the statute which gave a writ of error or appeal from all judgments or final orders of the Orphans' Court was held not to include cases in which neither writ of error nor appeal could be taken by the course of practice in the courts of the common law. *Watson v. May*, 8 Ala. 177.

Effect of Statutory Provisions.—A writ of error lies where jurisdiction of offenses cognizable and punishable by proceedings strictly according to the common law is conferred on the judge of probate. *Com. v. Sullivan*, 5 Allen (Mass.) 511.

1. *Swinburn v. Smith*, 15 W. Va. 483.
In *Ohio* a finding and judgment of a Court of Common Pleas, made in a case of contested election, brought before it by appeal under the statute, are reviewable on error in the District and Supreme Courts. *Lehman v. McBride*, 15 Ohio St. 573.

2. *Baxter v. Columbia Tp.*, 16 Ohio 57; *Cross v. People*, 8 Mich. 113.

3. *Smith v. Lapeer County*, 34 Mich. 58; *Baxter v. Columbia Tp.*, 16 Ohio 57; *Directors of Poor v. Overseers of Poor*, 110 Pa. St. 153. And compare

Overseers of Poor v. Overseers of Poor, 112 Pa. St. 99.

Proceedings under a statute to compel a son to support a mother are summary in character and cannot be reviewed on writ of error. *Smith v. Lapeer County*, 34 Mich. 58.

Compulsory Costs.—In *Pennsylvania* a decision compelling a district to pay costs and charges for maintaining and removing a pauper cannot be reviewed on writ of error. *Directors of Poor v. Overseers of Poor*, 110 Pa. St. 153. Compare *Overseers of Poor v. Overseers of Poor*, 112 Pa. St. 99.

4. *Buttrick v. Roy*, 72 Wis. 164; *Cracker v. State*, 60 Wis. 553. See also article *INSANITY*.

5. *Dorchester v. Wentworth*, 31 N. H. 451. See also article *HIGHWAYS*.

Proceedings taken before a commissioner's court of roads and revenue, to establish a new road, are not reviewable on writ of error. Roads, etc., *Comrs v. Thompson*, 15 Ala. 134.

Nor will the writ lie to remove a cause from a court of revenue and roads to a superior tribunal. *Ex p. Tarlton*, 2 Ala. 35.

Road Case.—A writ of error was held not to lie to a judgment of a Quarter Sessions upon an appeal of supervisors of roads from a summary conviction by a justice of the peace. *Ruhlman v. Com.*, 5 Binn. (Pa.) 24.

6. *Ex p. Berg*, 14 Ala. 516.

7. *Hannibal, etc., R. Co. v. Morton*, 20 Mo. 70; *Williams v. Hartford, etc., R. Co.*, 13 Conn. 110. And see in general article *EMINENT DOMAIN*, *ante*, p. 460.

8. *Parker v. Copland*, 4 Mich. 528, holding that such proceedings are summary and unknown to the common law, and that certiorari alone lies to bring such a cause into the Supreme Court; but, when appealed to the Circuit

of an attachment,¹ nor to a court martial.²

Quasi-legal Tribunals.—This rule is also applicable to the determination of quasi-legal tribunals, as of a common council.³

3. On Trial de Novo.—But where on appeal a trial *de novo* is had before a court of general jurisdiction a writ of error will lie to a judgment rendered therein upon a verdict given by a jury according to the common law,⁴ but not otherwise.⁵

VI. TO WHAT JUDGMENTS THE WRIT LIES⁶—**1. Finality.**—The Rule Stated.—The writ of error at common law is applicable only where the judgment to which it is sued out has the character of finality.⁷

Court, as provided by the statute, it becomes a proceeding according to the course of the common law, and error is the only mode of reviewing in the Supreme Court the judgment of the Circuit Court.

Ejectment.—In *Pennsylvania* it is held that a proceeding under the Act of June 24, 1885, whereby claimants in possession of land may rule purchasers to bring an action in ejectment within a defined time, is not reviewable on writ of error. *Davenport v. Jones*, 126 Pa. St. 271.

1. *Gore v. Ray*, 69 Mich. 114; *Gray v. York*, 44 Mich. 415.

2. *Tandy v. Rowell*, 54 N. H. 386.

3. *Stearns v. Wyoming* (Ohio, 1895), 41 N. E. Rep. 578.

In *Arkansas* a writ of error was held not to lie to the corporation court of the city of Little Rock. *Ex p. Frail*, 3 Ark. 561.

So in *Michigan* it was held that a writ of error will not lie on a conviction in a recorder's court of Detroit for an offense against a city ordinance. *Jackson v. People*, 8 Mich. 262.

In *Wisconsin* it is held that under Laws of 1895, c. 6, a judgment rendered in the police court of Milwaukee cannot be taken directly to the Supreme Court for review on writ of error. *Milwaukee v. Simons* (Wis. 1896), 67 N. W. Rep. 922.

4. *Beale v. Dougherty*, 3 Binn. (Pa.) 435; *Sullivan v. North Hudson County R. Co.*, 51 N. J. L. 518; *Parker v. Copland*, 4 Mich. 528; *Schuykill Nav. Co. v. Thoborn*, 7 S. & R. (Pa.) 411; *Com. v. Burkhart*, 23 Pa. St. 521.

Under Landlord and Tenant Act.—In *Pennsylvania* a judgment of a Court of Common Pleas, on a certiorari to remove the proceedings of justices under the landlord and tenant act, or the act to give possession to purchasers at sheriff's sale, was held to be reversible on

error brought to the Supreme Court. *Schuykill Nav. Co. v. Thoborn*, 7 S. & R. (Pa.) 411.

Appeal from County Commissioners.—In *Ohio* a petition in error to review a decision of the Court of Common Pleas, rendered in a case appealed from the board of county commissioners, under section 896 of the Revised Statutes, is maintainable. *Mannix v. Hamilton County*, 43 Ohio St. 210; *Clermont County v. Robb*, Wright (Ohio) 48; *Bowersox v. Seneca County*, 20 Ohio St. 496; *Belmont County v. Zieglerhofer*, 38 Ohio St. 523.

County Seat Case.—In *Ohio* the District Court was held to have jurisdiction to review on petition in error the proceedings of the courts of common pleas under the "act to authorize a contest of cases in which the removal of the seat of justice of a county has been submitted to a vote of the electors." *Powers v. Reed*, 19 Ohio St. 189.

Contest of Will.—The verdict in a case to contest the validity of a will may be reviewed on petition in error in the same manner as such review may be had in civil actions. *Glancy v. Glancy*, 17 Ohio St. 135.

5. *Melvin v. Bridge*, 3 Mass. 306.

Auditor's Report.—The writ does not lie to an inferior appellate court from a decision on appeal thereto from a township auditor's report on a school district treasurer's account. *Mohney v. School Dist.* (Pa. 1888), 15 Atl. Rep. 891.

6. To What Judgments the Writ Lies.—See also upon this subject articles AMOUNT IN CONTROVERSY, vol. 1, p. 702; CERTIORARI, vol. 4, p. 1; CONTEMPT, vol. 4, p. 764; DEFAULTS, vol. 6, p. 1; DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823; EXECUTIONS; GARNISHMENT; HABEAS CORPUS; MANDAMUS; NEW TRIAL.

7. *Alabama.*—*Stewart v. Price*, 16

All the books show that final judgment must be first rendered before the cause can be carried into a superior tribunal by writ of error. The inferior courts may rectify any errors they have committed, and do the party full and complete justice. It would be futile to proceed in the consideration of errors when the final

Ala. 40; *Hamilton v. Gwynn*, 24 Ala. 515; *Savage v. Benham*, 11 Ala. 49; *Shadden v. Sterling*, 23 Ala. 518; *Saltmarsh v. Bird*, 19 Ala. 665; *Powell v. Powell*, 7 Ala. 582; *Wilkinson v. Murphy*, 20 Ala. 104; *McLaren v. Allen*, Minor (Ala.) 117; *Harris v. Kreps*, Minor (Ala.) 184.

Colorado.—*Sloan v. Strickler*, 12 Colo. 179; *Good v. Martin*, 2 Colo. 292; *Daniels v. Denver*, 2 Colo. 595; *Doane v. Glenn*, 1 Colo. 417.

Connecticut.—*Wallace v. Middlebrook*, 28 Conn. 464; *Gleason v. Chester*, 1 Day (Conn.) 27.

Florida.—*Myerson v. Home Ins. Co.*, 15 Fla. 574; *Coons v. Harlee*, 17 Fla. 484; *St. Augustine v. Usina*, 16 Fla. 829; *Gates v. Hayner*, 22 Fla. 325; *McKinnon v. McCollum*, 6 Fla. 376; *Staples v. Hartridge*, 8 Fla. 426; *Sedgwick v. Dawkins*, 17 Fla. 556; *Johnson v. Polk County*, 24 Fla. 28; *Branch v. Branch*, 5 Fla. 447.

Georgia.—*Smith v. Cook*, 56 Ga. 661; *Wheeler v. Walker*, 55 Ga. 256; *Marks v. Hertz*, 65 Ga. 119; *Sheibley v. Georgia Southern R. Co.*, 65 Ga. 107; *Jones v. Dougherty*, 11 Ga. 305; *Johns v. Fuller*, 13 Ga. 506; *Camfield v. Shaw*, 40 Ga. 492; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Young v. Jones*, 89 Ga. 390.

Illinois.—*Hedges v. Madison County*, 6 Ill. 306; *Walker v. Oliver*, 63 Ill. 199; *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 70 Ill. 249; *Frederick v. Connecticut River Sav. Bank*, 106 Ill. 147; *Farson v. Gorham*, 117 Ill. 137; *Sweet v. Merki*, 27 Ill. App. 245; *Harsha v. McHenry*, 82 Ill. 279; *Gade v. Forset Glen Brick, etc., Co.*, 158 Ill. 39.

Indiana.—*Bradley v. Bearss*, 4 Ind. 186; *Fobes v. Martin*, 5 Ind. 452.

Iowa.—*Wallis v. Sparks*, 1 Morr. (Iowa) 20.

Kansas.—*Kansas Rolling Mill Co. v. Bovard*, 34 Kan. 21; *Nash v. Campbell*, 15 Kan. 226; *Miller v. Noyes*, 34 Kan. 13; *Peyton v. Peyton*, 34 Kan. 624.

Kentucky.—*Phillips v. Alcorn*, 4 J. Marsh. (Ky.) 38; *Rice v. Danville*,

etc., *Turnpike Road Co.*, 7 Dana (Ky.) 81; *Rule v. Hayden*, 3 B. Mon. (Ky.) 319.

Maryland.—*League v. State*, 36 Md. 257.

Massachusetts.—*Drowne v. Stimpson*, 2 Mass. 445.

Michigan.—*Holbrook v. Cook*, 5 Mich. 225; *Brady v. Toledo, etc., R. Co.*, 73 Mich. 457; *Clark v. North Muskegon*, 86 Mich. 29; *Adams v. Church*, 22 Mich. 79; *Churchill v. Burt*, 32 Mich. 490; *Perry v. Church* (Mich. 1895), 65 N. W. Rep. 273.

Mississippi.—*Matthews v. Sontheimer*, 39 Miss. 174; *Stebbins v. Niles*, 13 Smed. & M. (Miss.) 307; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Porter v. Deterly*, 1 Smed. & M. (Miss.) 163; *Lexington Bank v. Taylor*, 2 Smed. & M. (Miss.) 27; *Terry v. Robins*, 5 Smed. & M. (Miss.) 291.

Missouri.—*Wirt v. Dinan*, 41 Mo. App. 241; *Pearce v. McClanahan*, 50 Mo. 267; *Evans v. Russell*, 61 Mo. 37; *Rankin v. Perry*, 5 Mo. 501; *Collier v. Wheldon*, 1 Mo. 1; *Anderson v. Moberly*, 46 Mo. 191; *Richards v. Johnson*, 34 Mo. App. 83; *Witthaus v. Washington Sav. Bank*, 18 Mo. App. 183; *Davis v. Perry*, 46 Mo. 449; *Metzenberger v. Keil*, 31 Mo. App. 130; *Walser v. Haley*, 61 Mo. 445.

New Jersey.—*Dodd v. Lyon*, 49 N. J. L. 229; *Cooper v. Vanderveer*, 47 N. J. L. 178; *Allen v. Tyler*, 32 N. J. L. 499.

New York.—*Van Antwerp v. Newman*, 4 Cow. (N. Y.) 82; *Yates v. People*, 6 Johns. (N. Y.) 337.

North Carolina.—*Bowen v. Lanier*, Term (N. Car.) 241.

Ohio.—*Herf v. Shulze*, 10 Ohio 263; *Steubenville, etc., R. Co. v. Patrick*, 7 Ohio St. 170; *Young v. Shallenberger* (Ohio 1895), 41 N. E. Rep. 518.

Pennsylvania.—*Chadwick v. Ober*, 70 Pa. St. 264; *Reed's Appeal*, 71 Pa. St. 378; *Rauch v. Whitaker*, 4 W. N. C. (Pa.) 69; *People's F. Ins. Co. v. Hartshorne*, 84 Pa. St. 453; *Feagley v. Norbeck*, 127 Pa. St. 238; *Com. v. Judges*, 3 Binn. (Pa.) 273; *Hawk v. Jones*, 24 Pa. St. 127; *Erie Bank v.*

judgment may not be complained against by any one.¹

2. Technical Judgment Not Required.—The technical phraseology *consideratum est* was not required to constitute a final judgment reviewable by writ of error.² It was and is sufficient for the decision to have the nature and effect of a final judgment,³ although

Brawley, 8 Watts (Pa.) 530; Logan v. Jennings, 4 Rawle (Pa.) 355.

Tennessee.—Hume v. Commercial Bank, 1 Lea (Tenn.) 220; Hunter v. Gardenhire, 10 Lea (Tenn.) 87; Barksdale v. Butler, 6 Lea (Tenn.) 454; Barton v. Turley, 11 Lea (Tenn.) 600; *In re Johnson's Estate*, 9 Lea (Tenn.) 625; Porter v. Burton, 10 Heisk. (Tenn.) 589; Gibson v. Widener, 85 Tenn. 16; Terrell v. Ingersoll, 10 Lea (Tenn.) 77; Burton v. Woods, 16 Lea (Tenn.) 260; Jamison v. Lillard, 12 Lea (Tenn.) 690; Cawthon v. Searcy, 12 Lea (Tenn.) 649.

Texas.—Lay v. Bellinger, 1 Tex. App. Civ. Cas., § 23; Martin v. Crow, 28 Tex. 614; Stephenson v. Tennant, 1 Tex. App. Civ. Cas., § 543; State v. Pierce, 26 Tex. 114; Kennedy v. Morrison, 31 Tex. 211; State v. Paschal, 22 Tex. 584; Sanger v. Henderson, 85 Tex. 404; Albright v. Mallory, 19 Tex. 106.

Washington.—Hancock v. Stewart, 1 Wash. Ter. 323; Suffern v. Chisholm, 1 Wash. Ter. 487.

West Virginia.—Damron v. Ferguson, 32 W. Va. 33.

Wisconsin.—Hill v. Bloomer, 1 Pin. (Wis.) 283; Merrill v. Rollin, 1 Pin. (Wis.) 411; Dean v. Williams, 2 Pin. (Wis.) 91; Wheeler v. Scott, 3 Wis. 362; Paine v. Chase, 14 Wis. 653; Eaton v. Gillett, 16 Wis. 546; Remington v. Cummings, 5 Wis. 138.

United States.—McComb v. Knox County, 91 U. S. 1; Zeller v. Switzer, 91 U. S. 487; O'Dowd v. Russell, 14 Wall. (U. S.) 402; Moore v. Robbins, 18 Wall. (U. S.) 588; St. Clair County v. Lovington, 18 Wall. (U. S.) 628; Van Ness v. Van Ness, 6 How. (U. S.) 62; Rutherford v. Fisher, 4 Dall. (U. S.) 22; Young v. Grundy, 6 Cranch (U. S.) 51; Weston v. Charleston, 2 Pet. (U. S.) 464; Bender v. Pennsylvania Co., 148 U. S. 502; McLish v. Roff, 141 U. S. 661; Chicago, etc., R. Co. v. Roberts, 141 U. S. 690; Joy v. Adelbert College, 146 U. S. 355.

1. Miles v. Rempubliam, 4 Yeates (Pa.) 319.

What Constitutes a Final Judgment.—For discussion and illustration of what

constitutes a final judgment, see article APPEALS, vol. 2, p. 52 *et seq.*

Trial.—Thus no writ of error will lie until a trial has been had upon the issue made by the pleadings. Car. v. Coopwood, 24 Miss. 256.

Verdict.—The writ does not lie merely to set aside a verdict of the jury as contrary to law and evidence; it lies only to some decision of the court. Roach v. Sulter, 51 Ga. 169; Rule v. Hayden, 3 B. Mon. (Ky.) 319.

Unofficial Opinion.—Nor does it lie to the private unofficial opinion of a judge. Ashburn v. Dempsey, 15 Ga. 248.

Retention of Cause.—Where on appeal to a lower appellate tribunal, the judgment of a justice court is reversed, but the cause retained "for trial and final judgment as in other cases," error will not lie to such judgment of reversal. Cincinnati, etc., R. Co. v. Bailey, 39 Ohio St. 170.

2. Den v. Fen, 21 N. J. L. 700; Yates v. People, 6 Johns. (N. Y.) 403.

3. Den v. Fen, 21 N. J. L. 700; Evans v. Adams, 15 N. J. L. 373.

Audita Querela.—Where a defendant has a legal defense to an execution, as payment or release, his remedy is by writ of *audita querela*, upon which a writ of error lies. Gordonier v. Billings, 77 Pa. St. 502.

Replevin.—So the writ is a proper remedy to review the decision of a circuit judge dismissing a writ of replevin and quashing all proceedings, with costs, on a motion, such an order being a final determination of the suit. Jewell v. Lamoreaux, 30 Mich. 155.

Judgment Remanding Cause.—A writ of error will not lie to remove a cause from the Illinois Appellate to the Supreme Court where the judgment rendered in the former court remanded the cause for new trial; the judgment is not final. Flanigen v. East St. Louis, 131 Ill. 444.

Nul Tiel Record.—A writ of error lies upon an issue of *nul tiel record*. Crutcher v. Com., 6 Whart. (Pa.) 340. But see U. S. v. Cook, 2 Mason (U. S.) 22.

it may be technically an order or an award of a competent tribunal in the nature of a judgment.¹ But the writ will not lie to a statutory judgment upon a forfeited forthcoming bond, since such judgment springs into existence upon the forfeiture and is not strictly a judgment or order of a court of record.²

3. Void Judgment.—A writ of error will lie to a judgment although it is void and not merely erroneous.³ In such case a

1. *Com. v. Judges*, 3 Binn. (Pa.) 275; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *York, etc., R. Co. v. Myers*, 18 How. (U. S.) 246; *Heckers v. Fowler*, 2 Wall. (U. S.) 123.

At common law no writ of error could be brought but on a judgment or an award in the nature of a judgment. 2 Tidd Pr. 1141.

Order to Pay Over Money.—The writ lies to an order made on a motion requiring a sheriff to pay over money in satisfaction of an execution. *Wise v. Darby*, 9 Mo. 131.

Administration.—The writ will also lie upon an order of the trial court that an administrator retain all the money of the estate which may come into his hands, subject to the order of the court, for the purpose of paying all administrators and guardians such sums as shall be found due from the estate. *Gamble v. Hamilton*, 7 Mo. 469.

Arrest or Stay of Judgment.—A writ of error will lie to an order arresting a judgment, *Benjamin v. Armstrong*, 2 S. & R. (Pa.) 392; *Favor v. Philbrick*, 5 N. H. 359; *Powell v. Kinney*, 6 Blackf. (Ind.) 359; *State v. Foster*, 2 Mo. 210; *Anderson v. Moberly*, 46 Mo. 191 (*contra*, *Horne v. Barney*, 19 Johns. (N. Y.) 247; *Fish v. Weatherwax*, 2 Johns. Cas. (N. Y.) 215), or staying the judgment indefinitely, *Patterson v. Patterson*, 27 Pa. St. 40.

Intervention.—Or upon an order denying an application for intervention. *Williams v. Hall*, 7 B. Mon. (Ky.) 297.

Order Allowing Guardian to Sell.—Section 123, Rev. Stat. Illinois 1874, allowing a writ of error to be sued out to the Supreme Court of Illinois from an order or decree authorizing a guardian to sell lands, was repealed by an amendatory act approved May 21, 1877. *Kingsbury v. Sperry*, 119 Ill. 279.

Removal of Clerk.—Where a clerk of a court is removed by a judgment of the court for a legal cause, the proceeding is reviewable by writ of error. *Ragsdale v. State*, 2 Swan (Tenn.) 416.

Writ of Restitution.—So an order awarding a "writ of restitution" is reviewable on writ of error in Washington. *Chambers v. Hoover*, 3 Wash. Ter. 20.

2. *Taylor v. Powers*, 3 Ala. 285; *Rector v. Harris*, 19 Ark. 265; *Smiser v. Robertson*, 16 Ark. 599; *M'Nutt v. Wilcox*, 3 How. (Miss.) 421. But see dictum in *Smith v. Basinger*, 12 Tex. 227.

But it may issue on the original judgment after a forthcoming bond given if not forfeited. *Davis v. Jordan*, 5 How. (Miss.) 295.

3. *Connecticut.*—*Stonington v. States*, 31 Conn. 213.

Colorado.—*Cooper v. American Cent. Ins. Co.*, 3 Colo. 318; *Filley v. Cody*, 4 Colo. 109; *Skinner v. Beshoar*, 2 Colo. 387; *Bean v. People*, 6 Colo. 98. And compare *Hoehne v. Trugillo*, 1 Colo. 161.

Georgia.—*Castleberry v. State*, 68 Ga. 49; *Thornton v. Manchester Invest. Co.* (Ga. 1895), 22 S. E. Rep. 987.

Massachusetts.—*Waters v. Randall*, 8 Met. (Mass.) 132; *Jordan v. Dennis*, 7 Met. (Mass.) 590; *Gray v. Thrasher*, 104 Mass. 373; *Arnold v. Tourtellot*, 13 Pick. (Mass.) 172.

Minnesota.—*Sullivan v. La Cross, etc.*, *Steam Packet Co.*, 10 Minn. 386.

New York.—*Striker v. Mott*, 6 Wend. (N. Y.) 465.

Tennessee.—*Ex p. Martin*, 5 Yerg. (Tenn.) 456 (under express statutory provision).

Wisconsin.—*Mitchell v. Kennedy*, 1 Wis. 511; *Abrams v. Jones*, 4 Wis. 806; *Calkins v. Hays*, 4 Wis. 200. Compare *Lewis v. Sercomb*, 1 Wis. 394.

So it was said in *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318, *affirming Skinner v. Beshoar*, 2 Colo. 385, that "error will lie to review what assumes to itself the force of an adjudication in law, although upon the face of the record it may want the essentials of validity."

No Jurisdiction.—And in *Jordan v.*

writ has been sustained even when brought by the original plaintiff in the void suit.¹

4. *On Report of Referees.*—A writ of error lies to a judgment entered upon the report of a referee.²

Dennis, 7 Met. (Mass.) 590, a plaintiff against whom a judgment was rendered was held to have a right to maintain a writ of error to reverse it on the ground that the court to which he resorted had no jurisdiction.

Judgment at Chambers.—A writ of error is appropriate to review a judgment rendered at chambers or in vacation without authority of law. *Bean v. People*, 6 Colo. 100; *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318; *Filley v. Cody*, 4 Colo. 109.

Limitations of the Principle.—But this is the rule only where apparently a judgment has been rendered in a void proceeding. Thus in *Skinner v. Beshoar*, 2 Colo. 386, it was said: "But the writ of error is the process provided by the common law to afford relief against an erroneous judgment; it lies only to a judgment, and debate has arisen whether the omissions of the record now under consideration have not the effect to turn all the proceedings into absolute nullities. If the record transmitted show that no judgment at all has been given, or that though it contain words in the form and similitude of a judgment, they lack the binding force of the law's adjudication, there would seem to be plausible ground to assert that the party complaining should seek his remedy in another forum. And so where the record contained only an informal entry, succeeding the title of the cause in these words, 'judgment rendered for the plaintiff in the above-entitled suit, at the above-named term by the court, for the sum of seventy-eight dollars and thirty-seven cents damages and his costs, against the said defendant,' the writ of error was summarily dismissed. *Wheeler v. Scott*, 3 Wis. 364." See also *Bean v. People*, 6 Colo. 98.

Rule in Mississippi.—In Mississippi, however, it was held that where a circuit court had rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error would lie from such a judgment, as it was void because of lack of jurisdiction in the trial court, and dismissal

was the only remedy. *Wallace v. Wingate*, 6 Smed. & M. (Miss.) 151.

1. *Capron v. Van Noorden*, 2 Cranch (U. S.) 126; *Jordan v. Dennis*, 7 Met. (Mass.) 590.

2. *McPherson v. Cheadell*, 24 Wend. (N. Y.) 22; *Short v. Pratt*, 6 Mass. 496; *Henderson v. Adams*, 5 Cush. (Mass.) 612; *Lyman v. Arms*, 5 Pick. (Mass.) 213.

So in *Massachusetts* it was held that a writ of error lay upon a judgment of the Common Pleas rendered on a report of referees appointed under a statute. *Short v. Pratt*, 6 Mass. 496.

Rule in Delaware.—In Delaware no writ of error will lie to a judgment rendered on a report of referees in the Superior Court except on error which appears by the record in the judgment or proceeding. *Layton v. Trustees of Poor*, 6 Houst. (Del.) 13.

Wisconsin.—Under Const. Wis., art. 1, § 21, providing that "writs of error shall never be prohibited by law," and Rev. Stat. § 3043, providing that "writs of error may issue of course out of the Supreme Court * * * to review final judgments in actions triable by jury," a writ of error lies in a case where the court awards a compulsory reference. *Buttrick v. Roy*, 72 Wis. 164.

Facts must be Found.—But a writ of error will not authorize the Court of Errors to examine a special report containing only evidence of the facts transpiring at the hearing. It must be accompanied by a statement or findings of fact raising the question of law and showing its relation to the judgment. *McPherson v. Cheadell*, 24 Wend. (N. Y.) 22; *Feeter v. Heath*, 11 Wend. (N. Y.) 477.

In United States Courts.—It is not settled whether cases tried before a referee pursuant to state laws can be reviewed in the federal appellate courts under the existing acts of Congress. *Dietz v. Lymer*, 63 Fed. Rep. 758; *Boogher v. New York L. Ins. Co.*, 103 U. S. 90.

But in any case they cannot be reviewed on writ of error unless a jury is waived in the mode provided by the Act of 1865, by a written stipulation

5. On Award of Arbitrators.—The writ will also lie to an award of arbitrators made and returned pursuant to a rule or order of court upon which a judgment has been entered.¹

6. Judgment in Favor of Plaintiff in Error.—So the mere fact that the judgment is rendered in favor of the plaintiff in error does not affect his right to maintain the writ, as he has a legal right to a perfect judgment,² unless all the points decided below are decided in favor of the plaintiff's full contention, in which case he cannot sue out the writ.³

7. Decisions Peculiar to Various Jurisdictions.—In *Illinois* the writ of error lies to review all decisions of the trial court involving

signed by the parties. Rev. Stat. U. S., §§ 649, 700; Dietz v. Lymer, 63 Fed. Rep. 758; Boogher v. New York L. Ins. Co., 103 U. S. 90; Dundee Mortg., etc., Invest. Co. v. Hughes, 124 U. S. 157.

Presumption of Written Stipulation.—Where a reference could not be ordered by a state law without the written consent of the parties to the action, it will be assumed that, where the record shows the order for a reference, the statute has been complied with and a jury waived by written stipulation. Dietz v. Lymer, 63 Fed. Rep. 758.

1. Wilson v. Colwell, 3 Watts (Pa.) 212; Lewis v. England, 4 Binn. (Pa.) 5; Ebersoll v. England, 3 Binn. (Pa.) 528; Nolan v. Colorado Cent. Consol. Min. Co., 63 Fed. Rep. 930; Thornton v. Carson, 7 Cranch (U. S.) 597; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83; York, etc., R. Co. v. Myers, 18 How. (U. S.) 246; Heckers v. Fowler, 2 Wall. (U. S.) 123.

Auditor's Report.—In *Pennsylvania* a writ of error does not lie to the Court of Common Pleas upon an appeal from an auditor's report. Mohney v. School-Dist. (Pa. 1888), 15 Atl. Rep. 891.

Where Not Reviewable.—A judgment upon an award rendered by arbitrators under a statutory submission, where the submission is in due form and the award is one that could have been lawfully made, is not reviewable on writ of error. The statutory remedy to vacate the award is proper. Cooper v. Andrews, 44 Mich. 94.

2. *Florida.*—Hale v. Crowell, 2 Fla. 534; Ward v. Bull, 1 Fla. 311.

Illinois.—Teal v. Russell, 3 Ill. 319; Fuller v. Robb, 26 Ill. 246; Jones v. Wight, 5 Ill. 338; Thayer v. Finley, 36 Ill. 262; Davidson v. Bond, 12 Ill.

84; Hartman v. Belleville, etc., R. Co., 64 Ill. 24.

New York.—Sarles v. Hyatt, 1 Cow. (N. Y.) 253; Bissell v. Marshall, 6 Johns. (N. Y.) 100.

United States.—Capron v. Van Noorden, 2 Cranch (U. S.) 126.

England.—Johnson v. Jebb, 3 Burr. 1772.

Minor Point.—So of course a plaintiff in error who wins on a minor point, but fails in the main object of his suit, may maintain a writ of error to reverse the judgment in his favor. Gentry v. Barnett, 6 T. B. Mon. (Ky.) 113.

Colorado.—Under the statute governing appeals to the Supreme Court of Colorado a party cannot take a statutory appeal from a judgment rendered in his own favor, but he may sue out a writ of error to have it reviewed. Harvey v. Travelers Ins. Co., 18 Colo. 354.

Georgia.—In Georgia, however, it is held that a plaintiff cannot maintain a writ of error to reverse a judgment in his own favor, voluntarily entered into by himself, where the object of the writ is to correct errors in the admission of evidence and in the charge of the court. He must first make a motion for a new trial. Van Leonard v. Eagle, etc., Mfg. Co., 60 Ga. 544.

3. Ward v. Bull, 1 Fla. 318; Trabue v. M'Kettrick, 4 Bibb (Ky.) 180; Hughes v. Stickney, 13 Wend. (N. Y.) 280.

On Statutory Proceeding.—So where, upon a statutory proceeding by a town against the father of a bastard child, the court, without authority, ordered the defendant to pay a weekly sum for the support of the child, it was held that the judgment might be reversed upon a writ of error brought by the plaintiffs themselves, although it was in their favor, as they were entitled to a

property rights or personal liberty and not reviewable on appeal.¹ In *New Jersey* it cannot be sued out from the Court of Errors and Appeals to a judgment of a court for the trial of small causes.² In *West Virginia* it lies to a judgment setting aside the verdict of a jury in favor of the defendant as contrary to law and evidence.³ In *Ohio*, an order of the Court of Common Pleas sustaining a motion to set aside a judgment rendered at the preceding term is to be deemed "an order affecting a substantial right made upon a summary application in an action after judgment," and may be reversed, vacated, or modified by a proceeding in error, as provided by the statute regulating review by petition in error.⁴ In *Wisconsin* it lies to review all final judgments in civil cases, in actions triable by jury, except actions for divorce.⁵ In *Texas* the Supreme Court may grant a writ of error to a judgment of a court of civil appeals, reversing and remanding a judgment of an inferior court, where its holding differs from that of another court of civil appeals on the same point of law; but this rule does not apply if the question has already been determined by the Supreme Court.⁶ In *Colorado* it

legal enforceable judgment. *Seymour v. Belden*, 28 Conn. 443.

1. "This right exists independently of any statutory or constitutional provisions, by force of the common law, in all cases in which the jurisdiction of such inferior court is exercised according to the course of the common law. And in the latter class of cases the writ lies to the circuit courts, whether an appeal is given or not. Where an appeal is given, it is to be regarded as merely cumulative." *Haines v. People*, 97 Ill. 161, *citing*, in support of these conclusions, *Peak v. People*, 76 Ill. 289; *Hyde Park v. Dunham*, 85 Ill. 569; *Hall v. Thode*, 75 Ill. 173; *St. Louis, etc., R. Co. v. Lux*, 63 Ill. 523; *Marion County v. Harper*, 44 Ill. 482; *Coon v. Mason County*, 22 Ill. 666; *Schlattweiler v. St. Clair County*, 63 Ill. 449; *Horner v. Goe*, 54 Ill. 286; *Holden v. Herkimer*, 53 Ill. 258; *People v. Smith*, 51 Ill. 177; *Fitzgerald v. Glancy*, 49 Ill. 465; *Moore v. Mayfield*, 47 Ill. 167; *Hobson v. Paine*, 40 Ill. 25; *Unknown Heirs v. Baker*, 23 Ill. 484; *McClay v. Norris*, 9 Ill. 370.

2. Although the cause may be appealed to the Court of Common Pleas, since, on the legal side, it is confined to a review of the judicial errors committed in the supreme and circuit courts. *Parker v. Wallace*, 53 N. J. L. 243.

Under the Practice Act of *New Jersey* it is only where a motion to strike

out a pleading is granted, not when it is refused, that a writ of error lies. *Cooper v. Vanderveer*, 47 N. J. L. 178.

Construction of Practice Act.—Section 249 Practice Act, Revision N. J., 887, which authorizes the Circuit Court to apply in cases of doubt or difficulty to the Supreme Court for advice, and that in these cases the "certified opinion shall be returned with the writ of error as part of the record, and errors may be assigned thereon," does not enlarge the class of subjects reviewable on writs of error. *Delaware, etc., R. Co. v. Nevelle*, 51 N. J. L. 332.

3. *Gwynn v. Schwartz*, 32 W. Va. 487.

4. Rev. Stat. Ohio, §§ 6707-6710; *Braden v. Hoffman*, 46 Ohio St. 639; *Hettrick v. Wilson*, 12 Ohio St. 136; *Taylor v. Fitch*, 12 Ohio St. 169; *Huntington v. Finch*, 3 Ohio St. 447.

5. Rev. Stat. Wis., § 3043; *Crocker v. State*, 60 Wis. 555.

6. *Sturgis Nat. Bank v. Smith*, 87 Tex. 649.

Judgment Involving Construction of Statute.—Section 5 of the "Act to organize the Courts of Civil Appeals," approved April 13, 1892, provides, among other things, that the judgment of the courts of civil appeals shall be conclusive, and that no writ of error shall lie thereto "in any civil case appealed from a county court, * * * except in probate matters and in cases involving the revenue laws of the state or the validity of a statute." An appli-

may be sued out from the Supreme Court to every final judgment or decree of the County Court.¹ In the *United States* courts a writ of error will lie from the Supreme Court of the United States to a state court only where a federal question is involved,² and where such question has been properly raised in the state court.³ It lies to a territorial court only in cases triable by jury; in all other cases the remedy is by appeal.⁴ Where the only question

cation for a writ of error to the Court of Civil Appeals will therefore be denied where the construction of a statute only is involved, but not its validity. *Mathews Lumber Co. v. Hardin*, 87 Tex. 639.

In Contested Elections.—Under article 1011 of Rev. Stat., as amended April 13, 1892, and section 5 of the act of the legislature organizing the courts of civil appeals, approved April 13, 1892, in subdivision 3, providing: "The judgment of the courts of civil appeals shall be conclusive in all cases upon the law and the facts in the following cases, nor shall a writ of error be allowed thereto from the Supreme Court, to wit: * * * (4) All cases of contested elections of every character other than for state offices, except where the validity of a statute is attacked by the decision," a writ of error from the Supreme Court will not lie to a judgment on a proceeding by information in the nature of a quo warranto by the state of Texas to oust a claimant from the office of county clerk, and to place the relator in possession of the office. *State v. Thompson*, 88 Tex. 228.

1. It includes a decree for the sale of land of a decedent to pay debts. *Sloan v. Strickler*, 12 Colo. 179.

2. *Central Land Co. v. Laidey*, 159 U. S. 103.

3. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 540; *Spies v. Illinois*, 123 U. S. 131; *Brooks v. Missouri*, 124 U. S. 394; *Chappell v. Bradshaw*, 128 U. S. 132; *Brown v. Massachusetts*, 144 U. S. 573; *Schuyler Nat. Bank v. Bollong*, 150 U. S. 85; *Powell v. Brunswick County*, 150 U. S. 433; *Miller v. Texas*, 153 U. S. 535; *Morrison v. Watson*, 154 U. S. 111; *Sayward v. Denny*, 158 U. S. 180.

To Decision Refusing Appeal.—The Supreme Court of the United States has jurisdiction of a writ of errors sued out to the Circuit Court of Appeals to review its decision refusing to entertain an appeal from the Supreme Court of a territory, on the ground that the case

was not one in which the judgment was made final in the Circuit Court of Appeals, under section 6 of the Act of March 3, 1891. *Aztec Min. Co. v. Ripley*, 151 U. S. 79.

4. *Story v. Black*, 119 U. S. 235; *Hecht v. Boughton*, 105 U. S. 235; *Woolf v. Hamilton*, 108 U. S. 15; *Bonfield v. Price*, 154 U. S. 672.

Circuit Court of Appeals.—Under §§ 5 and 6 of the Act of Congress March 3, 1891, creating the United States Circuit Court of Appeals, that court has no jurisdiction of a writ of error where the jurisdiction of the District Court is in question. The writ must be made returnable direct to the Supreme Court. *U. S. v. Sutton*, 47 Fed. Rep. 129. *Compare McLish v. Roff*, 141 U. S. 661, and *Crabtree v. Madden*, 54 Fed. Rep. 426.

Constitutional Question.—Where the sole question presented is whether a state statute contravenes the Constitution of the United States, the writ of error must be prosecuted directly to the Supreme Court of the United States. It does not lie to the Circuit Court of Appeals. *Chicago, etc., R. Co. v. Evans*, 58 Fed. Rep. 433.

Use of Mails.—Under Rev. Stat. U. S., § 5480, the use of the mails for fraudulent purposes is an "infamous crime" within the meaning of Judiciary Act March 3, 1891, §§ 5 and 6, and a writ of error should be brought to the Supreme Court of the United States, and not to the Circuit Court of Appeals.

Jurisdiction in Supreme Court.—

Where the writ of error from the Supreme Court of the United States direct to the District Court is allowed in the usual and general form, to review its judgment without certifying or specifying the question of jurisdiction, the Supreme Court cannot take jurisdiction under Act of March 3, 1891, c. 517, § 5. *Chappell v. U. S.*, 160 U. S. 499; *Maynard v. Hecht*, 151 U. S. 324; *Moran v. Hagerman*, 151 U. S. 329; *Colvin v. Jacksonville*, 157

raised goes to the jurisdiction of the trial court to entertain the case a review upon writ of error can only be had in the United States Supreme Court, and not in the Circuit Court of Appeals,¹ and in such case the question of jurisdiction must be certified up to the Supreme Court or it will not acquire jurisdiction.²

In *Michigan*, where a case or proceeding in the Probate Court involves common-law questions and stands in the place of a suit at law, and assumes the form of a common-law suit in the Circuit Court, and a common-law issue is made up, exceptions may be settled and a writ of error lies from a final decision thereon.³

8. In Criminal Cases.—In criminal cases the rule requiring that the judgment to be reviewed must be final is applicable unless a statute provides otherwise,⁴ and any judgment on which a person

U. S. 368; *Davis, etc., Bldg., etc., Co. v. Barber*, 157 U. S. 673; *The Bayonne*, 159 U. S. 687; *Van Wageningen v. Sewall*, 160 U. S. 369. See article CERTIFIED CASES, vol. 3, p. 918.

1. *Cabot v. McMaster*, 65 Fed. Rep. 533; *Davis, etc., Bldg., etc., Co. v. Barber*, 18 U. S. App. 476; *Baltimore, etc., R. Co. v. Meyers*, 62 Fed. Rep. 367; *U. S. v. Severens*, 71 Fed. Rep. 768.

On Whole Case.—But where a party elects to take up the judgment below on the whole case, the Circuit Court of Appeals may determine all the questions in the case, including the question of jurisdiction. *Rust v. United Waterworks Co.*, 70 Fed. Rep. 129; *McLish v. Roff*, 141 U. S. 661; *Crabtree v. Madden*, 54 Fed. Rep. 426; *Crabtree v. Byrne*, 54 Fed. Rep. 432; *American Sugar-Refining Co. v. Johnson*, 60 Fed. Rep. 503; *American Sugar-Refining Co. v. Tatum*, 60 Fed. Rep. 514; *U. S. v. Jahn*, 155 U. S. 109.

2. *Maynard v. Hecht*, 151 U. S. 325; *Moran v. Hagerman*, 151 U. S. 329; *Colvin v. Jacksonville*, 157 U. S. 368; *Van Wagenen v. Sewall*, 160 U. S. 369; *Chappell v. U. S.*, 160 U. S. 499; *Davis v. Geissler*, 162 U. S. 290.

3. But appeals from interlocutory orders cannot take that form, *Churchill v. Burt*, 32 Mich. 490; nor proceedings for the removal of an administrator, *Conrad v. Button*, 28 Mich. 365; or for the appointment of a guardian, *Cameron v. Bentley*, 28 Mich. 520; or of an administrator, *Woolley v. Crane*, 86 Mich. 360; *Brinsmade's Appeal*, 52 Mich. 538.

A writ of error will lie on the affirmation by the Circuit Court of an order of dismissal made by the Probate Court

on a petition for the removal of an administrator, filed therein by a creditor of an estate. *Peckham v. Hoag*, 92 Mich. 423, citing *Labar v. Nichols*, 22 Mich. 200; *Hall v. Grovier*, 25 Mich. 438; *Brown v. Forsche*, 43 Mich. 495; *In re Moore's Appeal*, 84 Mich. 474.

But in several cases appeals from the final accounting of an administrator have been proceeded in as common-law cases without difficulty or confusion. *Hall v. Grovier*, 25 Mich. 428; *Brown v. Forsche*, 43 Mich. 492; *In re Mower's Appeal*, 48 Mich. 448; *Labar v. Nichols*, 22 Mich. 200; *American Baptist Missionary Union v. Peck*, 9 Mich. 445.

Georgia.—Under Code Ga., § 4250, declaring that "no cause shall be carried to the Supreme Court upon any bill of exceptions so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause," the Supreme Court of Georgia will not take jurisdiction of a writ of error brought before the rendering of such judgment and decree to reverse a judgment refusing a new trial in an action of ejectment tried on special pleadings as a cause in equity, and in which the verdict of the jury consists only of answers to certain specific questions propounded by the court in terms of section 4206 of the code, and the action is still pending below, awaiting a written judgment and decree upon the verdict. *McGowan v. Lufburrow*, 81 Ga. 358.

4. *Alabama.*—*Hodges v. State*, 8 Ala. 55; *Weissinger v. State*, 11 Ala. 540; *Willingham v. State*, 14 Ala. 539.

is liable to be and is in fact imprisoned is such a final decision.¹

Maryland.—*League v. State*, 36 Md. 257; *Neff v. State*, 57 Md. 390; *Forwood v. State*, 49 Md. 538; *Kearney v. State*, 46 Md. 422.

Michigan.—*Patten v. People*, 18 Mich. 314; *People v. Knapp*, 26 Mich. 112.

Mississippi.—*Loftin v. State*, 11 Smed. & M. (Miss.) 358.

Missouri.—*State v. Brown*, 41 Mo. 490; *State v. Fortune*, 10 Mo. 466; *State v. Rector*, 11 Mo. 28; *State v. Batchelor*, 15 Mo. 207; *State v. Wall*, 15 Mo. 208; *State v. Leapfoot*, 19 Mo. 375; *State v. Ruthven*, 19 Mo. 382.

New York.—*Yates v. People*, 6 Johns. (N. Y.) 337; *People v. Bork*, 78 N. Y. 347; *People v. Tarbox*, 30 How. Pr. (N. Y. Supreme Ct.) 318; *People v. Merrill*, 14 N. Y. 74; *Bogert v. People*, 6 Hun (N. Y.) 262; *Peet v. McGraw*, 21 Wend. (N. Y.) 667; *People v. Stearns*, 23 Wend. (N. Y.) 634; *People v. Nestle*, 19 N. Y. 583; *Tabor v. People*, 90 N. Y. 248; *Manke v. People*, 74 N. Y. 415; *People v. Loomis*, 30 How. Pr. (N. Y. Supreme Ct.) 323.

Ohio.—*Kinsley v. State*, 3 Ohio St. 508; *Cochrane v. State*, 30 Ohio St. 61; *Inskeep v. State*, 36 Ohio St. 145.

Pennsylvania.—*Com. v. Church*, 1 Pa. St. 105; *Miles v. Rempubliam*, 4 Yeates (Pa.) 319.

Tennessee.—*State v. Dillon*, 3 Hayw. (Tenn.) 174.

Texas.—*State v. Pierce*, 26 Tex. 114; *State v. Paschal*, 22 Tex. 584.

Wisconsin.—*Crocker v. State*, 60 Wis. 553; *Jenks v. State*, 16 Wis. 332; *Crilley v. State*, 20 Wis. 231; *Kneifle v. State*, 13 Wis. 368; *State v. Stone*, 37 Wis. 204; *Bennet v. State*, 24 Wis. 57.

New York.—A writ of error and a certiorari will issue from the Supreme Court to review a trial and conviction had in the City Court of Brooklyn upon an indictment found in the Court of Sessions and transferred to the City Court for trial. *People v. Neilson*, 22 Hun (N. Y.) 1.

Where a judgment against an accused in a criminal action is reversed by the general term of the Supreme Court on writ of error, solely upon the ground of an irregularity therein and in the sentence, and the proceedings are remitted to the trial court to pronounce a proper sentence and judg-

ment, error will not lie to the Court of Appeals at the suit of the plaintiff in error. He must await a final judgment, and for errors different from those brought up before he may sue out another writ of error. *Pratt v. People*, 67 N. Y. 606.

The Act of 1879 (chapter 449, Laws of 1879), amending the provisions of the Revised Statutes in reference to writs of error, applies only to cases where after conviction sentence has been suspended or stayed, and such conviction has been affirmed by a general term of the Supreme Court, and not to an order of the general term of the Supreme Court affirming a judgment of a Court of Sessions upon conviction. *Eighmy v. People*, 78 N. Y. 330.

Texas.—*Scire Facias*.—Although the Texas Court of Appeals had no jurisdiction (1883) to revise criminal cases on writ of error, yet *scire facias* cases were held reviewable thereon although criminal in nature, as they are regulated in practice by the rules obtaining in civil cases. *Hart v. State*, 13 Tex. App. 555; *Houston v. State*, 13 Tex. App. 558, 560; *State v. Arrington*, 13 Tex. App. 611.

1. *Com. v. Foster*, 122 Mass. 321; *Bryan v. Bates*, 12 Allen (Mass.) 201.

Quashing Indictment.—Where a writ of error is allowable in a criminal case at the instance of the state, a judgment quashing an indictment is a final appealable judgment. *State v. Hodges*, 55 Md. 134; *State v. McNally*, 55 Md. 565.

Dismissal in a Criminal Action.—A judgment of an intermediate tribunal dismissing a writ of error in a criminal action without affirming or reversing the judgment of the trial court, if there is no power to dismiss the writ, is a final judgment and so reviewable in the Court of Appeals. *Manke v. People*, 74 N. Y. 415.

Sentence.—Error does not lie to reverse a conviction in a criminal case until after sentence has been pronounced, and the sentence must appear of record. *Hill v. People*, 10 N. Y. 463.

Special Plea.—And unless by express statute it does not lie to a decision upon a special plea or a motion to discharge in a criminal case until final judgment. *State v. Ruthven*, 19 Mo. 382.

The writ of error lay at common law on outlawries,¹ upon final judgments on bail bonds, recognizances, and bonds taken for the suppression of offenses,² and to reverse sentences of additional punishment imposed on information against convicts who had been before convicted and sentenced.³

9. When Writ Not Applicable—*a.* INTERLOCUTORY JUDGMENTS.—The general doctrine precludes the issuance of a writ of error to review an interlocutory decision until after a final judgment has been rendered in the cause,⁴ whether in a civil or criminal

District of Columbia.—A sentence of death imposed by the Supreme Court of the District of Columbia cannot be reviewed by the United States Supreme Court, as the provisions of the Act of Congress Feb. 6, 1889, § 6 (25 Stat. at Large 655), granting such jurisdiction on writ of error from the federal courts generally do not apply. *Cross v. U. S.*, 145 U. S. 571; *In re Schneider*, Petitioner, 148 U. S. 157; *Cross v. Burke*, 146 U. S. 82; *In re Heath*, Petitioner, 144 U. S. 92.

Maryland.—If an instruction upon a question of law arising during a criminal trial be within the purview of the Act of 1872, c. 316, an objection for error in such instruction ought to be taken by bill of exceptions and not by petition as upon a writ of error. *Munshower v. State*, 56 Md. 514.

Illinois a writ of error is the only method by which a criminal case can be reviewed in the appellate courts. *Anderson v. People*, 28 Ill. App. 317; *Smith v. People*, 98 Ill. 407; *French v. People*, 77 Ill. 531.

1. *Yates v. People*, 6 Johns. (N. Y.) 405.

2. *Hill v. State*, 27 Tex. 609.

3. *Wilde v. Com.*, 2 Met. (Mass.) 408; *Bump v. Com.*, 8 Met. (Mass.) 533.

4. *Alabama.*—*Harris v. Kreps*, Minor (Ala.) 184; *McLaren v. Allen*, Minor (Ala.) 117; *Wyatt v. Judge*, 7 Port. (Ala.) 37.

Arkansas.—*Crabtree v. Crabtree*, 5 Ark. 638.

Connecticut.—*Carpenter v. Childs*, 1 Root (Conn.) 181; *Wallace v. Middlebrook*, 28 Conn. 464; *Finch v. Ives*, 24 Conn. 390; *Ray v. Fitch*, 1 Root (Conn.) 290; *Dunham v. Braiman*, 1 Root (Conn.) 551; *Gleason v. Chester*, 1 Day (Conn.) 27; *Treadway v. Coe*, 21 Conn. 283.

Florida.—*Bellamy v. Bellamy*, 4 Fla. 242.

Illinois.—*Hedges v. Madison Coun-*

ty, 6 Ill. 306; *Hayes v. Caldwell*, 10 Ill. 33; *Hunter v. Hunter*, 100 Ill. 519; *Ex p. Thompson*, 93 Ill. 89; *Springfield v. Edwards*, 84 Ill. 626.

Indiana.—*Bradley v. Bearss*, 4 Ind. 186.

Kentucky.—*Rule v. Hayden*, 3 B. Mon. (Ky.) 319; *Phillips v. Alcorn*, 4 J. J. Marsh. (Ky.) 38; *Lawless v. Reese*, 3 Bibb (Ky.) 479.

Maryland.—*State v. Boyle*, 25 Md. 509.

Michigan.—*Clark v. North Muskegon*, 86 Mich. 29; *Brady v. Toledo*, etc., R. Co., 73 Mich. 457.

Minnesota.—*Wakefield v. Spencer*, 8 Minn. 376.

Mississippi.—*Lexington Bank v. Taylor*, 2 Smed. & M. (Miss.) 27; *Heckingbottom v. Shell*, 3 Smed. & M. (Miss.) 588; *Terry v. Robins*, 5 Smed. & M. (Miss.) 291; *Stebbins v. Niles*, 13 Smed. & M. (Miss.) 307; *Pickle v. Holland*, 24 Miss. 566; *Dilworth v. Fooshe*, 34 Miss. 288; *Carr v. Coopwood*, 24 Miss. 256; *Wharton v. State*, 41 Miss. 680.

Missouri.—*Stephens v. Hume*, cited in *Ivory v. Delore*, 26 Mo. 506; *State v. Ruthven*, 19 Mo. 382; *Ivory v. Delore*, 26 Mo. 505; *Helm v. Bassett*, 9 Mo. 52; *Horr v. Knighton*, 9 Mo. 180; *Pipkin v. Allen*, 29 Mo. 229.

New Jersey.—*Cory v. Chosen Freeholders*, 44 N. J. L. 445.

New York.—*Peet v. McGraw*, 21 Wend. (N. Y.) 667.

Ohio.—*Kinsley v. State*, 3 Ohio St. 508.

Pennsylvania.—*Horner*, etc., Lateral R. Co., 37 Pa. St. 333.

Texas.—*Fowler v. Morrill*, 8 Tex. 153.

United States.—*Mayberry v. Thompson*, 5 How. (U. S.) 121.

Venue.—So a motion to change the venue or to postpone a trial are not subjects for a writ of error. *Cook v. Burnley*, 11 Wall. (U. S.) 660.

case,¹ unless a statute provides otherwise,² as, it would seem,

Disregard of Instruction.—Where the jury disregard the charge given them by the trial judge the remedy is by application to set aside the verdict, not by writ of error. Reading, etc., R. Co. v. Balthaser, 126 Pa. St. 1.

In Ohio the refusal of the Court of Common Pleas to allow a petition in error in a forcible detainer proceeding is not reviewable in the District Court on a petition in error. Rothwell v. Winterstein, 42 Ohio St. 249.

Feigned Issue.—The finding of a jury upon a feigned issue, formed and tried under the direction of the Court of Common Pleas, is not the subject-matter for a writ of error, but is a proceeding under the control of that court, and if error has intervened the remedy is by a motion there for a new trial. Brewer v. Ware, 18 N. J. L. 370; Neff v. Barr, 14 S. & R. (Pa.) 166; Baker v. Williamson, 2 Pa. St. 116; Baker v. Williamson, 4 Pa. St. 456; Com. v. Judges, 4 Pa. St. 301; Ingraham v. Caricabura, 5 Pa. St. 177; Christophers v. Selden, 28 Pa. St. 165.

Where authorized to a feigned issue directed out of a trial court the writ of error does not lie until after a final judgment or decree has been entered thereon. Green v. Mills, 103 Pa. St. 22; Reed's Appeal, 71 Pa. St. 378; Cake v. Cake, 106 Pa. St. 472.

Order Granting an Interpleader and Feigned Issue.—So no writ of error will lie to an order granting an interpleader and awarding a feigned issue. White v. Rech, 171 Pa. St. 82.

Order Directing Correction.—A writ of error will not lie to an order directing a correction to be made in a final judgment. It should be taken to the judgment as corrected. Schmidt v. Dreyer (Colo. 1895), 39 Pac. Rep. 1086.

Order Remanding Cause.—A writ of error will not lie to an order of a United States court remanding a cause to a state court. May v. State Nat. Bank, 59 Ark. 614.

Other Cases Where Writ Does Not Lie.—*Striking out Plea.*—To a rule striking out a plea. Mershon v. Castree, 57 N. J. L. 484.

Quod Computet.—To a judgment *quod computet*, because not a final judgment. Yates v. People, 6 Johns. (N. Y.) 405.

Venire de Novo.—A judgment reversing that of an inferior tribunal

and awarding a *venire de novo* is final. Jackson v. Walker, 6 Hill (N. Y.) 261.

Opening Judgment.—To an order opening a judgment to let in a defense. Hill v. Irwin, 32 Pa. St. 314.

Injunction.—To an interlocutory judgment removing an injunction. Miller v. Berry, 13 Tex. 208.

Striking Case from Docket.—To an order striking a case from the docket. Astor v. Chambers, 1 Mo. 191. *Contra*, Woodruff v. Bacon, 34 Conn. 181.

Partition.—To an interlocutory decree in partition. Stephens v. Hume, 25 Mo. 349.

Supersedeas.—To a refusal to grant a perpetual supersedeas to a judgment. West v. State, 7 Ark. 293.

Demurrer.—To a decision on a demurrer. Knapp v. Marshall, 26 Ill. 63; Robinson v. County Ct., 32 Mo. 428; Campbell v. Sneed, 5 Ark. 398; Palmer v. Crane, 8 Mo. 619.

Order Quashing Sequestration.—To an order quashing a writ of sequestration granted in aid of an action of trespass to try title. Little v. Morris, 10 Tex. 263.

Order to Sell Land.—To an order of the Circuit Court to sell land. White v. Shannon, 3 Ala. 286.

Order Setting Aside Writ of Restitution.—To an order granting a motion by plaintiff to set aside a writ of restitution issued in defendant's favor and to grant a writ of restitution to plaintiff. Barton v. Forsyth, 5 Wall. (U. S.) 190.

New Trial on Conditions.—To an order awarding a new trial on certain conditions. Lea v. Kelly, 15 Pet. (U. S.) 213; Tracy v. Holcombe, 24 How. (U. S.) 426.

1. State v. Bluefield Drug Co. (W. Va. 1896), 24 S. E. Rep. 649.

2. Missouri.—Rev. Stat. 1879, § 439, relating to proceedings upon a plea in abatement and providing for an interlocutory appeal therefrom, does not authorize a writ of error. Young v. Hudson, 99 Mo. 102, *approving* Duncan v. Forgey, 25 Mo. App. 310.

Texas.—Under Laws 1892, c. 14, art. 1011a, subd. 8, authorizing the Supreme Court to issue writs of error to the Court of Civil Appeals when the latter court's judgment "reversing a judgment practically settles the case," a reversal by the Court of Civil Appeals and its remand for the introduction of

where a party will suffer immediate loss or injury.¹

b. EXERCISE OF DISCRETION.—Nor will the writ lie to a decision involving an exercise of discretion unless such discretion is abused,² as, for instance, a refusal to grant a continuance,³ the

parol evidence is not such a judgment. *Gallagher v. McHugh*, 85 Tex. 446.

Georgia.—But the writ will lie in Georgia to a decision overruling a demurrer to a declaration alleging failure to state a cause of action before final judgment decided in the case, *Central R., etc., Co. v. Denson*, 83 Ga. 266; *Augusta v. Lombard*, 86 Ga. 165; and to a judgment overruling a demurrer to the whole bill, notwithstanding the complainants may have proceeded to a hearing and obtained a decree, and though the decree be not excepted to nor any motion made for a new trial. *Lowe v. Burke*, 79 Ga. 164.

Injunction.—In Georgia a writ of error will not, therefore, lie to an order rescinding a temporary restraining order, although it will lie to an order granting or dissolving an injunction. *Hollinshead v. Lincolnton*, 84 Ga. 590.

A post writ of error lies immediately to certain classes of interlocutory decisions, as to the decision granting or refusing an injunction. *Sheibley v. Georgia Southern R. Co.*, 65 Ga. 107.

1. *Com. v. Foster*, 122 Mass. 321; *Metcalfe's Case*, 11 Coke 39.

2. *Alabama.*—*Planters', etc., Bank v. Willis*, 5 Ala. 770; *Townson v. Moore*, 9 Port. (Ala.) 136; *Evans v. St. John*, 9 Port. (Ala.) 186.

Arkansas.—*Burriss v. Wise*, 2 Ark. 33; *Trammell v. Bassett*, 24 Ark. 499.

Connecticut.—*White v. Trinity Church*, 5 Conn. 187; *Lewis v. Hawley*, 1 Conn. 49; *Doane v. Cummins*, 11 Conn. 152; *Tomlinson v. Ward*, 2 Conn. 396; *Cowles v. Whitman*, 10 Conn. 121.

Florida.—*Denham v. State*, 22 Fla. 664; *Livingston v. Cooper*, 22 Fla. 292.

Georgia.—*Vanzant v. Arnold*, 31 Ga. 210; *Watson v. Warnock*, 31 Ga. 694.

Illinois.—*Oliver v. Hart*, 35 Ill. 55; *Mason v. McNamara*, 57 Ill. 274; *Brown v. Berry*, 47 Ill. 175.

Indiana.—*Haun v. Wilson*, 28 Ind. 296.

Iowa.—*State v. Ingalls*, 17 Iowa 8; *State v. Baldy*, 17 Iowa 39.

Kansas.—*Swartzel v. Dey*, 3 Kan. 244.

Kentucky.—*Owings v. Beall*, 1 Litt. (Ky.) 258; *Piat v. Allaway*, 2 Bibb (Ky.) 554.

Louisiana.—*State v. Merrick*, 10 La. Ann. 424.

Maryland.—*Hoffman v. State*, 20 Md. 425; *Wall v. Wall*, 2 Har. & G. (Md.) 79.

Michigan.—*Chaffee v. Soldan*, 5 Mich. 242; *Vincent v. Bowes*, 78 Mich. 315; *Toulman v. Swain*, 47 Mich. 82.

Minnesota.—*Fowler v. Atkinson*, 6 Minn. 578.

Mississippi.—*Price v. State*, 36 Miss. 531.

Missouri.—*King v. Pearce*, 40 Mo. 222; *Lackey v. Lubke*, 36 Mo. 115; *Walton v. Walton*, 19 Mo. 667.

Nebraska.—*Dodge v. People*, 4 Neb. 220.

New Hampshire.—*Rochester v. Roberts*, 29 N. H. 360.

New Jersey.—*Mershon v. Castree*, 57 N. J. L. 484; *Evans v. Adams*, 15 N. J. L. 373; *Davis v. Delaware Tp.*, 42 N. J. L. 513; *Red Bank First Nat. Bank v. Jones*, 44 N. J. L. 60; *Brown v. Warden*, 44 N. J. L. 177; *Gilliland v. Rappleyea*, 15 N. J. L. 138; *Hogencamp v. Ackerman*, 24 N. J. L. 133; *Eames v. Stiles*, 31 N. J. L. 490; *U. S. Watch Co. v. Learned*, 36 N. J. L. 429; *McCourry v. Doremus*, 10 N. J. L. 245; *Romaine v. Norris*, 8 N. J. L. 80; *State v. Wood*, 23 N. J. L. 560.

New York.—*Clason v. Shotwell*, 12 Johns. (N. Y.) 49; *Jenkins v. Brown*, 21 Wend. (N. Y.) 454.

Ohio.—*Raab's Estate*, 16 Ohio St. 274.

Oregon.—*Bowen v. State*, 1 Oregon 270.

Pennsylvania.—*Shortz v. Quigley*, 1 Binn. (Pa.) 226; *Com. v. Davis*, 109 Pa. St. 129; *Bunce v. Wightman*, 29 Pa. St. 335.

Tennessee.—*Jarnagin v. Atkinson*, 4 Humph. (Tenn.) 470.

Texas.—*Osborne v. Scott*, 13 Tex. 59.

Vermont.—*Emerson v. Paine*, 9 Vt. 271; *Foster v. Austin*, 33 Vt. 615; *Mosseaux v. Brigham*, 19 Vt. 457; *Amidon v. Aiken*, 28 Vt. 440.

Wisconsin.—*Smith v. Thorp*, 7 Wis. 514; *Paine v. Chase*, 14 Wis. 653.

3. *Owings v. Beall*, 1 Litt. (Ky.) 257; *Smalley v. Anderson*, 2 T. B. Mon. (Ky.) 56; *Hammonds v. Kemer*, 3 Hayw. (Tenn.) 145; *Jarnagin v. At.*

allowance or refusal of an amendment,¹ refusal of a motion to strike out a plea,² denial of an application for leave to appeal under a statute vesting a discretion in the trial justice to grant leave to appeal,³ a denial of a motion to reinstate a cause,⁴ or denial or allowance of a motion for a new trial.⁵

c. EXERCISE OF MINISTERIAL POWER.—And, as the act to be reviewed must be an exercise of judicial power, the writ does not lie to review merely ministerial acts.⁶

d. OTHER CASES WHERE WRIT DOES NOT LIE.—In various

kinson, 4 Humph. (Tenn.) 470; Marine L. Ins. Co. v. Hodgson, 6 Cranch (U. S.) 206; Woods v. Young, 4 Cranch (U. S.) 237; Brown v. Munger, 16 Vt. 12; M'Courry v. Doremus, 10 N. J. L. 249.

1. Merriam v. Langdon, 10 Conn. 460; Phillips v. Dana, 2 Ill. 498; Warren v. McHatton, 3 Ill. 32; Clarke v. Bell, 2 Litt. (Ky.) 162; Miller v. Shackelford, 4 Dana (Ky.) 264; Stearns v. Barrett, 1 Mason (U. S.) 153; Long v. Overton, 7 Mo. 567; Davis v. Church, 1 W. & S. (Pa.) 240; Helm v. Rodgers, 5 Humph. (Tenn.) 105; Chirac v. Reinicker, 11 Wheat. (U. S.) 280; Marine Ins. Co. v. Hodgson, 6 Cranch (U. S.) 206; Probate Court v. Hall, 14 Vt. 159; Davis v. Delaware Tp., 42 N. J. L. 517; Luysten v. Sniffen, 1 Barb. (N. Y.) 428.

2. Townson v. Moore, 9 Port. (Ala.) 136.

3. Vincent v. Bowes, 78 Mich. 315.

4. Wilson v. Ætna Ins. Co., 3 Ind. 557; Welch v. Mandeville, 7 Cranch (U. S.) 152.

5. Connecticut.—Magill v. Lyman, 6 Conn. 59; Gladwin v. Lewis, 6 Conn. 49; Kimball v. Cady, Kirby (Conn.) 41; Norwich, etc., R. Co. v. Cahill, 18 Conn. 484.

Illinois.—Clemson v. Kruper, 1 Ill. 210; Collins v. Claypole, 1 Ill. 212; Street v. Blue, 1 Ill. 261; Vernon v. May, 1 Ill. 294.

Indiana.—Goldsby v. Robertson, 1 Blackf. (Ind.) 21.

Kentucky.—Stewart v. Stewart, 2 T. B. Mon. (Ky.) 85.

Maryland.—Anderson v. State, 5 Har. & J. (Md.) 174.

Missouri.—State v. Bird, 1 Mo. 585; Keating v. Bradford, 25 Mo. 86.

New York.—*Ex p.* Fitzgerald, 23 Wend. (N. Y.) 648.

Oregon.—Bowen v. State, 1 Oregon 270.

Pennsylvania.—Stokes v. Burrell, 3 Grant's Cas. (Pa.) 241.

United States.—Marine Ins. Co. v. Hodgson, 6 Cranch (U. S.) 206; Marine Ins. Co. v. Young, 5 Cranch (U. S.) 187; Warner v. Norton, 20 How. (U. S.) 448; Doswell v. De La Lanza, 20 How. (U. S.) 29; Freeborn v. Smith, 2 Wall. (U. S.) 176; Home Ins. Co. v. Barton, 13 Wall. (U. S.) 603; Atchison, etc., R. Co. v. Howard, 4 U. S. App. 202; Hills v. Ross, 3 Dall. (U. S.) 184; Jennings v. The Brig Perseverance, 3 Dall. (U. S.) 336; Woods v. Young, 4 Cranch (U. S.) 237; U. S. v. Evans, 5 Cranch (U. S.) 280; Welch v. Mandeville, 7 Cranch (U. S.) 152; Barr v. Gratz, 4 Wheat. (U. S.) 213; Henderson v. Moore, 5 Cranch (U. S.) 11.

See in general, upon this subject, article NEW TRIAL.

For other examples, see the various articles relating to the decision which is sought to be reviewed.

6. Georgia.—Ashburn v. Dempsey, 15 Ga. 248.

Illinois.—Kingsbury v. Sperry, 119 Ill. 279.

Kentucky.—Taylor v. Com., 3 J. J. Marsh. (Ky.) 401.

Tennessee.—Thus the action of a circuit judge, under Code Tenn. § 778 (in force 1879), based upon the report of a grand jury, requiring a county trustee to give new bond and declaring his office vacant, because, in the opinion of the judge, the sureties to the bond tendered in compliance with the order were not good for the amount, was held not a judicial but a ministerial act, from which no writ of error or appeal lay to the Supreme Court. *Ex p.* Knight, 3 Lea (Tenn.) 401.

Power to Borrow.—A power given by a court to a guardian to borrow money and execute a mortgage on a ward's real estate was held a purely ministerial act, and accordingly not reviewable on writ of error. Kingsbury v. Sperry, 119 Ill. 279.

other classes of cases the writ does not lie, either because the appropriate remedy is before the trial court,¹ or because the point in error was not appropriately raised below. See article EXCEPTIONS AND OBJECTIONS, and consult the title indicating the proceeding to be reviewed.²

VII. FOR WHAT ERROR THE WRIT LIES—1. In General.—The writ lies “when a man is grieved by an error in the foundation, proceeding, judgment, or execution” of a suit.³

Curable Defects.—It does not lie for merely formal errors,⁴ but the defect must be one of substance not cured by statutes of amendments or jeofails.⁵

1. Rule to Ascertain Sum Due.—No writ of error will lie to the Superior Court on a rule to ascertain what amount of money, if any, is due on a judgment in that court, *Cloud v. Temple*, 6 Houst. (Del.) 14; or for a mistake in the computation of interest. *Lovell v. Kelley*, 48 Me. 263.

Taxation of Costs—In Common-law States.—A writ of error may still be maintained to obtain relief from an illegal taxation of costs, unless varied by statute. *Valentine v. Norton*, 30 Me. 200; *Field v. First Massachusetts Turnpike Corp.*, 5 Mass. 389; *Waite v. Garland*, 7 Mass. 453; *Thomas v. Sever*, 12 Mass. 379.

Under Modern Practice.—However, it is held that as a lower court does not, where the cost bill is taxed by the clerk, act upon costs, unless on some motion or application to correct the taxation already made by its ministerial officers, a writ of error would not be a proper remedy, if any lies, to review such corrective action. *Abbott v. Mathews*, 26 Mich. 176; *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

Question of Costs.—But it does not lie to review a question merely of costs where the original controversy has ceased to exist. *Robinson v. State*, 87 Tex. 562; *Lacoste v. Duffy*, 49 Tex. 767; *Gordon v. State*, 47 Tex. 208; *Matthews v. Davis*, 39 Ohio St. 54; *Randolph v. Rosser*, 7 Port. (Ala.) 249. *Compare Smith v. Coats*, 19 Ill. 405; *Den v. Fen*, 21 N. J. L. 700.

Too Small Judgment.—In *Massachusetts* it was held that a petition for a new trial, not a writ of error, was the proper remedy to correct a judgment too small because of an error in casting interest on a promissory note. *Whitwell v. Atkinson*, 6 Mass. 272.

2. Abatement.—Generally, where the defect could have been pleaded in abate-

ment, no writ of error lies. *Tandy v. Rowell*, 54 N. H. 385; *Merrill v. Cog-gill*, 12 N. H. 104.

Case Stated.—It does not lie on a case reserved or case stated below. *Pray v. Jersey City*, 33 N. J. L. 507; *Harrington v. Harrington*, 15 Ga. 561; *Alfred v. Saco*, 7 Mass. 380; *Carroll v. Richardson*, 9 Mass. 329; *Bacon v. Ward*, 10 Mass. 141; *Johnson v. Shed*, 21 Pick. (Mass.) 227; *Lansing's Appeal*, 10 Wis. 120.

Agreed Case.—So where the agreed case, as in early English practice, was never made part of the record, no writ of error would lie. *U. S. v. Eliason*, 16 Pet. (U. S.) 291. But where, as in the United States Circuit Court, it becomes part of the record in the cause, a writ of error lies thereon. *Stimpson v. Baltimore, etc., R. Co.*, 10 How. (U. S.) 347.

3. Williams v. Hartford, etc., R. Co., 13 Conn. 118; *McArthur v. Starrett*, 43 Me. 345; *Rochester v. Roberts*, 25 N. H. 501; *Reg. v. Paty*, 2 Salk. 504; *Buttrick v. Roy*, 72 Wis. 164.

“A writ of error, like other process of the law, is intended for the relief of some injury or grievance, and supposes a defect or error in substance in the commencement, progress, or termination of some judicial proceeding in a court of record.” *Herring v. Selden*, 1 Vt. 14.

4. Pettes v. Com., 126 Mass. 242.
5. Cheetham v. Tillotson, 4 Johns. (N. Y.) 500; *Harris v. Cole*, 2 Fla. 400.

“The object of a writ of error is to review and correct an error of law which is not amendable or cured at common law by some of the statutes of amendment and jeofails.” 3 Bl. Com. 405; 1 Bac. Ab., tit. Error; *William v. Gwyn*, 2 Saund. 46, note 6; *Graham's Pr.*, bk. 4; 1 Tidd's Pr., c. 43.” *Harris v. Cole*, 2 Fla. 400.

Error Apparent on Face of Record.—To reverse a judgment for error in law, the error must be apparent upon the face of the record.¹ The writ of error cannot be employed to reach errors arising on matter extrinsic to the record,² and if no error appears thereon, none will be presumed.³ The reviewing court cannot assume that facts appeared on the hearing below which are not disclosed by the record,⁴ and nothing can be assigned for error that contradicts it.⁵

2. Questions of Law.—A court of error is confined to a revisory jurisdiction only. It has no original jurisdiction except as conferred by statute, and accordingly must limit its examination to errors of law only.⁶

1. *Connecticut*.—*Zaleski v. Clark*, 45 Conn. 405.

Florida.—*Ex p. Powell*, 20 Fla. 806.

Illinois.—*McClay v. Norris*, 9 Ill. 370.

Maine.—*Lewiston Steam Mill Co. v. Merrill*, 78 Me. 107; *Starbird v. Eaton*, 42 Me. 569; *Kirby v. Wood*, 16 Me. 81; *Denison v. Portland Co.*, 60 Me. 521; *Valentine v. Norton*, 30 Me. 194; *McArthur v. Starrett*, 43 Me. 345; *Wood v. Leach*, 69 Me. 555; *Hobbs v. Staples*, 19 Me. 219; *Paul v. Hussey*, 35 Me. 97.

Maryland.—*Ford v. State*, 12 Md. 514; *State v. Williams*, 5 Md. 82.

New Hampshire.—*Claggett v. Simes*, 31 N. H. 29.

New Jersey.—*State v. Vandervere*, 25 N. J. L. 669.

New York.—*People v. Casey*, 72 N. Y. 395; *Willis v. People*, 32 N. Y. 715; *Gaffney v. People*, 50 N. Y. 416.

North Carolina.—*State v. Godwin*, 5 Ired. L. (N. Car.) 401.

Pennsylvania.—*Hazen v. Com.*, 23 Pa. St. 355; *Bain v. Funk*, 61 Pa. St. 185.

United States.—*Macheca v. U. S.*, 26 Fed. Rep. 845.

Report of Referee.—The writ will not lie to a judgment rendered on a report of referee in the Superior Court except on error which appears by the record in the judgment or proceedings in the court below. *Layton v. Trustees of Poor*, 6 Houst. (Del.) 13.

2. *Green v. State*, 59 Md. 123.

Exception—Plea Setting Up Extrinsic Matters.—“Upon writ of error in a criminal case the cause must be determined solely upon the record sent up to this court, and the only exception in civil cases is where there is a plea in this court to the assignment of er-

rors, setting up extrinsic matters, such as a release of errors, etc. In the absence of such plea the same rule obtains in civil cases.” *Per McAllister, J.*, in *Perteet v. People*, 70 Ill. 181.

3. *Peebles v. Rand*, 43 N. H. 337.

4. *Ex p. Powell*, 20 Fla. 806.

5. 3 Bacon's Abr., title Error, K.; *Wright v. Wickham*, Cro. Eliz. 469; *Jaques v. Cesar*, 2 Saund. 101 a; *Hudson v. Banks*, 1 Lev. 76; *Helburt v. Held*, 2 Ld. Raym. 1414; *Lampton v. Collingwood*, 1 Salk. 262; *Bradburn v. Taylor*, 1 Wils. 85; *Wetmore v. Plant*, 5 Conn. 541; *Cook v. Conway*, 3 Dana (Ky.) 454; *Field v. Gibbs*, 1 Pet. (C. C.) 155; *Claggett v. Simes*, 31 N. H. 22; *Patterson v. Cook*, 8 Port. (Ala.) 66; *Hill v. West*, 4 Yeates (Pa.) 385.

Reason for Rule.—“The records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.” 3 Bac. Abr. 371.

6. *Florida*.—*Ward v. Bull*, 1 Fla. 316.

Georgia.—*Beall v. Powell*, 4 Ga. 525; *Allen v. Savannah*, 9 Ga. 286; *Witkowski v. Skalowski*, 46 Ga. 41; *State v. Jones*, 7 Ga. 422.

Maine.—*Kirby v. Wood*, 16 Me. 81; *Smith v. Moore*, 6 Me. 275.

Maryland.—*Munshower v. State*, 56 Md. 518.

Missouri.—*McEvoy v. Lane*, 9 Mo. 49; *Von Phul v. St. Louis*, 9 Mo. 50.

New York.—*McPherson v. Cheadell*, 24 Wend. (N. Y.) 15; *Feeter v. Heath*, 11 Wend. (N. Y.) 481; *Donohue v. People*, 56 N. Y. 208.

In Criminal Cases.—The rule that a court of last resort can only review questions of law is applicable in criminal as well as civil cases.¹

3. Questions of Fact.—The appellate court has no authority to review questions of fact unless a statute expressly confers it,² and

Pennsylvania.—*Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57; *Gonser v. Smith*, 115 Pa. St. 452; *Jamison v. Collins*, 83 Pa. St. 359; *Brown v. Dempsey*, 95 Pa. St. 243; *Lyon v. Kurtz*, 30 Pittsb. L. J. (Pa.) 478; *Lee v. Keys*, 88 Pa. St. 175; *Glentworth's Appeal*, 38 Leg. Int. (Pa.) 342; *Ferry Co. v. Monaghan*, 10 W. N. C. (Pa.) 46; *Hutchinson v. Ledlie*, 36 Pa. St. 112.

Tennessee.—*Mitchell v. Nicholson*, 8 Yerg. (Tenn.) 197.

Vermont.—*Kirby v. Mayo*, 13 Vt. 103.

United States.—*U. S. v. Dawson*, 101 U. S. 569; *Parks v. Turner*, 12 How. (U. S.) 39; *U. S. v. 60½ Carats Brilliants*, 10 Blatchf. (U. S.) 221.

England.—*Jaques v. Cesar*, 2 Saund. 101, note 1.

Error in Law and Fact Distinguished.—“A judgment of a court may be erroneous either in fact or in law. When a court has made an erroneous ruling upon the record or upon the facts which are disclosed in the proceedings before it, it is error in law. * * * Error of the former class occurs when, by reason of some fact which is unknown to the court, it renders a judgment which is void or voidable.” *Cruger v. McCracken*, 87 Tex. 584.

Ohio.—So, under the amendment to Rev. Stat., § 7356, passed 1883 (80 Ohio Laws 170), only errors of law occurring on the trial or appearing in the pleadings or judgment can be reviewed by the appellate court. Questions of fact are not reviewable. *Wagner v. State*, 42 Ohio St. 537.

Vermont.—In Vermont questions of law apparent on the record by means of a report of auditors or the pleadings, or placed there by agreement of parties, may be reviewed in the Supreme Court by writ of error, although no exceptions to the judgment are filed in accordance with section 44, chapter 28, Comp. Stat. Vt. *Small v. Haskins*, 30 Vt. 172.

Special Findings.—Questions of law arising upon a special finding of fact made by the court on trial without a jury, and made part of the record, are

reviewable on writ of error. *Zaleski v. Clark*, 45 Conn. 405, note.

1. *Bucklin v. U. S.*, 159 U. S. 680.

2. *Connecticut.*—*Styles v. Tyler*, 64 Conn. 432; *Weeden v. Hawes*, 10 Conn. 54; *Dudley v. Deming*, 34 Conn. 169.

Georgia.—*Beall v. Powell*, 4 Ga. 525.

Iowa.—*Gordon v. Higley*, Morr. (Iowa) 13; *Miller v. O'Neal*, 9 Iowa 446; *Taylor v. Rockwell*, 10 Iowa 531; *Lane v. Goldsmith*, 23 Iowa 240.

Kentucky.—*Case v. Myers*, 6 Dana (Ky.) 330.

Massachusetts.—*Riley v. Waugh*, 8 Cush. (Mass.) 220.

Mississippi.—*Byrne v. Jeffries*, 38 Miss. 533.

New Jersey.—*Cox v. Drake*, 46 N. J. L. 167; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224; *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 529; *Harrison v. Allen*, 40 N. J. L. 557; *Elizabeth v. Hill*, 39 N. J. L. 555; *Blackford v. Plainfield Gaslight Co.*, 43 N. J. L. 438; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 580.

New York.—*Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 132; *People v. Superior Ct.*, 20 Wend. (N. Y.) 663.

Ohio.—*Gest v. Kenner*, 7 Ohio St. 75; *House v. Elliott*, 6 Ohio St. 497.

Vermont.—*Noble v. Jewett*, 2 D. Chip. (Vt.) 36; *Card v. Sargeant*, 15 Vt. 393; *Stevens v. Hewitt*, 30 Vt. 262; *West River Bank v. Gale*, 42 Vt. 27; *Emerson v. Young*, 18 Vt. 603; *Campbell v. Patterson*, 7 Vt. 86.

United States.—*Wiscart v. Dauchy*, 3 Dall. (U. S.) 321; *Generes v. Campbell*, 11 Wall. (U. S.) 193; *Miles v. U. S.*, 103 U. S. 304.

“There is no general issue to try questions of fact upon a writ of error, inasmuch as the plea *in nullo est erratum* is in the nature of a demurrer, * * * putting in issue only such errors as may be shown on the face of the record.” *Goodridge v. Ross*, 6 Met. (Mass.) 487.

Question of Fraud.—So in a case where there is legal evidence of fraud, the question whether the fraud was

this is so whether such questions arise upon the verdict of a jury or the findings of fact of a trial justice.¹

Agreed Statement of Facts.—So error does not lie to a judgment rendered on an agreed statement of facts submitted by the parties for the opinion and decision of the court.²

Facts Reported by Judge.—Nor does the writ lie where the facts proved before the jury are reported by the judge,³ unless it be for an error disclosed by the record which will not be cured by verdict.⁴

Where Re-examinable.—But the rule does not preclude the consideration of the facts so far as essential to the presentation of the questions of law,⁵ where the record shows that such facts were actually found by the court below, although they were not included in the formal findings made and preserved in the record,⁶ and it is competent for the court of errors to determine whether the facts found below are sufficient to support the judgment rendered upon them.⁷

4. Mixed Questions of Law and Fact.—Where mixed questions of

satisfactorily proved cannot be considered on writ of error. *Cox v. Drake*, 46 N. J. L. 167.

Competency of a Juror.—So upon writ of error the question of the competency of a juror to return a verdict cannot be examined, as it is a question of fact. *In re Buchanan*, Petitioner, 158 U. S. 31.

Texas.—In the Court of Civil Appeals of Texas the whole case, involving questions of fact as well as of law, is submitted to the court, whether the method be appeal or error. *Gainesville*, etc., *R. Co. v. Lacy*, 7 Tex. Civ. App. 63; *Magee v. Chadoin*, 44 Tex. 488; *Harle v. Langdon*, 60 Tex. 555; *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605.

1. *Elizabeth v. Hill*, 39 N. J. L. 555; *McEvoy v. Lane*, 9 Mo. 48; *Von Phul v. St. Louis*, 9 Mo. 49; *Young v. Kelly*, 9 Mo. 50; *Reynolds v. Rogers*, 5 Ohio 169; *Lease v. Franklin*, 84 Iowa 413; *Taylor v. Rockwell*, 10 Iowa 532; *Lane v. Goldsmith*, 23 Iowa 242; *State v. Roney*, 37 Iowa 32.

Where a cause is tried by the court without a jury, a writ of error will lie where it would have been permissible if the case had been tried by a jury. *Fowler v. Towle*, 49 N. H. 507.

When Finding of Fact Error in Law.—A finding of fact may be of itself an error in law. *Styles v. Tyler*, 64 Conn. 432.

It is an error in law where it is made without any evidence of the fact as to matters not the subject of judicial no-

tice. *Fernald v. Bush*, 131 Mass. 591. Or to refuse to find a material fact which was in issue, and was proved by uncontradicted evidence. *The E. A. Packer*, 140 U. S. 360; *Kennedy v. Porter*, 109 N. Y. 526; *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263.

2. *Alfred v. Saco*, 7 Mass. 380; *Carroll v. Richardson*, 9 Mass. 329; *Gray v. Storer*, 10 Mass. 163; *Warren v. Coombs*, 44 Me. 88.

Texas—Assumption of Fact.—Where the Court of Civil Appeals assumes the existence of facts not shown by the agreed case, but which it is not incumbent on the plaintiff to prove, his application for a writ of error to the Supreme Court will be denied. *California Bank v. Marshall* (Tex. 1893), 22 S. W. Rep. 6.

3. *Johnson v. Shed*, 21 Pick. (Mass.) 225; *Warren v. Coombs*, 44 Me. 88.

4. *Smith v. Moore*, 6 Me. 275.

5. *Styles v. Tyler*, 64 Conn. 432.

6. *Styles v. Tyler*, 64 Conn. 432.

But see *Saint Anthony Mill Co. v. Vandall*, 1 Minn. 250, in which it was held that the only way to incorporate the evidence or any part of it in the record, so as to subject to review upon writ of error the questions of law arising thereon, is by bill of exceptions. See also *Covington v. Covington*, 32 Miss. 145.

7. *Elizabeth v. Hill*, 39 N. J. L. 555; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39; *Tyng v. Grinnell*, 92 U. S. 467.

law and fact are referred to the court for its decision, no writ of error lies,¹ unless the court is called upon to decide a question of law, or such question of law necessarily arises out of the facts, and is distinctly presented to the court upon them, so that the decision of the point of law will decide the merits of the cause, and the decision of the court is wrong.²

Assignments of Error.—And the joinder of questions of law and fact in the same assignment is not permissible,³ unless it is expressly allowed by the statute.⁴

VIII. EXCLUSIVENESS OF REMEDY—1. **Actions at Law.**—At common law a writ of error is the sole remedy to review a judgment rendered in an action at law brought before a court of record.⁵

1. *Campbell v. Patterson*, 7 Vt. 86; *Warren v. Coombs*, 44 Me. 88; *Ward v. Bull*, 1 Fla. 311.

2. *Ward v. Bull*, 1 Fla. 311.

3. *Fitch v. Lothrop*, 2 Root (Conn.) 524.

Striking out Errors of Fact.—Where error in fact and error in law are joined, a plea in abatement will lie. The court may order the error in fact erased and examine the error in law. *Lewis v. Lawson*, 1 Root (Conn.) 262; *Ward v. Bull*, 1 Fla. 316.

Rule in Maine.—In Maine, however, where error in law and error in fact are joined, the proper remedy is to move to dismiss the writ because of the misjoinder. *Valentine v. Norton*, 30 Me. 199.

4. *Eliot v. McCormick*, 141 Mass. 194, citing *Goodridge v. Ross*, 6 Met. (Mass.) 487; *Morrison v. Underwood*, 5 Cush. (Mass.) 52; *Tilden v. Johnson*, 6 Cush. (Mass.) 354; *Packard v. Matthews*, 9 Gray (Mass.) 311; *Raymond v. Butterworth*, 139 Mass. 471.

5. *Colorado.*—*People v. Myers*, 1 Colo. 508.

Iowa.—*Ellis v. State*, 3 Iowa 217.

Nebraska.—*State v. Affholder*, 44 Neb. 497; *State v. Lancaster County*, 13 Neb. 223; *State v. Chicago, etc., R. Co.*, 19 Neb. 482; *State v. School Dist. No. 9*, 30 Neb. 527.

United States.—*Stevens v. Clark*, 62 Fed. Rep. 321; *U. S. v. Hailey*, 118 U. S. 233; *Deland v. Platte County*, 155 U. S. 221; *Stringfellow v. Cain*, 99 U. S. 610; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *Woolf v. Hamilton*, 108 U. S. 15; *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. (U. S.) 455; *Sarchet v. U. S.*, 12 Pet. (U. S.) 143; *Bevins v. Ramsey*, 11 How. (U. S.) 185; *Burrows v. Marshal*, 15 Wall. (U. S.) 682.

Intervening Petition in Chancery Suit.

—An intervening petition in a chancery suit, setting up a cause of action at law against the receivers and treated as an action at law and directed to be tried by a jury, is reviewable on writ of error, and not by appeal. *Rouse v. Hornsby*, 67 Fed. Rep. 219.

Habeas Corpus—Florida.—In Florida a writ of error is the sole means by which a judgment in a habeas corpus proceeding is reviewable in the Supreme Court. *Tyler v. Painter*, 16 Fla. 145; *Ex p. Edwards*, 11 Fla. 174.

The issuance of a writ in such a case lies in the discretion of the Supreme Court, and it does not issue as a matter of course, either from the court or the clerk's office. *Ex p. Finch*, 15 Fla. 631.

Nebraska.—In Nebraska a judgment of the District Court in an action of law is only reviewable on a petition in error. *Prentice Brownstone Co. v. King*, 39 Neb. 816.

Petition to Recover Fees—United States Courts.—A writ of error, not appeal, is the sole method of reviewing a judgment rendered upon a petition filed by a clerk of the courts against the United States under Act of Congress March 3, 1887, 24 Stat. At. L., p. 505, to recover sums due him as fees. *U. S. v. Fletcher*, 60 Fed. Rep. 53.

United States Courts.—Judgments in a district or circuit court of the United States, in cases brought under the Act of March 3, 1887, c. 359, 24 Stat. 505, are not required to be brought to the Supreme Court of the United States for revision by appeal only, but may be brought by writ of error; but they will be re-examined in the Supreme Court only when the record contains a specific finding of facts with the con-

A mandamus cannot be used as a substitute,¹ nor will a technical chancery appeal lie.²

2. Suits in Equity.—On the other hand, a writ of error does not lie to bring up for review a decree in equity; this can only be done by an appeal,³ unless a statute, expressly or by necessary

clusions of law thereon. *Chase v. U. S.*, 155 U. S. 489.

Case against United States.—Under the Act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," the distinction between cases at law, cases in equity, and cases in admiralty is maintained, and where the case is at law it can be brought up by writ of error alone; in equity or admiralty it is brought up by appeal. *Chase v. U. S.*, 155 U. S. 489.

1. *Ex p.* Baltimore, etc., R. Co., 108 U. S. 566; *Ex p.* Williamson, 8 Ark. 424; *Ex p.* Hoard, 105 U. S. 578; *Ex p.* Loring, 94 U. S. 418; *Ex p.* Des Moines, etc., R. Co., 103 U. S. 794; *Ex p.* Nelson, 1 Cow. (N. Y.) 417; *Ex p.* Bostwick, 1 Cow. (N. Y.) 143; *Columbia Bank v. Sweeney*, 1 Pet. (U. S.) 567.

In Criminal Cases.—And so, unless a statute provide otherwise, a writ of error is the sole mode by which a criminal case can be brought up for review. *Mohler v. People*, 24 Ill. 26.

2. *Ward v. Gregory*, 7 Pet. (U. S.) 633; *Bevins v. Ramsey*, 11 How. (U. S.) 185; *Burrows v. Marshal*, 15 Wall. (U. S.) 682.

Under Comp. Laws N. Mex. 1884, 2193, chancery cases, as well as cases at law, are reviewable by writ of error. *Farish v. New Mexico Min. Co.* (N. Mex. 1889), 21 Pac. Rep. 82.

The same rule applies in *Florida* since the Revised Statutes went into effect, June 13, 1892, and an appeal cannot be entertained in an action at law. *Taylor v. Kissimmee City*, 37 Fla. 235.

3. *Arkansas.*—*Rector v. Baun*, 5 Ark. 314; *Gibson v. Rogers*, 2 Ark. 334.

Florida.—*Columbia County v. Bryson*, 13 Fla. 282; *Bradford v. Marvin*, 2 Fla. 101; *Harris v. Cole*, 2 Fla. 400.

Massachusetts.—*Smith v. Rice*, 11 Mass. 507.

Missouri.—*North Missouri R. Co. v. Green*, 34 Mo. 160; *Anderson v. Biddle*, 9 Mo. 580.

New Mexico.—*Kidder v. Bennett*, 2 N. Mex. 37.

Ohio.—*Gilliland v. Sellers*, 2 Ohio St. 223.

Pennsylvania.—*Johns v. Erb*, 5 Pa. St. 232; *Elliott v. Sanderson*, 1 P. & W. (Pa.) 74; *Springer v. Springer*, 43 Pa. St. 518; *Horton v. Miller*, 44 Pa. St. 256; *Brown v. Parkinson*, 56 Pa. St. 341; *Elliott v. Sanderson*, 1 P. & W. (Pa.) 74; *Miller v. Miller*, 3 Binn. (Pa.) 30; *Breitenbach v. Bush*, 44 Pa. St. 313.

Wisconsin.—*Crocker v. State*, 60 Wis. 555; *Delaplaine v. Madison*, 7 Wis. 407; *Howes v. Buckingham*, 13 Wis. 443; *Welden v. Legate*, 1 Pin. (Wis.) 286; *Shannon v. State*, 18 Wis. 604; *Costello v. Buch*, 25 Wis. 477.

United States.—*Walker v. Dreville*, 12 Wall. (U. S.) 441; *McCullum v. Eager*, 2 How. (U. S.) 61; *Stevens v. Clark*, 62 Fed. Rep. 323; *Sarchet v. U. S.*, 12 Pet. (U. S.) 144.

See also article APPEALS, vol. 2, p. 31 *et seq.*

Decree of Subrogation.—A writ of error does not lie to a decree of subrogation to a judgment, *Brown v. Parkinson*, 56 Pa. St. 336; *Springer v. Springer*, 43 Pa. St. 518; or to a decision on an application to the equitable powers of the court to set off one judgment against another. *Brown v. Parkinson*, 56 Pa. St. 336.

To Allowance against Estate.—In *Missouri*, where heirs appeal from allowance against the estate in the Probate Court, if on a trial anew in the Circuit Court judgment is rendered against the estate, there can be no more adjudgment against the appellants for costs than there could be for the debt or the damages mentioned in the appeal bond. The statute providing for such is complete in itself, and is not analogous to the statute allowing appeals from a justice's court; but, like the statute permitting appeals in forcible entry and detainer, no judgment can be rendered against the appellants therein in a summary manner, and such judgment may be reached by writ of error. *Harrington v. Evans*, 49 Mo. App. 372.

Probate of Will.—A proceeding in the

implication, so provides.¹

3. Effect of Statutes Authorizing Appeal.—In some jurisdictions, in classes of actions where the right of appeal is given, the party aggrieved may bring up the cause for review either by appeal or by writ of error, but usually this is the case only where the statute specially provides that the remedy shall be cumulative.²

The weight of authority, it is apprehended, holds that a writ of error does not lie where a party is entitled to an appeal, and that, too, although the statute giving the right of appeal does not expressly provide that such remedy shall be exclusive. In such case the right to a writ of error is considered abolished by implication.³

Supreme Court of the District of Columbia, relative to affirming an order of the special term of the same court admitting a will to probate, is not strictly an equitable proceeding, but may be brought up by writ of error. *Ormsby v. Webb*, 134 U. S. 47.

Unreviewable Judgments.—And where a statute authorizes an appeal only from judgments otherwise unreviewable, a writ of error does not lie. *Wirt v. Dinan*, 41 Mo. App. 242.

1. *Lockett v. Townsend*, 3 Tex. 119.

As to when a writ of error lies to review a decree, it was said, in *Gibson v. Widener*, 85 Tenn. 16: "A writ of error lies only from a final judgment or decree. New Code, 3895. It does not lie except in cases where an appeal or appeal in error is a matter of right and not of discretion." *Meek v. Mathis*, 1 Heisk. (Tenn.) 540; *Hume v. Commercial Bank*, 1 Lea (Tenn.) 222.

The appeal in this cause did not lie as a matter of right, the decree not being final (New Code 3874), *Abbott v. Fagg*, 1 Heisk. (Tenn.) 747; *Thruston v. Belote*, 12 Heisk. (Tenn.) 249; *Cawthon v. Searcy*, 12 Lea (Tenn.) 651, and it follows that the writ of error cannot be employed to review the decision complained of.

2. See *Smith v. Gibson*, 25 Neb. 511; *Burke v. Cunningham*, 42 Neb. 646; *White v. Blum*, 4 Neb. 557; *McMichael v. Groves*, 14 Colo. 540; *Rice v. Reed*, 29 Ark. 320; *U. S. v. Gwyn* (N. Mex. 1888), 42 Pac. Rep. 167; *Horton v. Peacock*, 1 Wyoming 57; *Moody v. Stephenson*, 1 Minn. 401; *Bell v. Brown*, 5 Yerg. (Tenn.) 107; *Harding v. Larkin*, 41 Ill. 413; *Brewster v. Cowen*, 55 Conn. 152; *Gainesville, etc., R. Co. v. Lacy*, 7 Tex. Civ. App. 63; *Lockett v. Townsend*, 3 Tex. 119;

Cheek v. Rogers, 1 Tex. 440; *State v. Thompson*, 30 Mo. App. 503.

New Mexico.—By section 2193 Comp. Laws N. Mex. "all causes, either in law or equity, finally adjudged or determined in the district courts may be removed into the Supreme Court of the territory by appeal or writ of error." *U. S. v. Gwyn* (N. Mex. 1888), 42 Pac. Rep. 167.

3. *Alabama.*—*Ex p. Sanford*, 5 Ala. 562; *Russell v. Peirce*, 7 Port. (Ala.) 276.

California.—*Haight v. Gay*, 8 Cal. 300; *Sacramento, etc., R. Co. v. Harlan*, 24 Cal. 335; *Ex p. Thistleton*, 52 Cal. 220; *Adams v. Town*, 3 Cal. 247; *Middleton v. Gould*, 5 Cal. 190; *Widber v. Superior Ct.*, 94 Cal. 430; *Nowland v. Vaughn*, 9 Cal. 51.

Illinois.—*Hall v. Thode*, 75 Ill. 173; *Kingsbury v. Sperry*, 119 Ill. 279; *Hobson v. Paine*, 40 Ill. 25; *Holden v. Herkimer*, 53 Ill. 258; *Horner v. Goe*, 54 Ill. 285; *Frans v. People*, 59 Ill. 427; *Ennis v. Ennis*, 103 Ill. 95.

Maine.—*Howard v. Hill*, 31 Me. 420.

Massachusetts.—*Monk v. Guild*, 3 Met. (Mass.) 374; *Gay v. Richardson*, 18 Pick. (Mass.) 417; *Champion v. Brooks*, 9 Mass. 228; *Savage v. Gulliver*, 4 Mass. 171.

Mississippi.—*Robertson v. Williams*, 6 How. (Miss.) 579.

New Hampshire.—*Peebles v. Rand*, 43 N. H. 342; *Medcalf v. Swett*, 1 N. H. 338; *Tandy v. Rowell*, 54 N. H. 386; *Flanders v. White Mountains Bank*, 43 N. H. 383.

Pennsylvania.—*Wike v. Lightner*, 1 Rawle (Pa.) 289; *M'Clemmons v. Graham*, 3 Binn. (Pa.) 89.

Contra.—*Carter v. Buchanan*, 2 Ga. 337.

Reason for Rule.—The reasons on which the rule is founded are that the remedy by appeal is more simple, more prompt, less expensive, and less circuitous.¹

Exceptions to Rule.—There are, however, some exceptions to the rule as stated. It does not apply where the aggrieved party, without any laches on his part, cannot avail himself of the statutory remedy.² "The rule that he who has a right to appeal shall not bring error, applies, of course, to cases only where the party had an opportunity to appeal."³

In Criminal Cases.—So in criminal cases the defendant may resort to a writ of error unless the statute allowing an appeal abolishes the writ in express terms.⁴

Effect of Limited Right of Appeal.—It has been held that where a statute substitutes a limited right of appeal, confined to questions of law only, such an appeal is in the nature of a writ of error, and that in the absence of a statutory declaration abrogating writs of error such a writ will lie as an alternative remedy. *Peck v. Hapgood*, 10 Met. (Mass.) 175; *Day v. Laflin*, 6 Met. (Mass.) 280. See also *Henderson v. Adams*, 5 Cush. (Mass.) 610.

Writ of Review.—A provision by statute allowing a writ of review does not preclude a remedy by writ of error where not all the requisitions of the statute allowing a writ of review are fully complied with. *Smith v. Paige*, 4 Allen (Mass.) 94.

Adjudication in Insolvency.—Under section 67 of the Insol. Act Cal. (Code Civ. Pro., p. 679), providing for an appeal to the Supreme Court from an order granting or refusing an adjudication in insolvency, a writ of error will not lie to review the action of the Superior Court in adjudicating a person an insolvent debtor. *Widber v. Superior Ct.*, 94 Cal. 430. Compare *Sacramento, etc., R. Co. v. Harlan*, 24 Cal. 334.

1. *Monk v. Guild*, 3 Met. (Mass.) 374.

2. *Valier v. Hart*, 11 Mass. 300; *Putnam v. Churchill*, 4 Mass. 516; *Thayer v. Com.*, 12 Met. (Mass.) 9; *Monk v. Guild*, 3 Met. (Mass.) 373; *Howard v. Hill*, 31 Me. 420; *Jewell v. Brown*, 33 Me. 252.

Waiver.—Where a party has lost his right of appeal in a civil case without laches and without having waived it, expressly or impliedly, a writ of error may be granted. *Barnett v. State*, 36 Me. 199.

Want of Notification.—Thus, if the

party never appeared, or was never duly summoned, and judgment was rendered against him by default, the remedy by appeal would not be exclusive. *Gay v. Richardson*, 18 Pick. (Mass.) 417; *Arnold v. Tourtellot*, 13 Pick. (Mass.) 172; *Peebles v. Rand*, 43 N. H. 343.

Personal Disability.—So where a party is an infant and cannot avail himself of an appeal, he is entitled to a writ of error. *Valier v. Hart*, 11 Mass. 300.

Fraud or Accident.—And a party who has been prevented by fraud or inevitable accident from taking an appeal is not debarred from suing out a writ of error. *Jewell v. Brown*, 33 Me. 252.

3. *Monk v. Guild*, 3 Met. (Mass.) 372; *Skipwith v. Hill*, 2 Mass. 35; *Putnam v. Churchill*, 4 Mass. 517; *Valier v. Hart*, 11 Mass. 300; *Howard v. Hill*, 31 Me. 420.

4. *Cooke, et al.*, Petitioners, 15 Pick. (Mass.) 234; *Thayer v. Com.*, 12 Met. (Mass.) 9; *Barnett v. State*, 36 Me. 199.

Reason for Exception.—Although this remedy by appeal in civil cases takes away the remedy by a writ of error by implication, as a general rule, yet in criminal cases the reason for the rule ceases, and there it does not apply. The appellant in such cases is required to recognize with surety to prosecute his appeal or stand committed. His remedy by appeal would often be more onerous than by writ of error to reverse an erroneous judgment, and therefore it is that his right to proceed by error is not taken away or impaired by giving him the right of appeal. *Cooke, et al.*, Petitioners, 15 Pick. (Mass.) 239; *Thayer v. Com.*, 12 Met. (Mass.) 9; *Co. Litt.* 288, b; 3

4. Election of Remedies.—In cases where both remedies are open to the party aggrieved, the general rule as to election of remedies is applicable. Hence, if a party presents his case for review by proceedings in error, he will be held to have made his election to proceed by error and not by appeal.¹ Both remedies cannot be prosecuted simultaneously.² And where an appeal has been taken and prosecuted to judgment a writ of error cannot thereafter be maintained to review the judgment of the lower court.³ If, however, the appeal has been abandoned, or dismissed because not perfected in time,⁴ or for want of prosecution,⁵ or for want of jurisdiction,⁶ the appellant is not estopped from suing out a writ of error.⁷

Black. Com. 407; *Williams v. Andros-coggin*, etc., R. Co., 36 Me. 201.

1. *Thomas v. Thomas* (Neb. 1896), 67 N. W. Rep. 182; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Burke v. Cunningham*, 42 Neb. 645; *Monroe v. Reid*, 46 Neb. 316; *Woodard v. Baird*, 43 Neb. 310; *Harris v. Sim-mang* (Tex. Civ. App. 1895), 29 S. W. Rep. 668; *Horton v. Peacock*, 1 Wyoming 57.

"It was never intended by the law that an appellee could lie quiescent while his rights and those of others were being adjudicated by an appellate court, and, after a decision that is not agreeable to him, sue out a writ of error and present the same case for re-adjudication. It is the policy of the law to discourage and prevent vexatious and troublesome litigation, and to discountenance any attempt to have successive appeals brought up on the same record from the same judgment." *Harris v. Simmang* (Tex. Civ. App. 1895), 29 S. W. Rep. 668.

2. *Rice v. Reed*, 29 Ark. 320; *Yell v. Outlaw*, 14 Ark. 415; *Lloyd v. Welch*, 35 Ga. 104; *Jones v. Crawford*, 18 Ga. 281; *Carter v. Buchanan*, 2 Ga. 337; *Gainesville, etc., R. Co. v. Lacy*, 7 Tex. Civ. App. 63; *Moody v. Stephenson*, 1 Minn. 401; *State v. Thompson*, 30 Mo. App. 503; *Bell v. Brown*, 5 Yerg. (Tenn.) 107.

Appeal by One Party—Error by Another.—In cases where appeals and writs of error are concurrent remedies, the taking of an appeal by one party does not deprive the other of his right to sue out a writ of error, and both proceedings may be had at the same time. *Harding v. Larkin*, 41 Ill. 413.

3. *Gainesville, etc., R. Co. v. Lacy*, 7

Tex. Civ. App. 63; *Schnaider's Brew-ing Co. v. Levvie*, 41 Mo. App. 584.

4. *Hanna v. Pitman*, 25 Ark. 276; *Carson v. Merle*, 4 Ill. 168; *Cahill v. Cantwell*, 31 Neb. 158; *Steele v. Haynes*, 20 Neb. 316; *Covington v. Neilson*, 6 Yerg. (Tenn.) 475; *Baker v. Chatfield*, 23 Fla. 63. *Contra*, *Horton v. Peacock*, 1 Wyoming 57.

A party who has appealed may abandon the appeal and enforce the decree rendered below by execution and then take out a writ of error to in-ccrease the amount of the decree. *Bond v. Greenwald*, 4 Heisk. (Tenn.) 454.

Dismissal without Prejudice.—Under Civil Code of Colo. 1887, § 399, pro-viding that where an appeal is dis-missed without prejudice to another appeal or writ of error, another may be taken, a writ of error will not lie after the dismissal of an appeal unless it is stated that the appeal was without prejudice. *McMichael v. Groves*, 14 Colo. 540.

Abandonment of Appeal by Filing Peti-tion in Error.—Where a case is appeal-able in its nature and a transcript is filed within the time allowed for appeal, but thereafter, and within the time permitted for instituting proceedings in error, the appellant files and attaches to the transcript a petition in error, he will be held to have abandoned his appeal and elected to proceed in error. *Burke v. Cunningham*, 42 Neb. 646; *Woodard v. Baird*, 43 Neb. 310.

5. *Brill v. Meek*, 20 Mo. 358; *Schon-field v. Turner* (Tex. 1887), 6 S. W. Rep. 628.

6. *Bull v. Harrell*, 7 How. (Miss.) 9.

7. **Texas.**—Where an appeal from a judgment has been perfected, and the appellees are entitled to an affirmance because the transcript was not filed in

Effect of Waiver.—Where the remedies are cumulative, an agreement to waive the one is not a waiver of the other.¹

IX. PLURAL WRITS OF ERROR—1. **To Several Judgments.**—One writ of error cannot be sued out to two or more separate and distinct judgments,² and this is so whether rendered between the same³ or different parties.⁴ So, also, the rule applies although the judgments are rendered on the same evidence,⁵ and although the questions involved in each judgment are the same.⁶

2. **Cross-writs of Error.**—In the absence of statute providing otherwise, the defendant in error cannot, as a matter of right, assign cross-error either against the plaintiff in error⁷ or against a codefendant in error.⁸ The only remedy, it would seem, is to sue out a writ of error in the same case, his right to do so not being barred or affected by the writ of error of his adversary.⁹

In some jurisdictions there is express statutory authorization for the assignment of cross-errors. These statutes, however, do not deprive the defendant in error of the right to sue out a writ

time and move for an affirmance of the judgment on certificate as provided by statute, appellant cannot defeat the motion by application for a writ of error. *Davidson v. Ikard*, 86 Tex. 67; *Barber v. Sabine*, etc., R. Co., 9 Tex. Civ. App. 93; *Perez v. Garza*, 52 Tex. 573; *Thompson v. Anderson*, 82 Tex. 237; *Hurley v. Lester* (Tex. Civ. App. 1895), 32 S. W. Rep. 555; *Knox v. Earbee* (Tex. Civ. App. 1895), 31 S. W. Rep. 531. But if the appellant fails to move for an affirmance, *Thompson v. Anderson*, 82 Tex. 237; *Schonfield v. Turner* (Tex. 1887), 6 S. W. Rep. 628, or moves to dismiss the appeal instead of moving for an affirmance, and the appeal is dismissed, Texas, etc., R. Co. v. *Hare*, 4 Tex. Civ. App. 18, the appellant may then sue out a writ of error.

1. *Wynn v. Bellas*, 34 Pa. St. 160; *Putnam v. Churchill*, 4 Mass. 517.

2. *Jones v. Etheridge*, 6 Port. (Ala.) 208; *De Sylva v. Henry*, 4 Stew. & P. (Ala.) 409; *Boyett v. Kerr*, 7 Ala. 9; *Read v. Owen*, 9 Port. (Ala.) 180; *Guthrie v. Noel*, 5 J. J. Marsh. (Ky.) 295; *Cauley v. Pittsburgh*, etc., R. Co., 95 Pa. St. 398.

When Single Writ of Error Appropriate.—If an execution has issued on a judgment, and a forthcoming bond has been given thereon and forfeited, and another judgment entered awarding an execution thereon, a writ of error and supersedeas should be awarded for error in the first judgment not only to it but also to the judgment awarding

execution on the forthcoming bond. *Laidley v. Bright*, 17 W. Va. 779; *Monroe v. Webb*, 4 Munf. (Va.) 73. And supplemental proceedings to correct the record and amend the transcript already filed should not be brought up on a separate writ of error but reported for the transcript already filed. *Pleyte v. Pleyte*, 14 Colo. 593; *Wolfley v. Lebanon Min. Co.*, 3 Colo. 296; *Knox v. McFerran*, 4 Colo. 348.

Probate Proceedings.—The judgment of the judge of the County Court upon the probate of a will and a decree of final settlement of the estate under the will cannot be joined in the same writ of error. *Boyett v. Kerr*, 7 Ala. 9.

Consolidated Affidavit of Defense.—And it matters not in the application of this rule that one consolidated affidavit of defense has been filed in the action below. *Hollohan v. McLean*, 1 W. N. C. (Pa.) 262.

3. *Jones v. Etheridge*, 6 Port. (Ala.) 208; *De Sylva v. Henry*, 4 Stew. & P. (Ala.) 409.

4. *Vance v. Maroney*, 3 Colo. 293.

5. *Cauley v. Pittsburgh*, etc., R. Co., 95 Pa. St. 398.

6. *Cameron v. State*, 87 Tex. 246.

7. *Smith v. Sackett*, 15 Ill. 528, and note; *Page v. People*, 99 Ill. 418. See also *Wickliffe v. Buckman*, 12 B. Mon. (Ky.) 424.

8. *Wilson v. Daniel*, 13 B. Mon. (Ky.) 348.

9. *Harding v. Larkin*, 41 Ill. 413; *Page v. People*, 99 Ill. 424; *Wickliffe v. Buckman*, 12 B. Mon. (Ky.) 424.

of error, if he prefers to do so. But if he elects to avail himself of the statutory remedy, he is precluded from thereafter suing out a separate writ of error.¹

In jurisdictions where the substituted statutory proceeding by petition in error obtains, it is competent for the defendant in error, by analogy with the common-law practice, to file a cross-petition in error.²

X. PARTIES—1. Plaintiffs—a. WHO ENTITLED TO WRIT—

(1) *The General Rule.*—No person is entitled to a writ of error other than a party or privy to the record,³ or one who has been

1. *Page v. People*, 99 Ill. 425; *Wickliffe v. Buckman*, 12 B. Mon. (Ky.) 424.

2. *Shinkle v. Ripley First Nat. Bank*, 22 Ohio St. 516; *Bundy v. Ophir Iron Co.*, 35 Ohio St. 80; *Mannix v. Purcell*, 46 Ohio St. 102; *Hanna v. Barrett*, 39 Kan. 446; *Stettauer v. Carney*, 20 Kan. 496 (*overruling* *Bedell v. Burlington Nat. Bank*, 16 Kan. 130).

In *Shinkle v. Ripley First Nat. Bank*, 22 Ohio St. 516, it was said: "There is no good reason why cross-petitions in error should not be allowed equally as in original actions. They were allowed at common law, and there is nothing in the code which forbids their use. On the contrary, they are calculated to subserve a leading object of the code, namely, to avoid multiplicity of suits, and to render litigation simple, cheap, and speedy."

Additional Process.—Where the party against whom a cross-writ or petition in error is prosecuted is already in court, additional process need not be served upon him. *Brown v. Kuhn*, 40 Ohio St. 468.

Formal Leave.—In *Ohio* it was held that where no formal leave was required to be obtained of the court to file a petition in error, the defendant in error might file a cross-petition without leave. *Bundy v. Ophir Iron Co.*, 35 Ohio St. 80.

Time.—So, too, the statute limiting the time for taking proceedings in error applies to cross-proceedings with the same force and effect as to the original proceedings. *Mannix v. Purcell*, 46 Ohio St. 102.

3. *Alabama.*—*Henry v. Smoot*, Minor (Ala.) 18; *Dupree v. Perry*, 18 Ala. 34; *Hill v. Hill*, 6 Ala. 166; *Earle v. Juzan*, 7 Ala. 474; *Watson v. May*, 8 Ala. 177.

Connecticut.—*Bull v. Meloney*, 27

Conn. 560; *Alling v. Shelton*, 16 Conn. 436; *Coe v. Turner*, 5 Conn. 86.

Florida.—*Howse v. Judson*, 1 Fla. 155; *Pensacola v. Reese*, 20 Fla. 437.

Georgia.—*Townsend v. Davis*, 1 Ga. 495; *Kimbrough v. Pitts*, 63 Ga. 496.

Illinois.—*Harwood v. Cox*, 26 Ill. App. 374; *Louisville, etc., R. Co. v. Surwald*, 150 Ill. 394.

Kentucky.—*Com. v. Dudley*, 5 T. B. Mon. (Ky.) 21; *Hume v. Long*, 6 T. B. Mon. (Ky.) 118; *Bleight v. M'Ilvoy*, 4 T. B. Mon. (Ky.) 147; *Marr v. Hanna*, 7 J. J. Marsh. (Ky.) 643; *Davidson v. Bush*, Hard. (Ky.) 210; *Barr v. Stevens*, 1 Bibb (Ky.) 292; *South v. Hoy*, 3 Bibb (Ky.) 522; *Stevens v. Stevens*, 2 Dana (Ky.) 428; *Satterfield v. Crow*, 8 B. Mon. (Ky.) 553.

Massachusetts.—*Shaw v. Blair*, 4 Cush. (Mass.) 98.

Mississippi.—*Dougherty v. Compton*, 3 Smed. & M. (Miss.) 100; *Flournoy v. Smith*, 3 How. (Miss.) 62; *Beazley v. Prentiss*, 13 Smed. & M. (Miss.) 97; *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473.

Missouri.—*Thompson v. Northcott*, 1 Mo. 224.

Nebraska.—*Burlington, etc., R. Co. v. Martin*, 47 Neb. 56.

New Jersey.—*Black v. Kirgan*, 15 N. J. L. 48; *Sherer v. Collins*, 17 N. J. L. 181.

New Mexico.—*Albuquerque v. Zeiger* (N. Mex. 1891), 25 Pac. Rep. 787.

New York.—*Thompson v. Valarino*, 3 Den. (N. Y.) 179; *Dale v. Roosevelt*, 8 Cow. (N. Y.) 333; *Bissell v. Kip*, 5 Johns. (N. Y.) 99.

Pennsylvania.—*Hessel v. Fritz*, 124 Pa. St. 229; *Steel v. Bridenbach*, 7 W. & S. (Pa.) 150; *Cadmus v. Jackson*, 52 Pa. St. 302.

Tennessee.—*Linch v. Linch*, 1 Lea (Tenn.) 526.

Texas.—*Smith v. Gerlach*, 2 Tex. 424; *Stephenson v. Texas, etc., R. Co.*,

injured by the judgment and will be benefited by its reversal,¹ or one who is competent to release error.²

(2) *Privies*.—By privies, within the meaning of the foregoing rule, are meant heirs, executors, administrators, terre-tenants, or those having an interest in remainder or reversion, or one who is made a party by the law, as he who comes in as a vouchee.³ Accordingly, any of these is entitled to sue out a writ of error.⁴

42 Tex. 162; *Roundtree v. Stone*, 81 Tex. 299.

United States.—*Payne v. Niles*, 20 How. (U. S.) 219; *Bayard v. Lombard*, 9 How. (U. S.) 530; *Green v. Watkins*, 6 Wheat. (U. S.) 260.

England.—*Cannon v. Abbott*, 1 Lev. 210; *William v. Gwyn*, 2 Saund. 46 a, note 6; *Vaughan v. Loriman*, Cro. Jac. 138; *Johnson v. Jebb*, 3 Burr. 1772; *Bull v. Steward*, 1 Wils. 255; *Ognel v. Paston*, Cro. Eliz. 165; *Burton v. Eyre*, Cro. Jac. 288.

Authority of Attorney.—It has been held that an attorney cannot sue out a writ of error of his own motion, *Anonymous*, 11 Ill. 488, or at the instance of the friends of the party without authorization of the party himself. *Ex p. Dorr*, 3 How. (U. S.) 103. *Compare Grosvenor v. Danforth*, 16 Mass. 74; *Dixon v. Brophrey*, 29 Iowa 460.

1. *Hill v. Hill*, 6 Ala. 168; *Dupree v. Perry*, 18 Ala. 34; *Henry v. Smoot*, Minor (Ala.) 18; *Black v. Kirgan*, 15 N. J. L. 49; *Dougherty v. Compton*, 3 Smed. & M. (Miss.) 100; *Howse v. Judson*, 1 Fla. 155; *Townsend v. Davis*, 1 Ga. 495; *Harrington v. Roberts*, 7 Ga. 510; *Louisville, etc., R. Co. v. Surwald*, 150 Ill. 394; *Com. v. Dudley*, 5 T. B. Mon. (Ky.) 21; *Bleight v. M'Ilvoy*, 4 T. B. Mon. (Ky.) 142; *Hume v. Long*, 6 T. B. Mon. (Ky.) 116; *Coe v. Turner*, 5 Conn. 86; *Al-ling v. Shelton*, 16 Conn. 436; *Bayard v. Lombard*, 9 How. (U. S.) 530; *William v. Gwyn*, 2 Saund. 46 a, note 6; 3 Bacon's Abr., tit. Error, B. 330.

The damage or grievance contemplated which entitles a party to a writ of error is a direct and positive one, effected by the judgment, concluding and acting upon the rights of the party. The damage must be by the record, and not in consequence of it. The plaintiff in error must be entitled to restitution of the thing lost by the record. Thus "my debtor may not be able to satisfy me, in consequence of his debtor having been

ruined by an erroneous judgment obtained against him. Shall I therefore have error to get that judgment out of the way of my debtor that so I may reach my debt? Certainly not; for though I am injured by that judgment, it is an indirect injury, altogether incidental, and not flowing immediately from the judgment." *Black v. Kirgan*, 15 N. J. L. 45. To the same effect, see *Sherer v. Collins*, 17 N. J. L. 181.

2. *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Black v. Kirgan*, 15 N. J. L. 46.

3. *Howse v. Judson*, 1 Fla. 158; *Dale v. Roosevelt*, 8 Cow. (N. Y.) 333; *Barr v. Stevens*, 1 Bibb (Ky.) 292.

4. *Hill v. Hill*, 6 Ala. 168.

Personal Representatives.—In a personal action, a writ of error can only be brought by the personal representatives of the defendant in case of his death. *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11.

An *administrator de bonis non* cannot, in the absence of statute, maintain a writ of error to reverse a judgment recovered by the original executor. *Grout v. Chamberlin*, 4 Mass. 611.

But where, by virtue of a statute, the *administrator de bonis non* is in privity with the previous administrator, he may prosecute or defend a writ of error for or against the previous administrator without revivor. *Mayer v. McLure*, 36 Miss. 389.

Heirs.—In real actions an heir who is injured by an erroneous judgment may prosecute a writ of error to reverse it where the ancestor has died *pendente lite*. *Green v. Watkins*, 6 Wheat. (U. S.) 260. But heirs are in no better position than their ancestors, and are not entitled to sue out a writ unless the ancestor might have done so if living. *Clayton v. Cheeley*, 5 Colo. 337.

A judgment recovered on default against a person admitted to have been *non compos mentis* at the time of the proceedings in the cause will be reversed on a writ of error brought by

Privy to be Shown by Writ.—If, however, the writ of error is not prosecuted by the party of record, but by the heir or other representative or person entitled to it, by privity of estate or interest, the character in which he sues must appear on the writ.¹

(3) *Artificial Persons.*—A writ of error may be prosecuted by either a natural or an artificial person.²

(4) *Infants.*—An infant defendant may and should sue out a writ of error by next friend.³

(5) *Principal and Bail.*—Where there is a judgment against the principal and also against the bail the principal cannot sue out a writ of error on the judgment against the bail, nor can the bail sue out a writ of error on the judgment against the principal.⁴

(6) *In Criminal Cases—By the State.*—In criminal cases a writ of error to a verdict of acquittal cannot be sued out by the state, as a defendant cannot be twice put in jeopardy.⁵ “It is a rule of

his administrator after his decease. *Leach v. Marsh*, 47 Me. 548.

Reversioners and Remaindermen.—At common law, if judgment had been obtained against the lessee for life, the reversioner, if immediate, might bring error after his death. *William v. Gwyn*, 2 Saund. 46 a, note 6.

And in a plea of land against the tenant the heir to the land must, in case of the tenant's death, bring error. *William v. Gwyn*, 2 Saund. 46 a, note 6.

And a remainderman or reversioner may, after the term has expired, maintain a writ of error to reverse an erroneous judgment against the tenant for life or years. *Leonard v. Bryant*, 11 Met. (Mass.) 373.

Political Officers.—There is no privity between political or administrative officials and their successors in office, so as to enable the successors to bring a writ of error to reverse a judgment rendered against their predecessors in a suit brought by them in their official capacity. So in *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11, in the case of a judgment rendered against overseers of the poor.

Stockholders.—Where a judgment against a corporation is satisfied out of the private estate of one of the stockholders, he becomes privy in law to the judgment, and may sue out a writ of error in his own name, without joining his fellow stockholders, to reverse such judgment. *Merrill v. Suffolk Bank*, 31 Me. 57.

1. *Black v. Kirgan*, 15 N. J. L. 49; *William v. Gwyn*, 2 Saund. 46 a, note 6;

Roundtree v. Stone, 81 Tex. 299; *Thomas v. Jones*, 10 Tex. 52.

Heir.—Though if heir he need not in all cases show how made heir. *William v. Gwyn*, 2 Saund. 46 a, note 6; *Stevens v. Stevens*, 2 Dana (Ky.) 429.

Petition in Error.—Where a petition in error is substituted he must show by proper averments in the petition in error the facts under which he claims to be privy to the judgment; the facts so pleaded are issuable, and the petition must be verified. *Hanover v. Sperry*, 35 Ohio St. 244.

2. *Bowles v. Rouse*, 8 Ill. 409.

Lessor in Ejectment.—In *Fortune v. Center*, 2 Ohio St. 538, it was held that in an action of ejectment, where all that was claimed is recovered, one lessor of the plaintiff cannot bring a writ of error against another because more was received on the demise of the latter and less on that of the former than should have been. Their rights must be determined by a suit between themselves.

3. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *McClay v. Norris*, 9 Ill. 370.

Waiver of Disability.—It has been held that if an infant sues out a writ of error in his own name, and there is a joinder in error, the disability is thereby waived. *McClay v. Norris*, 9 Ill. 370.

4. *Russell v. Hart*, Sneed (Ky.) 308; *Jaqueth v. Jackson*, 17 Wend. (N. Y.) 436, citing *Lancaster v. Keyleigh*, Cro. Car. 300; *Bushell v. Yarller*, Cro. Car. 408; *Smith v. James*, Cro. Car. 575; *Forrest v. Sandland*, Hob. 72.

5. *Arkansas.*—*State v. Graham*, 1 Ark. 428.

the common law that no one shall be brought twice into jeopardy for one and the same offense. Were it not for this salutary rule, one obnoxious to the government might be harassed and run down by repeated attempts to carry on a prosecution against him. Because of this rule it is that a new trial cannot be granted in a criminal case where the defendant is acquitted. A writ of error will lie for the defendant, but not against him. This is a rule of such vital importance to the security of the citizen that it cannot be impaired but by express words."¹

Statutory Changes.—In some jurisdictions statutes authorize writs of error in behalf of the prosecution in certain cases, as, for instance,

Florida.—State v. Burns, 18 Fla. 186.

Georgia.—State v. Jones, 7 Ga. 422; State v. Lavinia, 25 Ga. 311.

Illinois.—People v. Dill, 2 Ill. 257; People v. Royal, 2 Ill. 557.

Indiana.—State v. Davis, 4 Blackf. (Ind.) 345.

Iowa.—State v. Johnson, 2 Iowa 549; Part of Lot No. 294 v. State, 1 Iowa 507.

Kentucky.—Com. v. Brown, 3 J. J. Marsh. (Ky.) 597; Com. v. Mitchell, 3 J. J. Marsh. (Ky.) 630; Com. v. Thompson, 13 B. Mon. (Ky.) 159; Com. v. Jefferson, 6 B. Mon. (Ky.) 313.

Maryland.—Compare State v. Buchanan, 5 Har. & J. (Md.) 317; State v. Boyle, 25 Md. 519.

Massachusetts.—Com. v. Cummings, 3 Cush. (Mass.) 212.

Michigan.—People v. Swift, 59 Mich. 530.

Minnesota.—State v. McGrorty, 2 Minn. 224.

Missouri.—State v. Cox, 67 Mo. 46; State v. Copeland, 65 Mo. 497; State v. Spear, 6 Mo. 644; State v. Hamilton, 65 Mo. 667; State v. Burgoerfer, 107 Mo. 1; State v. Heisserer, 83 Mo. 692; State v. Brueggstadt, 7 Mo. App. 576; State v. Boyle, 1 Mo. App. 18.

New York.—People v. Corning, 2 N. Y. 9.

Tennessee.—State v. Reynolds, 4 Hayw. (Tenn.) 110.

Virginia.—Com. v. Harrison, 2 Va. Cas. 202; Case v. Com., 1 Va. Cas. 264.

Wisconsin.—U. S. v. Salter, 1 Pin. (Wis.) 283; State v. Kemp, 17 Wis. 669.

United States.—U. S. v. Plumer, 3 Cliff. (U. S.) 1.

England.—Rex v. Reynell, 6 East 375; Rex v. Mann, 4 M. & S. 337; Rex v. Wandsworth, 1 B. & Ald. 63; Rex v. Wandsworth, 2 Chit. Rep. 282, 18 E. C. L. 337; Rex v. Brice, 1

Chit. Rep. 352, 18 E. C. L. 105; Rex v. Cohen, 1 Stark. 516, 2 E. C. L. 197; Rex v. Sutton, 5 B. & Ad. 52, 27 E. C. L. 31.

Taking False Oath.—A proceeding to convict a person of a misdemeanor in taking a corrupt voluntary oath is a criminal proceeding. State v. Brueggstadt, 7 Mo. App. 576.

Under Municipal Ordinances.—Prosecutions under municipal ordinances are in the nature of *quasi* criminal causes, Hawkinsville v. Ethridge, 96 Ga. 326; Pilotage Com'rs v. Tabbott, 72 Ga. 89, and a judgment in favor of the defendant cannot be reviewed by writ of error or otherwise at the instance of the municipality. Hawkinsville v. Ethridge, 96 Ga. 326; Cranston v. Augusta, 61 Ga. 572; State v. Jones, 7 Ga. 422; State v. Lavinia, 25 Ga. 311.

Bastardy Proceedings.—In *Illinois* it is held that a prosecution for bastardy is not a criminal proceeding, and that a writ of error will therefore lie at the suit of the people to review a judgment rendered in such proceeding. People v. Noxon, 40 Ill. 30; Mann v. People, 35 Ill. 467; Pease v. Hubbard, 37 Ill. 257; Maloney v. People, 38 Ill. 62.

But in *Michigan* it is considered that a prosecution for bastardy, not being after the course of the common law, cannot be brought up for review by writ of error, and that the only remedy of the party aggrieved is by certiorari. Cross v. People, 8 Mich. 113.

Suits on Bonds and Recognizances.—The state may sue out a writ of error on bonds and recognizances although arising out of criminal proceedings. State v. Lockhart, 24 Ga. 420. Compare Hart v. State, 13 Tex. App. 556.

1. State v. Reynolds, 2 Hayw. (Tenn.) 110, quoted and approved in People v. Corning, 2 N. Y. 16.

where the indictment is quashed on motion, or where a demurrer thereto is sustained, or on motion in arrest of judgment. None of these statutes, however, allows the prosecution to sue out a writ of error after a verdict of acquittal.¹

Defendant.—For defendant's right to the writ, see *infra*, XIII. *Application for the Writ and XV. Allowance of the Writ.*

b. JOINDER—(1) *The General Rule.*—All the parties below against whom a joint judgment is rendered must, unless otherwise provided by statute,² be joined as plaintiffs in error where a writ of error is sued out by one or more of them.³

1. *Maryland.*—State v. Boyle, 25 Md. 519.

Missouri.—State v. Burgdoerfer, 107 Mo. 1; State v. Heisserer, 83 Mo. 692. The rule was formerly otherwise. State v. Copeland, 65 Mo. 497 (*overruling* State v. Peck, 51 Mo. 111; State v. Cunningham, 51 Mo. 479; State v. Newkirk, 49 Mo. 472); State v. Cox, 67 Mo. 46.

New York.—People v. Bork, 78 N. Y. 349; People v. Carnal, 6 N. Y. 463; People v. Barry, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 657; People v. Stone, 9 Wend. (N. Y.) 182; People v. Onondaga Gen. Sess., 2 Wend. (N. Y.) 631.

Pennsylvania.—See Com. v. Wallace, 114 Pa. St. 405; Com. v. Taylor, 5 Binn. (Pa.) 277; Com. v. McKisson, 8 S. & R. (Pa.) 420; Heikes v. Com., 26 Pa. St. 513; Com. v. Capp, 48 Pa. St. 53.

Violation of Revenue Laws.—Under the statutes of *Virginia* and *West Virginia*, a writ of error will lie at the instance of the state to review a judgment in a prosecution for the violation of a law relating to revenues. Com. v. Scott, 10 Gratt. (Va.) 749; Tefft v. Com., 8 Leigh (Va.) 721; Com. v. Coe, 9 Leigh (Va.) 620; Com. v. Hampton, 3 Gratt. (Va.) 562; Com. v. Hill, 5 Gratt. (Va.) 682; Com. v. Hatcher, 6 Gratt. (Va.) 667; State v. Allen, 8 W. Va. 680; State v. Fitzpatrick, 8 W. Va. 707; State v. Kyle, 8 W. Va. 711.

Misdemeanor.—In *Tennessee* the state was held entitled to a writ of error to a judgment against it in a misdemeanor case, under a statute providing for a writ of error generally to such judgments and not excluding the state. State v. Fields, Mart. & Y. (Tenn.) 137; State v. Simpson, 5 Yerg. (Tenn.) 365.

2. *Alexandria v. Leland*, 1 Idaho 425.

3. *Alabama.*—Callar v. Brittain, Minor (Ala.) 27; Eastland v. Jones, Minor (Ala.) 275; Merrill v. Jones, 2 Ala. 192; Jameson v. Colburn, 1 Stew. & P. (Ala.) 253; Cleaveland v. McAdams, 21 Ala. 321; Swift v. Hill, 1 Port. (Ala.) 277; Billinslea v. Abercrombie, 2 Stew. & P. (Ala.) 24; Tombeckbee Bank v. Freeman, Minor (Ala.) 285; Cullum v. Batre, 1 Ala. 126; Branch Bank v. McCollum, 20 Ala. 280; Duncan v. Hargrove, 22 Ala. 150; Savage v. Walsh, 24 Ala. 293; Moore v. McGuire, 26 Ala. 461.

Arkansas.—State Bank v. Kerby, 9 Ark. 347; Miller v. Heard, 6 Ark. 73.

Connecticut.—Phelps v. Ellsworth, 3 Day (Conn.) 144; Gaylord v. Payne, 4 Conn. 190.

Delaware.—Whitaker v. Parker, 2 Harr. (Del.) 413.

Florida.—Standley v. Jaffray, 13 Fla. 596.

Georgia.—Dill v. Jones, 2 Ga. 79; Morris v. Wiley, 2 Ga. 287; Long v. Strickland, 2 Ga. 348; Carey v. Rice, 2 Ga. 408; Coffee v. Newsom, 2 Ga. 439; Psalmonds v. Barksdale, 3 Ga. 584; Beall v. Fox, 4 Ga. 403; Hargraves v. Lewis, 6 Ga. 207; Harrington v. Roberts, 7 Ga. 510; Carey v. Giles, 10 Ga. 1.

Illinois.—Robinson v. Magarity, 28 Ill. 423.

Iowa.—Huner v. Reeves, 2 Greene (Iowa) 190.

Kentucky.—Callaghan v. Carr, 1 A. K. Marsh. (Ky.) 22; Johnson v. Johnson, 1 Dana (Ky.) 366; Campbell v. Johnston, 4 Dana (Ky.) 178; Watson v. Whaley, 2 Bibb (Ky.) 392; Cook v. Conway, 3 Dana (Ky.) 454; Castleman v. Holmes, 7 T. B. Mon. (Ky.) 591.

Massachusetts.—Andrews v. Bosworth, 3 Mass. 223; Shirley v. Lunenburg, 11 Mass. 383; Gay v. Richardson, 18 Pick. (Mass.) 417.

Michigan.—Mills v. Bunce, 26 Mich. 101.

Reason for Rule.—There are several reasons for this rule. In the first place, the writ must agree with the record¹ or it will be quashed.² In the second place, if one defendant alone were permitted to bring his writ, every defendant might sue out a writ and the plaintiff be unreasonably delayed in obtaining the benefit of his judgment.³ A third reason given in several cases

Minnesota.—*Babcock v. Sanborn*, 3 Minn. 141.

Mississippi.—*Henderson v. Wilson*, 4 Smed. & M. (Miss.) 732; *Thomas v. Wyatt*, 9 Smed. & M. (Miss.) 308; *Preira v. Silva*, 4 Smed. & M. (Miss.) 735; *Whitworth v. Carter*, 41 Miss. 639; *Hoggatt v. Ferrall*, 41 Miss. 642.

Nebraska.—*Hendrickson v. Sullivan*, 28 Neb. 790; *Wolf v. Murphy*, 21 Neb. 472.

New Hampshire.—*Whitmore v. Delano*, 6 N. H. 543.

New York.—*Jaqueth v. Jackson*, 17 Wend. (N. Y.) 434; *Richards v. Walton*, 12 Johns. (N. Y.) 434; *Thompson v. Valarino*, 3 Den. (N. Y.) 179; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558.

Ohio.—*Smetters v. Rainey*, 14 Ohio St. 287; *Jones v. Marsh*, 30 Ohio St. 20.

Pennsylvania.—*Fotterall v. Floyd*, 6 S. & R. (Pa.) 315.

Tennessee.—*Patterson v. Butterworth*, 4 Yerg. (Tenn.) 158; *Huff v. Miller*, 2 Swan (Tenn.) 85.

Texas.—*Summerlin v. Reeves*, 29 Tex. 86; *Hancock v. Metz*, 15 Tex. 205; *Clark v. Thompson*, 42 Tex. 128; *Barnard v. Tarleton*, 57 Tex. 402; *Thompson v. Pine*, 55 Tex. 427.

Washington.—*Garrison v. Cheeney*, 1 Wash. Ter. 489.

Wisconsin.—*Doty v. Strong*, 1 Pin. (Wis.) 165.

United States.—*Williams v. U. S. Bank*, 11 Wheat. (U. S.) 414; *Owings v. Kincannon*, 7 Pet. (U. S.) 399; *Wilson v. Life, etc., Ins. Co.*, 12 Pet. (U. S.) 140; *Todd v. Daniel*, 16 Pet. (U. S.) 521; *Smyth v. Strader*, 12 How. (U. S.) 327; *Davenport v. Fletcher*, 16 How. (U. S.) 142; *Mussina v. Cavazos*, 20 How. (U. S.) 280; *Clifton v. Sheldon*, 23 How. (U. S.) 481; *Masterson v. Herndon*, 10 Wall. (U. S.) 416; *Hampton v. Rouse*, 13 Wall. (U. S.) 187; *Feibelman v. Packard*, 108 U. S. 14; *Estis v. Trabue*, 128 U. S. 225; *Deneale v. Stump*, 8 Pet. (U. S.) 526; *Simpson v. Greeley*, 20 Wall. (U. S.) 152.

England.—*Brewer v. Turner*, 1 Stra. 233; *Hackett v. Herne*, Carth. 7; *Cooper v. Ginger*, 1 Stra. 606; *Knox v. Costello*, 3 Burr. 1789; *Jaques v. Cesar*, 2 Saund. 101 a; *Walker v. Stokoe*, 1 Ld. Raym. 71; *Vaughan v. Loriman*, Cro. Jac. 138; *Parker v. Lawrence*, Hob. 70.

Petition in Error.—The same rule obtains where a petition in error is substituted under code practice for a writ of error. *Wolf v. Murphy*, 21 Neb. 472.

Joint Distributees.—When there is a final settlement of an insolvent estate by the administrator before the County Court, the administrator on the one side and all those claiming distribution on the other are necessary parties to the settlement, and the distributees named in the judgment of the County Court occupy the position of joint plaintiffs, not because their interests are necessarily joint, but because such judgments arise out of the same proceedings, and the case cannot be removed piecemeal, and all the distributees must be joined as joint plaintiffs in error. *Merrill v. Jones*, 2 Ala. 192.

Where but One Defendant is Served.—And where a writ is served on only one of the defendants, and judgment is rendered against both, both must join in a writ of error to reverse the judgment. *Gay v. Richardson*, 18 Pick. (Mass.) 417.

1. *State Bank v. Kerby*, 9 Ark. 345; *Gasquett v. Berry*, 6 Ark. 246; *McKee v. Murphy*, 1 Ark. 19; *Borden v. State*, 8 Ark. 399; *Hudspeth v. State*, 1 Ark. 20; *Hoggatt v. Ferrall*, 41 Miss. 643; *Doty v. Strong*, 1 Pin. (Wis.) 165; *Jaques v. Cesar*, 2 Saund. 101 a.

2. *Doty v. Strong*, 1 Pin. (Wis.) 165; *Gasquett v. Berry*, 6 Ark. 246.

3. *Burleson v. Henderson*, 4 Tex. 55; *Smetters v. Rainey*, 13 Ohio St. 568; *State Bank v. Kerby*, 9 Ark. 345; *Whitworth v. Carter*, 41 Miss. 641; *Knox v. Costello*, 3 Burr. 1792; *Hackett v. Herne*, Carth. 8, 2 Tidd's Pr. 1135; *Fotterall v. Floyd*, 6 S. & R. (Pa.) 315.

is that the judgment is entire and cannot be bad as to one and good against the others.¹

(2) *Summons and Severance*.—One defendant in a joint judgment may sue out a writ of error in the name of all the defendants,² and it is competent for him to do so without first obtaining their consent.³ But if they refuse to join in the prosecution of the writ, they must be summoned into court and a judgment of severance obtained against them,⁴ whereupon the remaining plaintiffs in error may prosecute the writ alone.⁵ In this manner all hardship on the defendant and all inconvenience to the plaintiff are avoided.⁶

(3) *Husband and Wife*.—At common law, where a judgment is rendered against a married woman, she cannot sue out a writ of error in her own name. Her husband must join her in suing out the writ.⁷

1. *Whitmore v. Delano*, 6 N. H. 547.

2. *Alabama*.—*Jameson v. Colburn*, 1 Stew. & P. (Ala.) 253; *Webster v. Yancy*, Minor (Ala.) 183; *Portis v. Creagh*, 4 Port. (Ala.) 332; *Cullum v. Batre*, 1 Ala. 126; *Duncan v. Hargrove*, 22 Ala. 150.

Mississippi.—*Whitworth v. Carter*, 41 Miss. 641; *Hoggatt v. Ferrall*, 41 Miss. 642.

Presumption as to Parties.—Where the writ of error names all the parties as they are found in the record, the court will not presume that there were other parties not named, and dismiss for failure to join such parties. *Gumbel v. Pitkin*, 113 U. S. 545.

Joinder as Defendants.—Where some of the parties refuse to become plaintiffs in error they may, where statutes so provide, be made defendants, and must be made either one or the other. *Hendrickson v. Sullivan*, 28 Neb. 790.

3. *Portis v. Creagh*, 4 Port. (Ala.) 332; *Hoggatt v. Ferrall*, 41 Miss. 643.

4. *Flournoy v. Burke*, 4 How. (Miss.) 337; *Henderson v. Wilson*, 4 Smed. & M. (Miss.) 733; *U. S. v. Knox*, 128 U. S. 230; *Whitmore v. Delano*, 6 N. H. 545; *Knox v. Steele*, 18 Ala. 815; *Watson v. Whaley*, 2 Bibb (Ky.) 392; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558; *Fotterall v. Floyd*, 6 S. & R. (Pa.) 321; *Black v. Kirgan*, 15 N. J. L. 45; *Patterson v. Butterworth*, 4 Yerg. (Tenn.) 158; *Webster v. Yancy*, Minor (Ala.) 183; *Hargraves v. Lewis*, 7 Ga. 110.

Parties Summoned into Chancery.—In *Carr v. Callaghan*, 3 Litt. (Ky.)

377, it was held that where a writ of error was made applicable to bring up a decree in chancery, the appellate court would, in accordance with equity, direct of its own motion that parties who were not made parties to the writ of error, but would be affected by the adjudication on appeal, should be summoned in before the hearing.

Substitutes for Summons and Severance.—In *Doty v. Strong*, 1 Pin. (Wis.) 168, it was said: "The practice of summons and severance is not familiar to the American courts of error. The more easy and equally legitimate practice would be to enter a rule against those persons named in the writ of error as plaintiffs and not appearing, either to appear and assign error or submit to be severed. In any practice, however, all the defendants in the judgment must first join in suing out the writ of error."

Notification.—A notification to plaintiff in error and his refusal to join is a good substitute for summons and severance. *Masterson v. Herndon*, 10 Wall. (U. S.) 416; *O'Dowd v. Russell*, 14 Wall. (U. S.) 402.

5. *Jameson v. Colburn*, 1 Stew. & P. (Ala.) 253.

6. *Fotterall v. Floyd*, 6 S. & R. (Pa.) 315.

7. *McPhail v. Mosely*, 14 Ala. 740; *Whitmore v. Delano*, 6 N. H. 543.

Discontinuance as to Husband.—Where a case against husband and wife is discontinued as to the husband, the wife should sue out a writ of error in her name alone, but it was held in *Michigan* that the irregularity of join-

(4) *When Joinder Unnecessary*.—Where one joint defendant below releases error, he need not be joined as plaintiff in error.¹ And where there is no judgment against one of the defendants, it is, of course, unnecessary to join him.²

Formal Parties.—And merely formal parties who have no substantial interest in the controversy need not be joined.³

Separate Interests.—So to reverse a several judgment against several, there should be separate writs of error.⁴

ing her husband might be disregarded. *Campau v. Brown*, 48 Mich. 146.

Husband Barred by Statute of Limitations.—Where a joint judgment or decree has been rendered against husband and wife, although the husband's right to a writ of error is barred by the statute of limitations, the wife cannot sue out a writ of error by next friend; it must be sued out in the joint names of husband and wife. *Garrett v. Cocke*, 8 Baxt. (Tenn.) 274.

Death of Feme Covert Defendant.—Where a judgment for the recovery of land is rendered against a woman and her husband, the latter may join with the wife's heirs after her death in suing out a writ of error to reverse the judgment. *Hammond v. Hammond*, 21 Ohio St. 620.

Suit Brought as Feme Sole by Married Woman.—Although an action be brought as *feme sole* by a woman who is really married, the husband may join her from respect to his interests at common law in her person and services. *Cadmus v. Jackson*, 52 Pa. St. 302.

After Death of Husband.—Where husband and wife prosecute a writ of error to a joint judgment or decree against both, no second writ of error can be prosecuted by the wife after the death of her husband, under a statute protracting the operation of the statute of limitations against her until that time. *Banton v. Campbell*, 9 B. Mon. (Ky.) 587.

Where Citation Served.—Where the husband is merely a formal party to the action against the wife, but not a party to the judgment, he need not be named in the writ of error where a citation has been served upon him. *Marchand v. Livandais*, 127 U. S. 775.

1. *Ellis v. Bullard*, 11 Cush. (Mass.) 497.

Stipulation of Finality.—So the joinder of three defendants below as plaintiffs in error, where two had made a

stipulation that the judgment below should be final, will be dismissed for irregularity. *Cole v. Thayer*, 25 Mich. 212.

Effect of Release on Rights of Codefendant.—Release of error by one of several defendants is no bar to the right of his codefendants to sue out a writ of error. *Hacket v. Herne*, 3 Mod. 134. But they cannot maintain a writ of error in the joint names of all the defendants to reverse the judgment. *Ellis v. Bullard*, 11 Cush. (Mass.) 496.

2. *Flournoy v. Burke*, 4 How. (Miss.) 337, 2 Sellon's Prac. 401; *Bavasar v. Faux*, 1 Wils. 88, 1 Arch. Prac. 232; *Shaw v. Blair*, 4 Cush. (Mass.) 97; *Adams v. Robinson*, Minor (Ala.) 285; *Wyche v. Greene*, 16 Ga. 49.

Trespass.—So where three were sued out in trespass, and one was acquitted and judgment rendered against the other two, it was held that they could bring error and the one acquitted ought not to be joined. *Cannon v. Abbot*, 1 Lev. 210; *Doty v. Strong*, 1 Pin. (Wis.) 168.

Parties Not Joined Below.—A party who does not join in an appeal to an intermediate appellate court cannot sue out a writ of error from its decision therein. *Jackson v. Hosmer*, 14 Mich. 88.

3. *Craig v. Carswell*, 4 Stew. & P. (Ala.) 267; *Loring v. Wittich*, 16 Fla. 324; *Baker v. Backus*, 32 Ill. 79; *Parker v. Lawrence*, Hob. 70.

Sheriff in Tax Suit.—So a sheriff appointed by a statute to collect a tax is not a necessary party as coplaintiff in error where a writ of error is sued out by the municipality to reverse a judgment in favor of a taxpayer enjoining both the municipality and sheriff from collecting the tax. He has no substantial interest therein. *Albuquerque v. Zeiger* (N. Mex. 1891), 25 Pac. Rep. 787.

4. *Callaghan v. Carr*, 1 A. K. Marsh. (Ky.) 22; *Malaer v. Damron*, 31 Ill. App. 576.

(5) *Effect of Nonjoinder or Misjoinder*.—At common law the failure to join a necessary plaintiff in error deprived the appellate court of jurisdiction, and was ground for dismissal on motion of the defendant in error.¹ And this was also the effect of a misjoinder of parties as plaintiffs in error.²

Cured by Amendment.—In some jurisdictions the omission of a necessary party to a proceeding in error may be cured by amendment,³ where the statute has not run as against such party,⁴ and in *Ohio* the petition was held amendable after the time limited by statute to sue out the writ has expired,⁵ if the omission was by mistake and not intentional.⁶

Suit to Remove Pauper.—So in a suit of one town against another for the removal of a pauper, in which the pauper was made a party, the town and pauper against whom the judgment for removal was rendered were held to have distinct and separate interests, and a separate writ of error was maintainable on behalf of each alone. *Shirley v. Lunenburg*, 11 Mass. 385; *Clapp v. Bromaghan*, 9 Cow. (N. Y.) 304; *Whiting v. Cochran*, 9 Mass. 532; *Germain v. Mason*, 12 Wall. (U. S.) 259; *Coffee v. Planters' Bank*, 11 Smed. & M. (Miss.) 458.

In Privy.—Each person in privy having a distinct interest in the judgment may sue out a separate and distinct writ of error. *Porter v. Rumery*, 10 Mass. 68.

Probate Court Decree.—A proceeding in a court exercising probate jurisdiction to establish or amend a will is in the nature of a proceeding *in rem*, and a judgment therein is both joint and several, and a writ of error may be maintained by one coparty or all, or a portion of such coparties may unite. *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152.

By Intervener.—A person allowed to intervene in a controversy, and having a substantial interest therein, may sue out his separate writ of error from the decision rendered therein. *Wheeler v. Kennedy*, 1 Ala. 292.

1. *Alabama*.—*Merrill v. Jones*, 2 Ala. 192; *Tombeckbee Bank v. Freeman*, Minor (Ala.) 285.

Georgia.—*Knox v. McCalla*, 70 Ga. 725; *Barksdale v. Bunkley*, 26 Ga. 398.

Kentucky.—*Chambers v. Wilkins*, 2 Litt. (Ky.) 145.

Death of Coparty.—So where a writ of error is brought by two persons, a failure to suggest the death of a third codefendant on the record, against

whom and the joint plaintiffs in error a judgment had been rendered, is ground for quashing the writ. *Andrews v. Bosworth*, 3 Mass. 223.

Where Jurisdiction is Assumed.—Where the appellate court takes jurisdiction of a writ of error prosecuted by one of several defendants, it must, on affirmance, render judgment against him alone, without noticing the other defendants not served. *Puckett v. Ainsworth*, 1 Yerg. (Tenn.) 254.

Waiver.—So in *Ohio* the provision of the code (1866) that if no objection be taken on account of defect of parties the defendant will be deemed to have waived the same, applies by analogy to proceedings in error. *Cairnes v. Knight*, 17 Ohio St. 69.

2. *Vaughan v. Loriman*, Cro. Jac. 138; *Jaqueth v. Jackson*, 17 Wend. (N. Y.) 436; *Shaw v. Blair*, 4 Cush. (Mass.) 97; *Loring v. Wittich*, 16 Fla. 323; *Malaer v. Damron*, 31 Ill. App. 572.

3. *Secor v. Witter*, 39 Ohio St. 226; *Smetters v. Rainey*, 14 Ohio St. 287.

4. *Smetters v. Rainey*, 14 Ohio St. 287; *Seibel v. Bath* (Wyoming 1895), 40 Pac. Rep. 756.

5. *Secor v. Witter*, 39 Ohio St. 226.

6. *Secor v. Witter*, 39 Ohio St. 226.

Joinder is Not Jurisdictional.—So in *Wangerien v. Aspell*, 47 Ohio St. 250, it was held that all the parties to a joint judgment need not be joined on a proceeding in error to reverse it; but that the joinder of some of the parties gave the court jurisdiction of the subject-matter, and that dismissal was a matter of sound discretion where the absent parties were represented by a receiver who was made properly a party on appeal. Dismissal was denied.

In *Michigan* it was held that a writ of error sued out in the name of one

2. Defendants—*a*. AGAINST WHOM WRIT LIES.—The writ of error can be brought against none but parties or privies to the judgment below.¹

***b*. JOINDER.**—And all parties against whom the judgment was rendered,² and all persons privy to the judgment,³ should be joined as defendants, for "it is a dictate of natural justice, as well as a general principle of law, that every person to be directly affected in his interest or rights by the judgment of a court of record is entitled to be named or described in the suit, to have notice of it, and an opportunity of being heard in defense of his rights."⁴

of the joint parties against whom the judgment was rendered was amendable under a rule of court (Suprême Ct. Rule 35), and that if the parties not joined afterward filed their election not to proceed, the writ would not be dismissed for nonjoinder. *Spencer v. Fish*, 43 Mich. 226.

Kansas.—So in Kansas it was held that a proceeding in error would not be dismissed for lack of proper parties where a substantial relief sought by the plaintiff in error could be afforded without affecting the rights of parties not joined. *Flint, etc., Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 455.

1. New Orleans, etc., *R. Co. v. Rollins*, 36 Miss. 387.

Guardian.—A guardian appointed to defend a suit against a minor below must be made party to a writ of error brought in the action; otherwise it will be quashed. *Whitaker v. Patton*, 1 Port. (Ala.) 9.

Real Actions—Executor.—Where, in a real action, a verdict was found for the tenant, and he had judgment for costs, the demandant could not maintain a writ of error against the executor on the judgment, as the executor did not represent the deceased in regard to the land in controversy. *Porter v. Rummery*, 10 Mass. 64.

Administrator de Bonis Non.—Where an administrator *de bonis non* may maintain a writ of error without having himself made a party to the record in the court below by *scire facias* and revivor, in his name, against the defendant, it follows that conversely the defendant may have the same rights against the administrator *de bonis non*. New Orleans, etc., *R. Co. v. Rollins*, 36 Miss. 388.

Effect of Misjoinder.—Where it appears, on an inspection of the writ, that there is a misjoinder of parties defendant, the writ will be dismissed on mo-

tion. *Brown v. Levins*, 6 Port. (Ala.) 414.

2. *State Bank v. Kerby*, 9 Ark. 345; *Summerlin v. Reeves*, 29 Tex. 85; *Johnson v. Robeson*, 27 Tex. 526; *Harrington v. Roberts*, 7 Ga. 510.

Application of Rule.—Where a judgment is rendered against an administrator, in favor of several creditors, upon a final settlement of an estate reported insolvent, all the creditors must be made parties to the writ of error sued out by the administrator to revise the final decree. *Clarke v. West*, 5 Ala. 117.

Review of Order Granting New Trial.—Where suit is brought against partners in their firm name, and personal service is had upon each, and a verdict is rendered against the partnership, and the members of the firm make a motion for a new trial, which is granted upon a writ of error to the Supreme Court, each member of the firm is a necessary party defendant in error, and a failure to serve one of them with a copy of the bill of exceptions is cause for dismissing the writ of error. *Crothwait v. James*, 95 Ga. 570.

Executor.—Where the error assigned is that the defendant in error was dead at the rendition of the judgment the executor or administrator must be made party defendant. *Cisna v. Beach*, 15 Ohio 300.

3. *Porter v. Rummery*, 10 Mass. 64.

4. *Summerlin v. Reeves*, 29 Tex. 88.

Further Reasons for Rule.—"The same twofold reason required that the writ of error should set out all the names of those in whose favor the judgment was rendered; for, besides the consideration of conformity and agreement with the record, although a party in whose favor a judgment might be rendered would not generally be aggrieved, and could not therefore sue out a writ of error, yet

3. Description of Parties.—A writ of error should be sued out in the same names in which the proceedings below are conducted, and in no other.¹ The names of the parties should be given, so that the court may proceed to give a proper judgment on the case.²

4. Abatement—*a.* **IN GENERAL.**—The writ of error must be sued out in the name of a living person; where sued out in the name of a dead person it will abate.³

By Representatives.—Where a party dies before the suit in error has been begun his death should be suggested upon the record, and his legal representatives may thereupon prosecute a writ of error to the judgment upon being properly made parties to the cause.⁴

b. DEATH OF SOLE PLAINTIFF OR DEFENDANT IN ERROR.—The death of a sole plaintiff in error, before error is assigned, abates the writ, and proceedings to reverse must be taken to

his rights were to be passed upon, and moreover it often happens that it was necessary for him to reverse a judgment, even when it appears to be rendered in his favor, as where there is an error in the judgment prejudicial to him, or where the judgment was for a less amount than he had a right to demand; and besides, the common law regarded a judgment as an entire thing, and would not reverse it as to a part and affirm it for the residue (2 Saund. 101*v*), or reverse a judgment as to one and affirm it as to another (4 Randolph 386); and thus the other reason of the rule, in regard to vexation and multiplicity of actions, as well as that contemplating conformity to the record, had place." *State Bank v. Kerby*, 9 Ark. 348.

1. *Robinson v. Magarity*, 28 Ill. 423; *Hudspeth v. State*, 1 Ark. 20; *Jackson v. Wight*, 6 Ark. 387; *Tombigbee R. Co. v. Bell*, 4 Smed. & M. (Miss.) 685; *Borden v. State*, 8 Ark. 399.

2. *Deneale v. Stump*, 8 Pet. (U. S.) 527; *Bletch v. Johnson*, 40 Ill. 116; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355.

A writ of error brought in the name of a certain party "and others" is insufficient; the names of the others should be stated. *Beall v. Fox*, 4 Ga. 403; *Deneale v. Stump*, 8 Pet. (U. S.) 526. So a writ sued out in the name of "the heirs of Nicholas Wilson" must be dismissed. *Wilson v. Life, etc., Ins. Co.*, 12 Pet. (U. S.) 140.

Suing Out Writ in Firm Name.—It is error to sue out a writ of error in the

firm name or style of partnership without stating the names of the persons composing the firm. *Johnson v. Polk County*, 24 Fla. 28; *Estis v. Trabue*, 128 U. S. 225; *Williams v. Kitchen*, 43 Mo. App. 338; *Godbe v. Tootle*, 154 U. S. 576.

Omission of Middle Initial.—The omission of a middle initial will not invalidate a writ of error. *Bletch v. Johnson*, 40 Ill. 116.

Failure to Show Representative Capacity.—In *Green v. Foley*, 3 Stew. (Ala.) 239, it was held that a failure to describe the defendant in error in his representative capacity as administrator was not a fatal variance.

3. *Kennard v. Kennard*, 35 Ohio St. 660; *Neves v. Scott*, 15 Ga. 510.

Privy by Death.—A person becoming privy to the judgment by operation of law may file a petition in error on the death of a party before such proceeding has been commenced without being made a technical party by revivor. *Hanover v. Sperry*, 35 Ohio St. 245; *Hammond v. Hammond*, 21 Ohio St. 620.

Entry of Judgment.—In *King v. Dunn*, 21 Wend. (N. Y.) 253, it was held that where a plaintiff in error dies pending a writ of error, judgment of affirmance or reversal will be directed to be entered as of a term when he was alive *nunc pro tunc*.

4. *Bettis v. Taylor*, 6 Port. (Ala.) 333; *Headon v. Turner*, 6 Ala. 66; *Cisna v. Beach*, 15 Ohio 300; 1 Supp. U. S. Rev. Stat., Act March 3, 1875, c. 137, § 9; 18 Stat. at L. 473.

effectuate a review of the cause.¹ But the death of a sole defendant in error, before assignment of error, will not cause the writ to abate.²

1. *Green v. Watkins*, 6 Wheat. (U. S.) 260; *Ulshafer v. Stewart*, 71 Pa. St. 170; *Boas v. Heister*, 3 S. & R. (Pa.) 271; *Gregg v. Bethea*, 6 Port. (Ala.) 9; *English v. Andrews*, 4 Port. (Ala.) 319.

Effect.—The effect of abatement was simply to delay the proceedings to compel the representatives of the deceased to commence a new action. *Ulshafer v. Stewart*, 71 Pa. St. 170.

Notice of intention to revive must be given to the defendant in error by the representatives of a deceased plaintiff in error. *West v. Biggs*, 26 Ill. 533.

Alabama.—In Alabama it was held that the suit might be revived by the filing of the writ of error and transcript in the appellate court. "Until this is done there is no suit pending here in which the court would be authorized to entertain a suggestion of the plaintiff's death. * * * The production of the citation or certificate here, by the defendant in error, does not bring the suit commenced by the deceased plaintiff into court; these are only intended to authorize a judgment of affirmance where there is a default in the prosecution of the writ of error." *Ex p. Norris*, 2 Ala. 385.

Texas.—In *Hohenthal v. Turnure*, 50 Tex. 1, it was held that by virtue of an existing statute the death of the plaintiff in error, after filing petition for writ of error and the approval of his supersedeas bond, but before service of citation in error, and before making an assignment of errors, does not abate the writ of error.

Ohio.—In Ohio, while a proceeding in error is not strictly an action within the meaning of the code, the provisions of the code for reviving or continuing actions in favor of or against the successors in interest of a party or the representatives of a deceased party may be applied to proceedings in error. And the court is authorized, under section 39 of the code, on applications of the representatives of a deceased party, to allow them to become parties, and the proceedings in error to be carried on in their names, although more than a year may have intervened between the death of the original party and the time of the application. *Black v. Hill*, 29 Ohio St. 86.

Cross-petition.—Where a defendant to a petition in error and to cross-petitions dies, and the case is duly revived on application of the plaintiff in error against the administrator and heirs of the defendant, it is unnecessary to apply for or make any order of revivor as to cross-petitions. *Brown v. Kuhn*, 40 Ohio St. 468.

When Heirs need Not be Joined.—Where a statute provided that when a party entitled to a writ of error died after judgment the rights might be taken by his administrator, and another statute provided that upon the death of a plaintiff seeking to recover the title to land his administrator might be substituted, it was held that upon a writ of error brought by the defendant in such a suit to reverse a judgment, divesting him of possession, and brought against the administrator as defendant in error, the heirs of the deceased plaintiff need not be joined as defendants in error. *Perryman v. Rayburn* (Tex. Civ. App. 1895), 30 S. W. Rep. 915.

2. **Alabama.**—*Pope v. Welsh*, 18 Ala. 631; *Cox v. Whitfield*, 18 Ala. 738.

Florida.—U. S. Mutual Acc. Assoc. v. *Weller*, 30 Fla. 215.

Kentucky.—*Marshall v. Peck*, 1 Dana (Ky.) 609.

Maryland.—*Townshend v. Townshend*, 10 Gill & J. (Md.) 373.

New Jersey.—*Harwood v. Murphy*, 13 N. J. L. 193.

New York.—*Delaplaine v. Bergen*, 7 Hill (N. Y.) 591.

Ohio.—*Black v. Hill*, 29 Ohio St. 86; *Spurk v. Vangundy*, 3 Ohio 307.

Tennessee.—*Erwin v. Foster*, 6 Lea (Tenn.) 188.

United States.—*Green v. Watkins*, 6 Wheat. (U. S.) 260.

England.—*Wicket v. Creamer*, 1 Salk. 264; *Bromley v. Littleton*, Yelv. 112.

"If it happen before and the plaintiff will not assign errors, the representatives of the defendant may have a *scire facias quare executio non* in order to compel him; but if it happen after, they must proceed as if the defendants were living, till judgment be affirmed, and then revive by *scire facias*; and the plaintiff, in order to compel the representatives of the de-

Before Writ Issues.—Nor will the writ abate upon the death of the defendant in error before the writ issues. But the summons must in that case issue against his representatives,¹ and no steps need be taken to revive the judgment.²

After Assignment of Error.—Where the death does not occur until after assignment of error the writ will not abate, whether the death be of plaintiff or defendant in error.³

c. DEATH OF JOINT PLAINTIFF OR DEFENDANT IN ERROR.—The death of a joint plaintiff in error before error assigned does not abate the writ.⁴ The death may be suggested on the record and the suit proceed as before, unless the representatives of a deceased coplaintiff voluntarily come in and become joint coplaintiffs in error.⁵

So where there are several defendants in error, and one of them dies, the writ does not abate.⁶

defendant in error to join in error, may sue out a *scire facias ad audiendum errores*, either generally or naming them." *Green v. Watkins*, 6 Wheat. (U. S.) 260.

Marriage.—And of course the subsequent marriage of the defendant in error, where a *feme sole*, will not abate the writ. *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 210.

1. *Hutchcraft v. Gentry*, 2 J. J. Marsh. (Ky.) 500; *Van Valkenburg v. Rogers*, 17 Mich. 322.

2. *Van Valkenburg v. Rogers*, 17 Mich. 322.

Second Writ of Error.—Where a defendant in error dies pending a writ of error which is subsequently dismissed, and the plaintiff in error desires to sue out a new writ, an application must be made to the court below for the purpose of reviving the suit in the name of the representatives of the deceased; a writ of error can regularly issue, but a motion to revive the writ by suggesting the death and substituting the representatives as parties to the record is not regular. *McClane v. Boon*, 6 Wall. (U. S.) 244.

3. *Delaware.*—*Gregg v. Banner*, 2 Harr. (Del.) 407.

Florida.—*U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 215.

Indiana.—*Walpole v. Smith*, 4 Blackf. (Ind.) 151.

United States.—*Green v. Watkins*, 6 Wheat. (U. S.) 260.

Procedure.—If the plaintiff in error dies after assignment of errors the defendant may join in error and proceed to get judgment affirmed, if not erroneous, and he may then revive the judg-

ment against the representatives of the plaintiff. *Green v. Watkins*, 6 Wheat. (U. S.) 260.

4. *Huff v. Miller*, 2 Swan (Tenn.) 85; *McNutt v. Bland*, 2 How. (U. S.) 9.

5. *Gregg v. Bethea*, 6 Port. (Ala.) 9; *Evans v. Boggs*, Minor (Ala.) 354; *Perine v. Babcock*, 6 Port. (Ala.) 391; *Doty v. Strong*, 1 Pin. (Wis.) 165; *M'Kinney v. Carroll*, 12 Pet. (U. S.) 66; *Thorpe v. Mattingley*, 1 Phil. 200.

The English Stat. of 8 and 9 Wm. III., c. 11, § 7, enacted that "if there be two or more plaintiffs or defendants, and one or more shall die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not thereupon be abated, but such death being suggested upon the record, the action shall proceed." This statute is applicable to writs of error. *Ulshafer v. Stewart*, 71 Pa. St. 173.

6. 2 Tidd's Pr. 1164; *Wicket v. Creamer*, 1 Salk. 264.

Joinder of Administrator.—Where the administrator of a person deceased after judgment desires to join in the prosecution of a writ of error thereto, the death should be suggested on the record, and thereupon a *scire facias* will be awarded at the instance of the administrator, uniting the two-fold office of a *scire facias* to revive the decree against the administrator and a *scire facias ad audiendum errores*. *Huff v. Miller*, 2 Swan (Tenn.) 85.

Before Issuance.—If a codefendant in a writ of error is dead when the writ issues, it is cause for abatement if his

d. **BANKRUPTCY.**—The bankruptcy of a defendant in error does not abate the writ, and the assignees of the bankrupt cannot sue out a *scire facias* in their own names to compel an assignment of error; they should proceed in the bankrupt's name until judgment.¹

e. **MARRIAGE.**—But at common law a writ of error abates by the marriage of a female plaintiff in error.²

XI. RELEASE OF ERROR.—1. **Formal Release.**—Generally.—A party against whom a judgment is rendered may waive his right to prosecute a writ of error by a formal release of error.³

death be not suggested in the writ. *State Bank v. Ruddell*, 10 Ark. 123.

Death of One Payee.—Where, upon the death of one of several payees of a promissory note, the right of action vests in the survivor, a suit in error must be prosecuted against him to the exclusion of the representatives of the deceased defendants in error. *Bostwick v. Williams*, 40 Ill. 113.

1. *Kretchman v. Beyer*, 1 T. R. 463; 2 *Tidd's Pr.* 1164.

Under the United States Bankrupt Act of 1841, the assignees may maintain a writ of error to reverse a judgment rendered against a bankrupt. *Day v. Laffin*, 6 Met. (Mass.) 280.

2. *Buller v. de Pinna*, 2 Stra. 880; *Jenkins v. Bates*, 2 Stra. 1015.

3. 2 *Tidd's Pr.* 1170, 1172, 1174; *Barnes v. Moody*, 5 How. (Miss.) 636; *Adams v. Beem*, 4 Blackf. (Ind.) 128; *Clark v. Goodwin*, 1 Blackf. (Ind.) 74; *Boyd v. Crary*, 35 Ind. 363; *Miller v. Macklot*, 13 Ind. 217; *Millar v. Farrar*, 2 Blackf. (Ind.) 220. See *Ames v. Webber*, 10 Wend. (N. Y.) 576; *Boyd v. Weeks*, 6 Hill (N. Y.) 71; *Camden v. Edie*, 1 H. Bl. 21; *Baddely v. Shafto*, 8 Taunt. 434, 4 E. C. L. 156; *Cates v. West*, 2 T. R. 183.

By Agreement.—A party may be concluded by an agreement not to take out a writ of error. *Shisler v. Keavy*, 75 Pa. St. 79. See also *Andrews v. Lee*, 3 P. & W. (Pa.) 99; *Cuncle v. Dripps*, 3 P. & W. (Pa.) 291.

An attorney of record has authority without express warrant of attorney to refer a cause with a stipulation that the decision thereon shall not be subject to writ of error or appeal. *Sargeant v. Clark*, 108 Pa. St. 589.

So where the parties, by their attorneys, agreed that the question at issue between them should be raised on demurrer, and that, whatever might be the decision of the court thereon, "each

party shall pay his own costs and charges in and about the cause, and that such decision shall bind the parties," it was held to be a virtual agreement that the decision should be final, and that defendant could not sue out a writ of error thereon. *Brown v. Granville*, 4 M. & Scott 333, 30 E. C. L. 350. See also article **APPEALS**, *Waiver of Right of Appeal*, vol. 2, p. 173 et seq.

No writ of error lies where judgment is entered upon agreement that judgment be entered in accordance with the result of another case. *Bransford v. Karn*, 87 Va. 242.

Judgment by Confession.—A stipulation in a warrant of attorney that error shall not lie upon a judgment does not preclude the defendant from maintaining a writ of error to review a decision on a motion to set aside such judgment. *Lake v. Cook*, 15 Ill. 353.

Quashal of Writ Brought Contrary to Agreement.—Where the writ is brought contrary to an expressed or implied agreement not to sue out such writ, it will be quashed as issued against good faith. *Apothecaries' Co. v. Harrison*, 12 Ad. & El. 642, 40 E. C. L. 145. See also *Baring v. Shippin*, 2 Binn. (Pa.) 169; *Cuncle v. Dripps*, 3 P. & W. (Pa.) 291; *Com. v. Johnson*, 6 Pa. St. 136.

Rule Not Applicable in Capital Criminal Cases.—"This court will not, in general, proceed upon writs of error contrary to the agreement of the parties; but the rule is certainly not applicable to capital criminal cases." *Smith v. Com.*, 14 S. & R. (Pa.) 69.

Injunction as a Release.—An injunction against a judgment at law does not operate as a release of errors where the order of allowance does not require it. *Produt v. McCaleb*, 24 Miss. 169; *Gano v. White*, 3 Ohio 20 (*compare* *Chouteau v. Douchouquette*, 1 Mo. 716), or a statute so provide, *Henly v. Robertson*, 4 Yerg. (Tenn.) 172.

Execution of Release.—The release must be sealed¹ and must be signed by the party executing it.²

Effect of Release.—Where duly executed as required by law, and supported by a valid consideration, it will estop the party from prosecuting the writ.³

2. By Voluntary Acts of Plaintiff in Error.—A plaintiff in error may also be debarred from bringing his writ of error by his voluntary acts constituting a recognition of the validity of the judgment rendered, or by a waiver of his right thereto.⁴

Effect of Statute.—A statutory provision making the obtaining of a writ of injunction against a judgment operate as a release of errors at law does not prohibit the correction of a mistake made by the clerk in entering up the judgment of the court. *Blake v. Dunn*, 5 Humph. (Tenn.) 578.

Release of Actions.—As a writ of error is an action, a release of all actions will bar it. *Ulshafer v. Stewart*, 71 Pa. St. 171; *Ripley v. Morris*, 7 Ill. 381; 3 Bac. Abr., tit. Error, (L.); *Coke on Litt.* 288 b.

Joint Plaintiffs and Defendants—Effect of Release by.—A release of error by one joint plaintiff may be pleaded in bar to a writ of error brought by another. But a release by one joint defendant does not release or bar the right of another. *Genin v. Ingersoll*, 2 W. Va. 558.

Release by Infant.—Where an entire judgment against several joint defendants is bad because one was an infant, a plea of release of error by an infant after judgment and after he comes of age will not avail to sustain the judgment on a writ of error sued out by the remaining codefendants below, now plaintiffs in error. *Blanchard v. Gregory*, 14 Ohio 414.

1. *Cotton v. Wilson*, Minor (Ala.) 118. See also *Clark v. Goodwin*, 1 Blackf. (Ind.) 74.

"A release must be of as high dignity as the obligation or contract which it was intended to discharge." *Cotton v. Wilson*, Minor (Ala.) 118.

2. *Vick v. Maulding*, 1 How. (Miss.) 217.

3. *Barnes v. Moody*, 5 How. (Miss.) 636; *Vick v. Maulding*, 1 How. (Miss.) 217; *Clark v. Goodwin*, 1 Blackf. (Ind.) 74.

Error Prejudicial to Defendant Not Cured by Plaintiff's Release.—An error in a judgment prejudicial to a defendant cannot be cured by a release of the

plaintiff. *Buford v. Burdett*, 3 T. B. Mon. (Ky.) 226.

4. See article **APPEALS, Waiver of Right of Appeal**, vol. 2, p. 173 *et seq.*

Acts in pais, occurring either before or after the rendition of the decree, which would make it fraudulent in either party to seek a reversal of the decree, may be pleaded in bar of the writ. *Austin v. Bainter*, 40 Ill. 82.

Any act by a party which would render it fraudulent to reverse a decree may be relied on as a release of errors. *Corwin v. Shoup*, 76 Ill. 246.

Granting of Motion for New Trial.—A motion for new trial, made and granted in the court below, bars a writ of error to the judgment. *Culver v. Hitchcock*, 19 Wis. 343.

By Consent.—So where a judgment below is consented to by the party complaining, his writ of error will be dismissed. *Zorn v. Lamar*, 71 Ga. 80. See also *Mott v. Hill*, 7 Ga. 79; *Dannelly v. Speer*, 7 Ga. 227; *Kent v. Hunter*, 9 Ga. 207; *Macrea v. Nolan*, 33 Ga. 205; *Jones v. Mobile, etc., R. Co.*, 64 Ga. 446; *Killen v. Compton*, 60 Ga. 117; *Ewing v. Glidwell*, 3 How. (Miss.) 332.

By Confession of Judgment.—Confession of judgment operates as a release of errors. *Garner v. Burleson*, 26 Tex. 348; *Storey v. Nichols*, 22 Tex. 87; *Reid v. Case*, 14 Wis. 429; *Callier v. Denson*, Minor (Ala.) 19; *Gayle v. Foster*, Minor (Ala.) 125; *Cooke v. Pope*, 3 Munf. (Va.) 167; *Miller v. Macklot*, 13 Ind. 217.

A confession of judgment on a motion on a forthcoming bond will operate as a release of errors in the original judgment. *Edmonds v. Green*, 1 Rand. (Va.) 44; *M'Rae v. Turnpike Co.*, 3 Rand. (Va.) 160.

A defendant's relinquishing his plea and agreeing to the plaintiff's damages is a confession of judgment, and

3. How Release Pleaded.—A release of error should be specially pleaded.¹ The plea should set forth whether the release was by a written or a merely verbal agreement,² and should show that the release was based upon a good consideration.³

Construction of Plea.—Such plea will be taken most strongly against the pleader.⁴

4. Objections to Plea.—Objections affecting the merits of a plea

of course a release of errors. *Cooke v. Pope*, 3 Munf. (Va.) 167.

Confession Improperly Made No Waiver.—A confession of judgment made without service of process, and before the filing of a petition, was held contrary to law, and the error therein was not waived by the judgment upon confession being entered. *Montgomery v. Barnett*, 8 Tex. 143.

Judgment by Nihil Dicit as a Release.—In *Texas* it is held that judgment by *nihil dicit*, after a withdrawal of the pleas, is a virtual waiver of errors. *Storey v. Nichols*, 22 Tex. 87; *Garner v. Burleson*, 26 Tex. 348; *Cartwright v. Roff*, 1 Tex. 78; *Wheeler v. Pope*, 5 Tex. 262; *Burton v. Lawrence*, 4 Tex. 373.

In *Alabama*, on the contrary, it is held that a judgment by *nihil dicit* is not a release of errors. *Dinsmore v. Hand*, Minor (Ala.) 126.

1. *Adams v. Beem*, 4 Blackf. (Ind.) 128; *Vick v. Maulding*, 1 How. (Miss.) 217; *Veach v. Pierce*, 6 Ind. 48; *Corwin v. Shoup*, 76 Ill. 246; *Baddely v. Shafto*, 8 Taunt. 434, 4 E. C. L. 156; *Landon v. Pickering*, 2 Stra. 1215; *Prodou v. McCaleb*, 24 Miss. 169.

Facts Relied On should be Stated.—A plea to a writ of error which simply avers that the errors were released, without stating in what manner, or whether by deed, by parol, or by acts *in pais*, is too general. It should state the facts relied on as a release of errors. *Corwin v. Shoup*, 76 Ill. 246.

Reply or Demurrer.—To such plea the plaintiff may reply or demur. *Vick v. Maulding*, 1 How. (Miss.) 217.

Motion to Dismiss.—Under common-law practice it is not the proper subject of a motion to dismiss. *Vick v. Maulding*, 1 How. (Miss.) 217. See also *Baddely v. Shafto*, 8 Taunt. 434, 4 E. C. L. 156.

Direction of Issues.—Where special pleading is abolished, and there is no general issue to try questions of fact upon a writ of error, it may be compe-

tent for the court, under a general authority to direct the framing of issues, to allow the defendant in error to come in and plead that the judgment which is sought to be reversed is not erroneous in any matter of fact, in manner and form, etc., and tender an issue to the country, and may require him to file with such plea a specification, setting forth a release of errors, an estoppel, or any matter of fact in avoidance, on which he relies to show that the judgment ought not to be reversed. *Goodridge v. Ross*, 6 Met. (Mass.) 487. See article ASSIGNMENT OF ERRORS, vol. 2, p. 920.

Double Plea.—The defendant may, notwithstanding his plea of a release of error, also plead an accord and satisfaction. *Wilton Mfg. Co. v. Woodman*, 32 Me. 187.

2. *Beardsley v. Smith*, 139 Ill. 290. In this case the court said: "If the release is by deed, and is set up in the plea, * * * this court can determine, upon inspection of it, whether it is a valid release; but if the evidence rests in parol the issues must be sent to the Circuit Court, or to some other appropriate tribunal, to be tried."

3. *Beardsley v. Smith*, 139 Ill. 290. See also *Smucker v. Larimore*, 21 Ill. 267.

Sufficient Consideration.—The forbearance of the plaintiff to execute the writ of *habere facias* possession was held a good consideration. *Barnes v. Moody*, 5 How. (Miss.) 636.

Release Executed for Injunction.—A release of errors executed for the purpose of procuring an injunction may be pleaded in bar of a writ of error, although the injunction had been refused and the bill dismissed. *Millar v. Farrar*, 2 Blackf. (Ind.) 219.

4. *Beardsley v. Smith*, 139 Ill. 290; *Chamblin v. Blair*, 58 Ill. 385.

Subsequent Joinder in Error.—Where a defendant pleads release of error, and fails to sustain his plea, he cannot afterwards be allowed to join in error. *Austin v. Bainter*, 40 Ill. 82.

of release of errors can be made only upon demurrer to the plea, and will not avail against a motion for leave to withdraw a joinder in error and to file the plea.¹

5. **How Issue Tried.**—An issue of fact upon a plea of release of errors cannot be tried in the Supreme Court except by consent of parties. And even where such consent is given the court will not hear oral testimony, but will only try the issue upon evidence in writing.²

XII. TIME TO SUE OUT THE WRIT—1. **The Rule Stated.**—According to the early English decisions a writ of error could not be brought except on a judgment or an award in the nature of a judgment; hence the writ would not lie before judgment given.³ Subsequent decisions held that a writ of error might be brought before judgment rendered, and would be good, provided judgment was given before the return of the writ.⁴ If the writ were returnable before judgment it would be quashed.⁵ The practice of suing out writs of error before judgment rendered has never prevailed in the United States,⁶ where the time for suing out such writs is governed almost, if not entirely, by statute, and the writ should be sued out within the time limited by the statute regulating it.⁷

1. *Clapp v. Reid*, 40 Ill. 121; *Vick v. Maulding*, 1 How. (Miss.) 217; *Martin v. Ives*, 17 S. & R. (Pa.) 364.

2. *Austin v. Bainter*, 40 Ill. 82.

Issue when Returned to the Trial Court.—Where there is no consent, or if the evidence is not to be presented in writing, the court will direct the issue to be sent to the court from which the cause is brought, to be there tried by jury, and their verdict to be certified up to the appellate court. *Austin v. Bainter*, 40 Ill. 82.

3. 2 Tidd's Pr. 1140; Co. Litt. 288 b.

4. 2 Tidd's Pr. 1141; *Morfoot v. Chivers*, 1 Stra. 632; *Jaques v. Nixon*, 1 T. R. 279; *Ayres v. Lenthall*, 1 Mod. 112; *Bennet v. Nichols*, 4 T. R. 121.

Under English practice, where a writ of error acted as a supersedeas it was customary to sue out writs of error before rendition of the judgment to prevent issuance of execution thereon, and the custom was held valid. *Dutton v. Tracy*, 4 Conn. 372, citing *Gravall v. Stimpson*, 1 B. & P. 478; *Jaques v. Nixon*, 1 T. R. 280.

In *Arnold v. Sandford*, 14 Johns. (N. Y.) 424, it was said: "It is not the signing of the judgment roll, but the rendition of the judgment, which forms the test. The signing is the mere authentication of the judgment. In the cases of *Jaques v. Nixon*, 1 T. R. 280, it is admitted to be the set-

tled practice to sue out a writ of error before judgment is actually signed."

Bill of Exceptions.—But a party may sue out his writ of error before his bill of exceptions is signed. *Teller v. Willis*, 12 Mich. 384. *Contra*, 2 Tidd's Pr. 863; *Dillon v. Parker*, 1 Bing. 17, 8 E. C. L. 381. See also article **BILLS OF EXCEPTIONS**, vol. 3, p. 374.

5. 2 Tidd's Pr. 1141; 1 Ld. Raym. 1179; *Gould v. Coulthurst*, 1 Stra. 139.

6. See *supra*, VI. *To What Judgments the Writ Lies*.

7. *Alabama*.—*Bohannon v. Watts*, 14 Ala. 574; *Binford v. Binford*, 22 Ala. 682.

Colorado.—*Clayton v. Cheeley*, 5 Colo. 337.

Connecticut.—*Gaylord v. Payne*, 3 Conn. 258; *Allin v. Cook*, 1 Root (Conn.) 54.

Florida.—*Alvord v. Little*, 16 Fla. 158.

Illinois.—*Avery v. Babcock*, 35 Ill. 175; *Burnap v. Wight*, 14 Ill. 303; *Bertrand v. Taylor*, 87 Ill. 238.

Iowa.—*Wright v. Hughes*, 2 Greene (Iowa) 142.

Kentucky.—*Peak v. Bull*, 8 B. Mon. (Ky.) 428; *Langhorne v. Payne*, 14 B. Mon. (Ky.) 502.

Maryland.—*Dorsey v. Dorsey*, 4 Har. & J. (Md.) 215; *Andrews v. Bosley*, 6 Har. & J. (Md.) 99.

Before End of Term.—It may be prosecuted from a final judgment immediately after its rendition and before the end of the term at which it is rendered.¹

2. Effect of Statutes Governing.—Although the English rule was otherwise,² the weight of authority in *America* is, it is apprehended, that the commencement of a proceeding in error within the time prescribed by law is essential to give the reviewing court jurisdiction to hear and determine it,³ and that the parties may

Massachusetts.—*Eager v. Com.*, 4 Mass. 182.

Michigan.—*People v. Van Wagner*, 51 Mich. 171; *Teller v. Willis*, 12 Mich. 384.

Minnesota.—*Furlong v. Griffin*, 3 Minn. 207; *Gerish v. Johnson*, 5 Minn. 23.

Missouri.—*Ham v. St. Louis Public Schools*, 34 Mo. 181; *Judge v. Judge*, 38 Mo. 159.

Nebraska.—*Clark v. Morgan*, 21 Neb. 673.

New Jersey.—*State v. Holmes*, 36 N. J. L. 62.

New York.—*Manhattan Co. v. Os-good*, 1 Cow. (N. Y.) 65.

Ohio.—*The Schooner Marinda v. Dowlin*, 4 Ohio St. 500; *The Schooner Marinda v. Swain*, 4 Ohio St. 502; *Lorenz v. Clark*, 2 Ohio Dec. 528; *King v. Penn.*, 43 Ohio St. 57; *Little Miami R. Co. v. Hopkins*, 19 Ohio St. 279; *Cleveland, etc., R. Co. v. Wick*, 35 Ohio St. 247; *Piatt v. Sinton*, 35 Ohio St. 282; *Bowen v. Bowen*, 36 Ohio St. 314.

Pennsylvania.—*Weil v. Frauenthal*, 103 Pa. St. 317; *Pennsylvania Cent. Ins. Co. v. Gaus*, 91 Pa. St. 103.

Tennessee.—*Cain v. Cocke*, 1 Lea (Tenn.) 288.

Texas.—*Harvey v. Carroll*, 72 Tex. 63; *Shelley v. Southwick*, 31 Tex. 126; *McMillan v. Kelch*, 16 Tex. 150; *Waterhouse v. Love*, 23 Tex. 560; *Lubbock v. Cook*, 49 Tex. 96; *Odum v. Garner*, 86 Tex. 374; *Stoner v. Spencer*, 32 Tex. 653; *Wright v. Hardie*, 88 Tex. 653.

Washington.—*Stark v. Jenkins*, 1 Wash. Ter. 421.

United States.—*Hamilton v. Brown*, 53 Fed. Rep. 753; *U. S. v. Baxter*, 51 Fed. Rep. 624; *Scarborough v. Par-goud*, 108 U. S. 567; *Cummings v. Jones*, 104 U. S. 419; *Mussina v. Cava-zos*, 6 Wall. (U. S.) 355; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 54 Fed. Rep. 22; *Arnold v. Woolsey*, 54

Fed. Rep. 268; *Cambuston v. U. S.*, 95 U. S. 285.

Motion in Error—Connecticut.—In Connecticut a statute limiting the time to sue out a writ of error was held applicable to motions in error. *Finch v. Ives*, 24 Conn. 387.

By the "next Supreme Court of Errors," to which, by statute, a motion in error is to be brought, is intended the next court after the filing of the motion, and not after the close of the term. *Russell v. Monson*, 33 Conn. 506.

Statement of Time.—Where a statute or rule of court requires a writ of Error to state the time within which the defendant in error is notified to appear, the statute is mandatory and must be complied with. *Bonner v. Blum* (Tex. Civ. App. 1894), 25 S. W. Rep. 60.

Justice's Judgment—Iowa.—In Iowa no time is prescribed by law within which a writ of error must be brought to a justice's judgment. *Porter v. Helmick*, 2 Iowa 87; *Mudgett v. Park*, 2 Iowa 287.

New Jersey and Florida Criminal Cases.—The fifteenth section of the act respecting writs of error (Nix. Dig. 289) applies to criminal cases; a writ of error in a criminal case must be sued out within three years after judgment pronounced. *State v. Holmes*, 36 N. J. L. 62.

In *Florida* there is no limitation of time within which a writ of error from judgments of the circuit courts in criminal cases may be sued out. *Collins v. State*, 33 Fla. 429; *Miller v. State*, 15 Fla. 575.

1. *Byrne v. Jeffries*, 38 Miss. 533.

2. See *Brooks v. Norris*, 11 How. (U. S.) 208.

3. *King v. Penn.*, 43 Ohio St. 57; *The Schooner Marinda v. Dowlin*, 4 Ohio St. 500; *Little Miami R. Co. v. Hopkins*, 19 Ohio St. 279; *Cleveland, etc., R. Co. v. Wick*, 35 Ohio St. 247; *Piatt v. Sinton*, 35 Ohio St. 282;

not, by private agreement or consent, nor by voluntary appearance, confer upon the reviewing court power to hear and determine a proceeding in error commenced after the time expressly limited therefor.¹

3. Exception to Operation of Statutes.—No exception for disability or other cause can be created or recognized by the courts unless

Bowen v. Bowen, 36 Ohio St. 313; *Pendley v. State*, 87 Ga. 189; *Stevens v. Clark*, 62 Fed. Rep. 321; *White v. Iowa Nat. Bank*, 71 Fed. Rep. 97; *U. S. v. Baxter*, 51 Fed. Rep. 624; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 54 Fed. Rep. 22; *Cummings v. Jones*, 104 U. S. 419; *Stark v. Jenkins*, 1 Wash. Ter. 421; *Clark v. Morgan*, 21 Neb. 674. *Contra*, *Haley v. Elliott*, 20 Colo. 199; *Clayton v. Cheeley*, 5 Colo. 337; *Williams v. Craig*, 10 Tex. 438.

Retroactive Legislation — Effect. —

Whether or not a statute enacted after the rendition of a final judgment reducing the time within which a writ of error must be sued out will apply to such judgment is a matter of doubt. There are rulings which support both sides of the question. In *Texas* and *Wisconsin* it has been held that such a statute was applicable to a judgment rendered before the law went into effect. *Odum v. Garner*, 86 Tex. 374; *Compton v. Ashley* (Tex. Civ. App. 1895), 28 S. W. Rep. 924; *Smith v. Packard*, 12 Wis. 371. In *Ohio* it was held that a statute reducing the time within which to sue out a writ of error, and fixing the date at which it would become operative, does not apply to pending proceedings in error taken prior to the date named, unless the statute so provided. *Canaan Tp. v. Board of Infirmary Directors*, 46 Ohio St. 694. So it has been held that a statute enacted after the time for taking an appeal, or suing out a writ of error to a judgment, has expired, and which extends the time for doing so, will enable a party to take an appeal or sue out a writ of error. *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *Davis v. Ballard*, 1 J. J. Marsh. (Ky.) 563; *Alvord v. Little*, 16 Fla. 158. But a decision in *Alabama* maintains the contrary view. *Davis v. Pender*, Minor (Ala.) 57.

Repeal of Statutes.—A writ of error is a "proceeding" within the meaning of a statute which saves proceedings pending when the statute upon

which they are founded is repealed. *Lafferty v. Shinn*, 38 Ohio St. 49; *O'Donnell v. Downing*, 43 Ohio St. 62.

United States Practice.—Section 1080 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to the writs of error to the state courts. *Cummings v. Jones*, 104 U. S. 419.

Under Rev. Stat. U. S., § 4981, a cause cannot be removed from the District to the Circuit Court unless the writ is claimed and notice given within ten days, as in cases of appeal. *Wear v. Mayer*, 2 McCrary (U. S.) 172.

Under Rev. Stat. U. S., § 999, requiring that, when a writ of error is issued by the Supreme Court, the adverse party shall have at least thirty days' notice, it was held that the fact that the citation was served and made returnable less than thirty days after the writ was granted is not sufficient ground to dismiss the writ. *Seagrist v. Crabtree*, 127 U. S. 773.

Georgia.—Where a writ of error is not sued out within the time defined by statute for bringing up an interlocutory decision, but is seasonable to bring up the main cause, it will not be dismissed, but the interlocutory decision will not be reviewed. *Fouche v. Harison*, 78 Ga. 359.

1. *King v. Penn*, 43 Ohio St. 60; *Stevens v. Clark*, 62 Fed. Rep. 321; *Connecticut F. Ins. Co. v. Oldendorff*, 73 Fed. Rep. 88; *Stark v. Jenkins*, 1 Wash. Ter. 421; *Clark v. Morgan*, 21 Neb. 674.

What may be Waived.—In *Stevens v. Clark*, 62 Fed. Rep. 321, it was said: "The true line of distinction running through the cases is between facts which are jurisdictional and those which are not. The issuance of the writ and filing it with the court below within the time prescribed by law are jurisdictional, and cannot be waived. They are the only means known to the law for bringing up for review cases at law, but any mere irregularity in getting up the record may be waived."

expressly provided for in the statute limiting the time. The statute which creates the limitation must also create the exception.¹ These statutes are not strictly statutes of limitation,² hence exceptions created by general statutes of limitations applicable to original proceedings do not apply to a separate statute limiting the time to sue out a writ of error, unless it is expressly so provided.³

1. *Arkansas*.—*State Bank v. Morris*, 13 Ark. 291.

Mississippi.—*Butler v. Craig*, 27 Miss. 628; *Robertson v. Alford*, 13 Smed. & M. (Miss.) 510.

Texas.—*Harvey v. Carroll*, 72 Tex. 63.

Persons under Disability.—Persons under disabilities, as infants, married women, etc., cannot be relieved from the operation of the statute unless expressly excepted therein. *May v. Marshall*, 2 Litt. (Ky.) 147.

Effect of Statute.—The effect of a statute of limitations removing the bar in cases of disability is to extend the time for suing out the writ until the time defined after the removal of the disability. Persons under disability are not barred, therefore, from suing out the writ after the expiration of the general time defined by the statute and before their disability is removed. *Ridgely v. Bennett*, 13 Lea (Tenn.) 209; *Caldwell v. Hoddsden*, 1 Lea (Tenn.) 305.

When the Disability is Effectual.—No disability will suspend the operation of the statute unless it exists when the cause of action accrues; and when the statutes begin to operate no disability subsequently arising will suspend its running. *McDonald v. Hovey*, 110 U. S. 619.

Joint Plaintiff in Error.—In *Kennedy v. Duncan*, Hard. (Ky.) 373, it was held that where the statute of limitations excepted persons under disability from its operations until a disability was removed, all those who must of necessity join with the person under disability were so relieved from the operation that they might be joined as plaintiffs in error by such party at any time before the statute had run as to him. To the same effect, see *Callaghan v. Carr*, 2 Litt. (Ky.) 153. The same rule obtains in *Ohio* under the practice obtaining before the abolition of writs of error, *Wilkins v. Philips*, 3 Ohio 49; and in *Texas*, *Harvey v. Carroll*, 72 Tex. 63.

A contrary construction was, however, adopted in later cases in *Kentucky* arising under a subsequent statute (Feb. 8, 1816) containing the usual exceptions in favor of persons under disability, and it was held that the disability of one of the joint plaintiffs in error does not prevent the operation of the act as a bar to the joint action. *May v. Marshall*, 2 Litt. (Ky.) 147; *Holliday v. Hickman*, 6 T. B. Mon. (Ky.) 377; *Banton v. Campbell*, 2 Dana (Ky.) 421.

So where a husband's right to prosecute a writ of error jointly with his wife is barred, the wife cannot, under a statute allowing recusant coparties to be made defendants in error, sue out a writ of error by her next friend and make her husband a defendant in error. *Garrett v. Cocke*, 8 Baxt. (Tenn.) 274.

2. *State Bank v. Morris*, 13 Ark. 291; *State v. Kroner*, 2 Tex. 492; *Walker v. Taul*, 1 Tex. App. Civ. Cas., § 31; *Cunningham v. Perkins*, 28 Tex. 488; *Ryan v. Flint*, 30 Tex. 384.

3. *State Bank v. Morris*, 13 Ark. 291. In *Trim v. McPherson*, 7 Coldw. (Tenn.) 15, it was said: "A proceeding by a writ of error is often spoken of as being an action, or in the nature of an action, and in this view the statute limiting the time within which such a writ may be sued out might not inappropriately be termed a statute of limitation. But this term is not usually applied to the statutes regulating appellate proceedings." Accordingly, it was held that the statute regulating time to sue out a writ of error is not subject to the control of the general statute affecting limitations.

Applicable to Proceedings by State.—A statute limiting the time in which a writ of error may be sued out includes the state, although a general statute of limitations does not. *State v. Kroner*, 2 Tex. 492; *Walker v. Taul*, 1 Tex. App. Civ. Cas., § 31.

Construction.—Acts of limitation will be strictly construed, and cases not

Cannot be Extended.—And where a class is excepted from the effect of the statute it cannot be extended by the will of the court.¹

Part Excepted.—Where the plaintiff in error is within the exception of the statute he may sue out the writ although it has expired as to other joint parties below, not under disability.²

4. When Statute Begins to Run.—This question, it is apprehended, depends almost entirely upon the wording of the statute prescribing the limitation. In some jurisdictions the statute does not begin to run until "entry" of the judgment,³ while in others it runs from the date of the rendition of the judgment.⁴

clearly within the scope of the statute cannot be held to be included. *Asdell v. Sutherland, Peck (Tenn.)* 118.

Nunc pro Tunc.—A writ of error can only be issued and served *nunc pro tunc* where the failure to act seasonably, as required by statute, is due to official neglect alone. *Knight v. Towles, 32 Fla.* 473.

1. *Davenport v. Hannibal, 120 Mo.* 150; *Prideaux v. Webber, 1 Lev.* 31.

2. *Wells v. Wells, 4 T. B. Mon. (Ky.)* 154.

Procedure.—Where the statute has run against all parties except those under disability, as infants, etc., the latter, to obtain the allowance of a writ of error, must present a sworn petition, setting up the facts taking the case out of the usual limitations. *Ridgely v. Bennett, 13 Lea (Tenn.)* 206.

The appellee, seeking to contest the truth of the facts so set forth, must do so by plea. *Ridgely v. Bennett, 13 Lea (Tenn.)* 206.

A motion to dismiss admits the facts of the petition as true. *Ridgely v. Bennett, 13 Lea (Tenn.)* 206.

Construction of the Statute.—A statute exempting persons under disability does not require them to wait until the disability is removed before instituting the writ of error. *Ridgely v. Bennett, 13 Lea (Tenn.)* 206.

3. *Connecticut F. Ins. Co. v. Oldendorf, 73 Fed. Rep.* 89; *Brooks v. Norris, 11 How. (U. S.)* 204; *Mussina v. Cavazos, 6 Wall. (U. S.)* 355; *Polleys v. Black River Imp. Co., 113 U. S.* 82; *Hatch v. Coddington, 5 Blatchf. (U. S.)* 523; *Green v. Van Buskerk, 3 Wall. (U. S.)* 448; *Threadgill v. Platt, 71 Fed. Rep.* 1; *Klever v. Seawall, 65 Fed. Rep.* 373; *Blumenthal v. Shaw, 70 Fed. Rep.* 801; *Scarborough v. Pargoud, 108 U. S.* 567; *Cummings v. Jones, 104 U. S.* 419; *Humphrey v. Havens, 9 Minn.* 318, *overruling Fur-*

long v. Griffin, 3 Minn. 207; *Haines v. Paxton, 5 Minn.* 442; *Hornick v. Maguire, 47 Neb.* 826; *Ward v. Urmson, 40 Neb.* 695.

Remission to Lower Court.—In the *United States* Court of Appeals the court may refuse to pass on the question whether the judgment below was of such a final character that it would support a writ of error; but may, where peculiar circumstances render a decision on the question more appropriate to the lower court, remit the record to the trial court to pass on the question of finality. *Blumenthal v. Shaw, 70 Fed. Rep.* 801.

4. *Brown v. Clark, 31 Kan.* 521; *Lamme v. Schilling, 25 Kan.* 92; *Dyal v. Topeka, 35 Kan.* 62; *Guardian Sav. Bank v. Reilly, 8 Mo. App.* 544; *Borden v. Peoria M. & F. Ins. Co., 14 Mich.* 232; *Teller v. Willis, 12 Mich.* 384.

Effect of Motion for New Trial.—A motion for new trial does not, as a general rule, extend the time for taking proceedings in error. *Ham v. St. Louis Public Schools, 34 Mo.* 181; *Hollenbeck v. Tarkington, 14 Neb.* 430.

Contra.—*Williams v. Jones, 69 Ga.* 277, 757.

Necessity for Motion for New Trial.—In some states a motion for new trial must be made before an appeal or writ of error can be taken to bring up errors occurring on the trial. See article NEW TRIAL; also article EXCEPTIONS AND OBJECTIONS.

Effect of Motion to Vacate.—A motion to vacate a judgment does not extend the time in which to sue out a writ of error. *Buckley v. Sutton, 38 Mich.* 1; *Memphis v. Brown, 94 U. S.* 717.

Petition for Rehearing.—The statute does not begin to run until a motion or petition for rehearing, seasonably presented and entertained, has been disposed of. *Aspen Minn., etc., Co. v. Bil-*

5. How Statute Availed of.—Under strict practice the defense of the statute cannot be interposed by a motion to dismiss.¹ It must be availed of by a special plea made at a preliminary stage of the proceedings before issue is joined.²

By Motion.—But in the federal courts, and in many of the state courts, the rule has been changed, and a motion to dismiss will be recognized as proper.³

6. When Writ Considered Brought.—A writ of error is "brought,"

lings, 150 U. S. 31; *Voorhees v. John T. Noye Mfg. Co.*, 151 U. S. 135; *North-ern Pac. R. Co. v. Holmes*, 155 U. S. 137; *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488.

Computation of Time—General Rule.—When the computation of time is to be made from an act done, the day on which the act was done must be included, but when the computation is to be from the day itself, and not from the act done, then the day on which the act was done must be excluded. *Chiles v. Smith*, 13 B. Mon. (Ky.) 461; *Smith v. Gale*, 137 U. S. 577.

Michigan.—In computation of the time the day of issue must be excluded and the return day included. *Doyle v. Mizner*, 41 Mich. 549.

Issuance after an Elapsed Period.—Where no writ can be issued until a certain period has elapsed, either the day of the act from which the period begins to run or the day on which it is filed must be excluded; both cannot be counted. *Frantz v. Kaser*, 3 S. & R. (Pa.) 395.

1. *Haley v. Elliott*, 20 Colo. 199; *Burnap v. Wight*, 14 Ill. 303; *Higgs v. Evans*, 2 Stra. 837.

2. **Connecticut.**—*Allin v. Cook*, 1 Root (Conn.) 54.

Illinois.—*Burnap v. Wight*, 14 Ill. 303.

Massachusetts.—*Eager v. Com.*, 4 Mass. 182.

New York.—*Acker v. Ledyard*, 1 Den. (N. Y.) 677; *Fleet v. Youngs*, 11 Wend. (N. Y.) 522; *Keefer v. Keef-er*, 2 How. Pr. (N. Y. Supreme Ct.) 69.

England.—*Higgs v. Evans*, 2 Stra. 837.

Reason for Rule.—The reason given for the rule was that the defendant in error must plead in bar, so as to enable the plaintiff in error to reply the exceptions in the statute. *Fleet v. Youngs*, 11 Wend. (N. Y.) 526.

Plea Indivisible.—Where any portion

of the record is not barred the whole record is saved. So where a writ of error brought up two decrees, one on a master's report stating an account between the parties, and the other upon the master's distribution of assets, it was held that although the first decree was barred by the statute, the last decree being within time the whole record was saved. *Snyder v. Hall*, 10 Ill. App. 235.

3. *Haley v. Elliott*, 20 Colo. 199; *Brown v. Clark*, 31 Kan. 521; *Brooks v. Norris*, 11 How. (U. S.) 208; *French v. English*, 7 Neb. 124; *Clark v. Morgan*, 21 Neb. 673; *Cleveland, etc., R. Co. v. Wick*, 35 Ohio St. 247; *The Schooner Marinda v. Dowlin*, 4 Ohio St. 500; *Little Miami R. Co. v. Hop-kins*, 19 Ohio St. 279; *Teller v. Willis*, 12 Mich. 268; *Compton v. Ashley* (Tex. Civ. App. 1895), 28 S. W. Rep. 924; *Pendley v. State*, 87 Ga. 189.

In *Brooks v. Norris*, 11 How. (U. S.) 208, it was said: "According to the English practice the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion; nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defense which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court, he need not plead it, but may take advantage of it by motion."

So in *Ohio* it is said that the question whether the statute has been complied with is to be determined by the record, and no plea is required setting up the lapse of time as a bar. *Cleveland, etc., R. Co. v. Wick*, 35 Ohio St. 247.

Rule Discretionary.—Courts have power to change the practice, so as to allow the statute to be availed of on a motion to dismiss. *Fleet v. Youngs*, 11 Wend. (N. Y.) 526.

so as to terminate the running of the statute of limitations, where filed in the office of the clerk of the court rendering the judgment sought to be reviewed.¹ The day when the writ of error is issued by the clerk, or tested, is immaterial,² and so, where seasonably brought, is the failure to serve process before the expiration of the time for suing out the writ.³ Filing removes the record and transfers jurisdiction to the appellate court.⁴

XIII. APPLICATION FOR THE WRIT—1. Contents—In General.—To

1. *Florida*.—*Sammis v. Wightman*, 25 Fla. 552; *Orlando First Nat. Bank v. King*, 36 Fla. 25; *Crippen v. Livingston*, 12 Fla. 638.

Louisiana.—*State v. Judge*, 33 La. Ann. 1389.

United States.—*Brooks v. Norris*, 11 How. (U. S.) 204; *Mussina v. Cavazos*, 6 Wall. (U. S.) 360.

Practice in Texas.—In Texas, in practice, the writ of error does not issue at all. The point of time at which it would properly be issued, if issued at all, would be upon filing the petition and bond. That, then, may appropriately be taken as the time when the writ is granted, whether it be formally issued or not. *Crunk v. Crunk*, 23 Tex. 605.

Nebraska.—Under Code Civ. Pro. *Nebraska*, § 586, a transcript of the record must be filed with the petition in error, as it is the foundation of the jurisdiction of the appellate court, and consequently where the summons in error is issued and served after the petition in error is filed, and before the transcript, the appellate court will dismiss the proceeding. *Garneau v. Omaha Printing Co.*, 42 Neb. 847.

The summons in error must be issued within a year, or the defendant to a petition in error must enter a general appearance; otherwise no jurisdiction is acquired by the Supreme Court. *Benson v. Michael*, 29 Neb. 131; *Baker v. Sloss*, 13 Neb. 230; *Hollenbeck v. Tarkington*, 14 Neb. 430; *Rogers v. Redick*, 10 Neb. 332; *Hendrickson v. Sullivan*, 28 Neb. 790; *Bemis v. Rogers*, 8 Neb. 149.

The prohibition applies to an alias summons. *Baker v. Sloss*, 13 Neb. 230.

Ohio.—A proceeding in error is not commenced within the intendment of Civ. Code Ohio, § 523, unless the petition is filed and the appearance of the defendants effected by service of the summons, or otherwise. *Bowen v. Bowen*, 36 Ohio St. 313; *Robinson v.*

Orr, 16 Ohio St. 285; *Buckingham v. Commercial Bank*, 21 Ohio St. 131.

Kansas.—A proceeding in error is not deemed commenced in Kansas on the mere filing of a petition in error, without the issuance or waiver of a summons. *St. Louis, etc., R. Co. v. Rierison*, 38 Kan. 359.

It commences at the date when the summons in error is issued. *Thompson v. Wheeler, etc., Mfg. Co.*, 29 Kan. 476; *Smith County v. Labore*, 37 Kan. 480.

Codefendants.—Under Kan. Civ. Code, § 20, a proceeding in error is to be deemed commenced as to all codefendants in error when the summons in error is served upon one, so far as the statute of limitations is concerned. *Barber Asphalt Paving Co. v. Botsford*, 50 Kan. 331.

The same rule obtains in *Ohio*. *Buckingham v. Commercial Bank*, 21 Ohio St. 131; *Sidener v. Hawes*, 37 Ohio St. 532; *Secor v. Witter*, 39 Ohio St. 218; *Athens First Nat. Bank v. Green*, 40 Ohio St. 438.

2. *Sammis v. Wightman*, 25 Fla. 552; *Brooks v. Norris*, 11 How. (U. S.) 204; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355; *Scarborough v. Pargoud*, 108 U. S. 567; *Cummings v. Jones*, 104 U. S. 419.

3. *Burnap v. Wight*, 14 Ill. 303.

In Pennsylvania a writ of error took effect from its delivery to the prothonotary of the Common Pleas, and not from the time of its issuing. *Taylor v. Breisch*, 8 Pa. Co. Ct. Rep. 286.

4. *Mussina v. Cavazos*, 6 Wall. (U. S.) 355; *Scarborough v. Pargoud*, 108 U. S. 567; *Polleys v. Black River Imp. Co.*, 113 U. S. 81.

Effect of Removal.—Where the record is legally removed upon a writ of error that is out of time the proper course is not to quash the writ, but to disregard the assignment of errors. *Camp v. Welles*, 11 Pa. St. 207.

obtain a writ of error in *England*, it was necessary to make application to the cursitor of the county (an officer or clerk belonging to chancery and having specific duties) where the venue was laid in the original action. The cursitor would make out the writ in ordinary cases, as a matter of course, upon a note of instructions containing the names of the parties, the nature of the judgment, the court in which it was given, and the time when the writ was intended to be returnable.¹

In some jurisdictions a formal petition in error is required by statute.

Specific Averments.—The petition should describe the nature and character of the suit, and show with reasonable certainty what judgment the petitioner seeks to revise.² It should also show in

1. 2 Tidd's Pr. 1141; *Rochester v. Roberts*, 25 N. H. 503.

In *New Hampshire* writs of error are procured by simply applying to the clerk of the Superior Court of the county where the judgment was rendered, who will issue the writ as a matter of course on such application, no preliminary steps being requisite. *Rochester v. Roberts*, 25 N. H. 503.

Florida.—"Section 1270 of the Revised Statutes provides that writs of error shall issue on demand as matter of right. In what particular form this demand shall be, and whether it is to be written or oral, is nowhere provided for. The usual practice, we believe, is to file with the clerk a written demand therefor in the form of a *præcipe* requesting its issuance, but however this may be, when such a writ is properly issued and served, and brings a cause to this court for appellate review, the presumption comes with it that some sort of effective demand had been made for its issuance, and this court can have no such concern in the formality of that demand as that the absence of any tangible evidence of its having been made could furnish a ground of dismissal of the cause from this court." *Orlando First Nat. Bank v. King*, 36 Fla. 27.

2. *Hodo v. Mexican Nat. R. Co.*, 88 Tex. 523; *Cochrane v. Day*, 27 Tex. 389; *Forshey v. Galveston, etc., R. Co.*, 16 Tex. 516; *Wright v. Williams*, 12 Tex. 35.

Defective Address.—The address of the petition for the writ is merely formal, and a mistake therein may be ignored. *Johnson v. McCutchings*, 43 Tex. 553.

Amount of Judgment.—The amount

of the judgment, it seems, should be stated. *Cochrane v. Day*, 27 Tex. 389. But where the judgment is for costs, it has been held that a writ of error describing the judgment as "a judgment * * * against your petitioner for the costs of said suit, in favor of said defendants, the precise amount of which petitioner is unable to state," is sufficient. *Forshey v. Galveston, etc., R. Co.*, 16 Tex. 516.

Docket Number of Cause.—The petition should show the docket number of the cause. *Cochrane v. Day*, 27 Tex. 389; *Wright v. Williams*, 12 Tex. 35.

In *Texas* the petition should contain a copy of the opinion, statement, and conclusions of the Court of Civil Appeals. *Missouri, etc., R. Co. v. McFadden* (Tex. 1895), 32 S. W. Rep. 526.

Historical Statement Insufficient.—A mere historical statement of the case, without these elements, is defective but amendable. *Missouri, etc., R. Co. v. McFadden* (Tex. 1895), 32 S. W. Rep. 526. And no matter stated therein should be repeated elsewhere in the application. *Hilliard v. White*, 88 Tex. 591.

Case should Not be Fully Stated.—Accordingly the petition should not contain a full statement of the case where sufficiently stated in the conclusions of the Court of Civil Appeals. *Hilliard v. White*, 88 Tex. 591.

Filing Part of Transcript.—The applicant may file, as a part of his application, such extracts from the transcript of the trial court as the counsel may deem proper, and they may be considered on the application. *International, etc., R. Co. v. Douglass*, 87 Tex. 297.

what court and at what term the judgment was rendered.¹ It should state the names of the parties,² and show by suitable averments that the petitioner is a suitable plaintiff in error.³ It must show the grounds on which the application for a writ of error is based,⁴ and point out the errors alleged with such particularity as to enable the court to ascertain the precise ruling intended to be reviewed.⁵

1. *Daugherty v. Cartwright*, 31 Tex. 285. But the day of the term on which the judgment was rendered need not be stated. The term is sufficient. *Hillebrant v. Brewer*, 5 Tex. 566.

Motion for Rehearing.—In *Texas* the petition to the Supreme Court for a writ of error to the Court of Civil Appeals must show that a motion for the rehearing has been made in the latter court, based on all the errors relied on for the reversal of judgment by the writ of error applied for. *Southern Pac. Co. v. Haas*, 85 Tex. 401.

2. *Blackman v. Harry* (Tex. Civ. App. 1896), 35 S. W. Rep. 290; *Wright v. Williams*, 12 Tex. 36; *Owen v. Tankersly*, 12 Tex. 38; *Daugherty v. Cartwright*, 31 Tex. 284.

Residence.—And state the residence of the adverse party, where the statute requires the clerk, on filing the petition, "to direct the writ to the sheriff of the county where the opposite party is alleged to reside." *Daugherty v. Cartwright*, 31 Tex. 285; *Wheeler v. State*, 8 Tex. 228.

An averment in the petition in error that the defendant in error is not a resident of the state will not authorize service on the attorney. *Forshey v. Galveston, etc., R. Co.*, 16 Tex. 516.

Recitals of Citizenship.—The failure of the petition for the writ of error to aver the citizenship or noncitizenship of the defendant in error may be cured by the recital of the fact in the record. *Mills v. Howard*, 12 Tex. 10.

Omission of Name of Party.—Where a petition for a writ of error properly describes a judgment but omits the name of a party thereto, the defect may be cured by a proper description of the parties in the writ of error. *Summerlin v. Reeves*, 29 Tex. 85.

In *Texas* only the names of the parties adversely interested are required to be stated in a petition for writ of error. *Blackman v. Harry* (Tex. Civ. App. 1896), 35 S. W. Rep. 290.

3. *Cochrane v. Day*, 27 Tex. 385.

As Guardian.—When a person seeks

as guardian to sue out a writ of error to which he is not a party, he must not only describe himself as such, but, by proper averments in the petition, show his character and interest as guardian. *Cochrane v. Day*, 27 Tex. 385.

4. *Hodo v. Mexican Nat. R. Co.*, 88 Tex. 523; *Hilliard v. White*, 88 Tex. 591; *Alliance Milling Co. v. Eaton* (Tex. 1893), 24 S. W. Rep. 392; *Texas, etc., R. Co. v. Wilson*, 85 Tex. 507; *Hearn v. Gould*, 51 Md. 319; *State v. McNally*, 55 Md. 560; *State v. Brown* (Md. 1889), 16 Atl. Rep. 722; *Brown v. Rhodes*, 1 Kan. 359; *Hilliard v. White*, 88 Tex. 591.

Argumentative Assignment.—The assignment should be express and direct; an argumentative assignment of error is improper. *Hodo v. Mexican Nat. R. Co.*, 88 Tex. 523.

Requirements in Texas.—And in *Texas* a statement of the nature of the case, that the errors complained of affected only questions of law, that their decision was necessary to the adjudication of the Court of Civil Appeals, that they were properly presented to that court, and finally, all the points on which the writ is asked, must be distinctly and separately stated in the petition. *Texas, etc., R. Co. v. Wilson*, 85 Tex. 507.

Opinion.—The application should include an opinion filed on the hearing where necessary to a proper understanding of the questions involved, *Gulf, etc., R. Co. v. Kizziah* (Tex. 1893), 22 S. W. Rep. 300; and conclusions of law or fact made by the trial court, *Texas, etc., R. Co. v. Wilson*, 85 Tex. 507; *Alliance Milling Co. v. Eaton* (Tex. 1893), 24 S. W. Rep. 392; *Bauman v. Jaffray*, 86 Tex. 617.

What Not Considered.—No matters will be considered on application for writ of error other than such as are specifically set forth in it, and they must be confined to such matters as were embraced in a motion for rehearing. *Clark v. Gregory* (Tex. 1894), 26 S. W. Rep. 939.

5. *Wiseman v. Ziegler*, 41 Neb. 886;

Pleadings.—Neither the pleadings nor the evidence in the case should be set out in full,¹ and for gross violation of the rule in this respect the petition may be dismissed.²

Amendment.—But the court may allow the obnoxious petition to be amended;³ and where permission to amend is granted, the amendment must be made within the time allowed or the petition will be dismissed.⁴

2. Effect of Application.—The filing of a petition for a writ of error suspends all further action in the trial court.⁵

XIV. FORM OF THE WRIT—1. **Contents**—*a.* **AT COMMON LAW.**—The writ of error must describe specifically the record and judgment, and the cause wherein such judgment was given,⁶ and must set forth who are parties to that proceeding.⁷ It must also show to

Hanlon *v.* Union Pac. R. Co., 40 Neb. 52; Cortelyou *v.* Maben, 40 Neb. 512; Hodo *v.* Mexican Nat. R. Co., 88 Tex. 523.

1. San Antonio, etc., R. Co. *v.* Choate (Tex. 1896), 35 S. W. Rep. 472, where a rule of court forbade the introduction of such matter.

Where some issue arising upon the pleadings is sought to be presented to the court a statement of the pleadings or their substance is requisite and proper. Texas, etc., R. Co. *v.* Wilson, 85 Tex. 507.

2. San Antonio, etc., R. Co. *v.* Choate (Tex. 1896), 35 S. W. Rep. 472.

Mere Designation.—A mere designation of the nature of the pleading or the character of the action is all that is ordinarily proper. Texas, etc., R. Co. *v.* Wilson, 85 Tex. 507.

3. San Antonio, etc., R. Co. *v.* Choate (Tex. 1896), 35 S. W. Rep. 472.

4. Smith *v.* Estill (Tex. 1894), 27 S. W. Rep. 584.

5. Texas State Fair, etc., Exposition *v.* Lyon, 5 Tex. Civ. App. 382.

6. Vance *v.* Maroney, 3 Colo. 293; Rochester *v.* Roberts, 25 N. H. 503; Jaqueth *v.* Jackson, 17 Wend. (N. Y.) 436; Smyth *v.* Strader, 12 How. (U. S.) 327; Davenport *v.* Fletcher, 16 How. (U. S.) 142; Gasquett *v.* Berry, 6 Ark. 249.

What Is a Sufficient Description.—A writ which correctly describes the nature of the action, the parties, the court in which the writ was pending, and the trial at which the judgment or decree was rendered, is sufficiently certain. It need not be so minute as to preclude the possibility of there being any other record resembling that required to be brought up.

Brown *v.* M'Kee, 1 J. J. Marsh. (Ky.) 473.

Assignment of Errors.—It is improper to insert an assignment of errors in the writ of error. They should be stated in the *scire facias* to hear errors. Peirce *v.* Adams, 8 Mass. 383.

7. Names of Parties.—All the parties must be described by their proper names. Mussina *v.* Cavazos, 6 Wall. (U. S.) 355; Deneale *v.* Stump, 8 Pet. (U. S.) 526; Wilson *v.* New York L., etc., Ins. Co., 12 Pet. (U. S.) 140; Miller *v.* McKenzie, 10 Wall. (U. S.) 582; Owings *v.* Kincannon, 7 Pet. (U. S.) 399; Ming *v.* Gwatkin, 6 Rand. (Va.) 551. See *supra*, X. Parties, and *infra*, XXIII. Amendment of the Writ.

Specification of the Defendants in Error Unnecessary.—“It need not, however, and indeed never can, show who are the defendants in error, for as to them it has no office to perform; it is not directed to or served upon them, nor are they in any way required to answer to it; and while the party prevailing in the court below may be, and in most cases is, the defendant in error, it is not invariably so; *e. g.*, if the prevailing party below die after judgment given, the executor, where the judgment is *in personam* for damages or the like, or the heir, where lands are recovered, is the necessary party defendant to the writ of error. In such case the death, heirship, and the like are averred or suggested, sometimes in the assignment of errors, as it seems, but more frequently in the *scire facias* to hear errors, and at one of these stages in the process are set forth, for the first time, the names of those whom the party complaining would call upon

whose injury the error alleged has intervened, and that the parties so named are the plaintiffs in error,¹ and it must command the justice to whom it is directed to return the record thereof, and all things pertaining thereto, to the appellate court.²

b. UNDER STATUTES.—If a statute prescribes what the writ shall contain, the provisions thereof must be closely followed.³

Substantial Compliance.—But an exact and literal compliance is not required. A substantial compliance will be sufficient.⁴

2. Signature and Teste.—The writ should be tested by the chief justice of the court of errors, unless otherwise provided by statute,⁵ and should be signed by the clerk of the same.⁶

to respond to his complaint. It is manifest, therefore, that the defendant in error, who conceives himself entitled to be relieved of the burden of sustaining the record, should address his motion to the *scire facias* if he appears in pursuance thereof, or to the assignment of errors where he appears voluntarily. The motion is therefore inappropriate; all the causes assigned thereunder are, in point of law, impossible. The writ of error can neither follow nor depart from the *scire facias*, as to the parties defendant in error, nor bring to this court either the parties below or different parties." *Vance v. Maroney*, 3 Colo. 294.

1. *Vance v. Maroney*, 3 Colo. 293.

2. *Rochester v. Roberts*, 25 N. H. 503.

Requirement of Return.—It was held not a valid objection to a writ of error to remove a case from a Court of Sessions that it does not require a return of the judgment below, or a return of the proceedings on the indictment "if judgment be thereupon given." It is sufficient if the writ in terms commands that the record and proceedings (which include the judgment, if any be given) be certified to the Supreme Court, and the answer of the Court of Sessions sets forth the indictment, the trial, the exceptions, the findings of the jury, and the judgment of the court thereon. *Phillips v. People*, 57 Barb. (N. Y.) 353.

Setting Out Return Day.—The writ of error should set out the return day, *Sea v. Connecticut Mut. L. Ins. Co.*, 154 U. S. 659, but a failure to set it out is amendable. *De Sylva v. Henry*, 3 Port. (Ala.) 132. See article AMENDMENTS, vol. 1, p. 458.

3. *Driggs v. Higgins*, 19 Fla. 103; *Hall v. State*, 21 Ga. 148; *Lovingood v. Roberts*, 89 Ga. 417.

In *Texas*, under Acts 1892, p. 44,

art. 1394, the writ of error must state the time within which the defendant in error is notified to appear. *Morris v. Grapevine* (Tex. Civ. App. 1894), 25 S. W. Rep. 60.

Georgia.—The constitution confers no jurisdiction upon the Supreme Court, save for the trial and determination of writs of error from the Superior and City Courts. The writ of error provided for by statute prior to the Act of 1889 was abolished by that act, and a new and different one prescribed, an essential part of which is a clause in the judge's certificate showing that the bill of exceptions specifies all of the record material to a clear understanding of the errors complained of, or else that none of the record is material. *Pendley v. State*, 87 Ga. 186.

United States Courts.—The appellate regulations established by the New York Code Civ. Pro. do not regulate writs of error brought in United States courts sitting within the state. *Whalen v. Sheridan*, 10 Fed. Rep. 661.

4. *Lytle v. Territory*, 1 Wash. Ter. 435.

5. *Mussina v. Cavazos*, 6 Wall. (U. S.) 357; *Germain v. Mason*, 154 U. S. 587; *Wells v. McGregor*, 13 Wall. (U. S.) 188; *Demoss v. Camp*, 5 How. (Miss.) 516; *Orlando First Nat. Bank v. King*, 36 Fla. 25.

Void Writ.—U. S. Supreme Court.—A writ of error from the U. S. Supreme Court to a territorial Supreme Court, bearing the teste of the clerk of the Supreme Court of the territory, instead of the Chief Justice of the U. S. Supreme Court, is void. *Germain v. Mason*, 154 U. S. 587; *Wells v. McGregor*, 13 Wall. (U. S.) 188.

6. *Rochester v. Roberts*, 25 N. H. 504.

Where Amendable.—Where a writ of error from the U. S. Supreme Court

3. Seal.—The writ must be authenticated duly by the seal of the court from which it issues,¹ unless the want of one can be supplied by amendment, or a statute provides otherwise.²

XV. ALLOWANCE OF THE WRIT—1. Necessity for—*a.* IN CIVIL CASES.—Under the English practice no allowance of a writ of error was necessary in civil cases, as the writ was one of right, and grantable *ex debito justitiæ*.³ In this country also no allowance of the writ is necessary in a civil case, unless made so by statute.⁴

Statutory Requirement.—Where an allowance is required by statute, failure to comply renders the writ a nullity, and no jurisdiction is conferred.⁵

to a state appellate court is signed by the clerk of the state court, instead of by the clerk of the U. S. Supreme Court or U. S. Circuit Court for the proper district, the defect is amendable under § 1005, Rev. Stat. U. S. *Miller v. Texas*, 153 U. S. 535.

See *infra*, XXIII. *Amendment of the Writ*.

1. *Overton v. Cheek*, 22 How. (U. S.) 46; *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486.

2. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 750. See *infra*, XXIII. *Amendment of the Writ*.

3. 2 Tidd's Pr. 1134; *Christie v. Richardson*, 3 T. R. 78. See *supra*, IV. 3. *As a Writ of Right*.

Meaning of Allowance as Used in English Cases.—"The English books speak much of allowing a writ of error, but this does not mean a judicial act. There the writ is delivered to the clerk of the errors, who enters its receipt, whereupon the party takes of him a note or certificate that he has allowed the writ. This is what the books mean when they speak of allowance." *Van Antwerp v. Newman*, 4 Cow. (N. Y.) 84. See also *Gravall v. Stimpson*, 1 B. & P. 479, note *a*; *Payne v. Whaley*, 2 B. & P. 137; *Meriton v. Stevens*, Barnes 205; *Sykes v. Dawson*, Barnes 209.

4. Anonymous, 16 N. J. L. 271; *Rochester v. Roberts*, 25 N. H. 501.

"It is not necessary that a writ of error should be allowed by a judge. It is a writ of right; and the proper officer is bound to issue it, of course, on the application of the party." *Van Antwerp v. Newman*, 4 Cow. (N. Y.) 84. See also *Craig v. Scott*, 1 Wend. (N. Y.) 35; *Huse v. Grimes*, 2 N. H. 210; *Pembroke v. Abington*, 2 Mass. 142; *Weiskoph v. Dibble*, 18 Fla. 22; *Marsh v. Com.*, 16 S. & R. (Pa.) 319.

"With us the English idea of allowance of the writ is seldom complied with beyond the receipt of it by the clerk of the court to which it is directed. The filing it with him, and his entering the receipt of it, is an allowance, and stays execution if bail be in." *Van Antwerp v. Newman*, 4 Cow. (N. Y.) 84.

No formal allowance by the Circuit Court of the United States of a writ of error from the Supreme Court of the United States to review a judgment of that court is required. The writ issues in the proper case as a matter of right, but when sued out security must be given and a citation to the adverse party signed. *Ex p. Virginia Com'rs*, 112 U. S. 177; *Davidson v. Lanier*, 4 Wall. (U. S.) 447.

Practice in U. S. Courts.—A writ of error to the highest court of a state must be allowed either by a justice of the U. S. court or by a judge of such state court. *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588. See also *Callan v. May*, 2 Black (U. S.) 541; *Warner v. Texas, etc., R. Co.*, 54 Fed. Rep. 920; *Butler v. Gage*, 138 U. S. 55; *Barrel v. Western Transp. Co.*, 3 Wall. (U. S.) 424; *Gleason v. Florida*, 9 Wall. (U. S.) 779, and note, 784.

"Writs of error to state courts have never been allowed as of right. It has always been the practice to submit the record of the state courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the state, and whether the case, upon the face of the record, will justify the allowance of the writ." *Twitchell v. Com.*, 7 Wall. (U. S.) 324.

5. *Hillhouse v. Dunning*, 7 Conn. 139; *Wright v. State*, 32 Fla. 472;

b. IN CRIMINAL CASES.—Under the English practice writs of error in cases of misdemeanor were grantable as of right on probable cause shown to the attorney-general.¹ In capital cases, however, the writ was held to be a matter of favor, and not of right.² As to the necessity of an allowance of a writ of error in criminal cases, the practice in this country varies in the different states. In some of these it is held that in criminal cases writs of error do not issue without a judicial order allowing them;³ in some the writ must be specially allowed on cause shown,⁴ or by consent of the attorney-general,⁵ while in other states it is held that a party is

State v. Newman, 24 Fla. 39; *Loftin v. State*, 11 Smed. & M. (Miss.) 358.

Connecticut.—The statute of May, 1823, relating to motions in error, is satisfied when there is an allowance of the motion and a recognizance for the security of the adverse party, without regard to the order in which these acts succeed each other. *Hillhouse v. Dunning*, 7 Conn. 139.

Certificate by Puisne Judge.—Where application was made to one of the puisne judges of the Common Pleas, during the absence from the county of the first judge, for a certificate under the Act of May 26, 1836, relating to writs of error in causes originating before a justice, and the judge applied to, after keeping the case under advisement for a few days, granted the certificate, it was held that it was regular, though in the meantime the first judge had returned. *Anonymous*, 7 Hill (N. Y.) 170.

1. 4 Bl. Com. 392; *Reg. v. Paty*, 2 Salk. 503.

Fiat of Attorney-General Necessary.—*Rex v. Wilkes*, 4 Burr. 2550.

2. 4 Bl. Com. 392. See *supra*, IV. 3. *As a Writ of Right*.

3. *McIver v. Marshall*, 24 Fla. 42; *State v. Newman*, 24 Fla. 33.

Under c. 1104, Laws 1861, and § 2, c. 1561, *Florida* Laws 1866, judges of the Circuit Court are authorized to allow writs of error in cases of misdemeanor and crimes not capital, as well as in capital cases. *Williams v. State*, 20 Fla. 396.

This applies also to writs of error in habeas corpus, cases, but the practice in proceedings on error in such cases is regulated by the habeas corpus act, and not by the general statute governing writs of error in criminal cases. *McIver v. Marshall*, 24 Fla. 42; *Tyler v. Painter*, 16 Fla. 144; *State v. Newman*, 24 Fla. 33.

In Capital Cases.—By statute in *New York* it was formerly held that a writ of error upon a judgment rendered on any indictment for a capital offense could not be issued unless allowed by one of the justices of the Supreme Court. *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 132. See also *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370; *Colt v. People*, 1 Park. Cr. Rep. (N. Y.) 611.

4. *Marsh v. Com.*, 16 S. & R. (Pa.) 319; *Com. v. Immell*, 6 Binn. (Pa.) 403; *Com. v. Meyer*, 2 S. & R. (Pa.) 453; *Sheffer v. Rempubliam*, 3 Yeates (Pa.) 41; *Com. v. Profit*, 4 Binn. (Pa.) 424; *Miles v. Rempubliam*, 4 Yeates (Pa.) 319.

Farris v. State, 1 Ohio St. 188. "Although in *England* it is spoken of in misdemeanors as a writ of right, yet this is only intended where there is probable cause of error. It does not, therefore, issue as a matter of course, but under the fiat of the attorney-general. * * * It is clear then that the writ does not issue as of course, but that some tribunal must first judge of the probable cause of error." *Jones v. Com.*, 2 Va. Cas. 224.

5. *Com. v. Profit*, 4 Binn. (Pa.) 424; *Com. v. Immell*, 6 Binn. (Pa.) 403; *Sheffer v. Rempubliam*, 3 Yeates (Pa.) 41; *Miles v. Rempubliam*, 4 Yeates (Pa.) 319.

In explanation of the different rules as to the allowance of the writ in civil and criminal cases, Recorder Riker, in *Lavett v. People*, 7 Cow. (N. Y.) 339, note, says: "It may here be asked, why should the law allow a writ of error to issue of course in mere matters of property, and yet, where the liberty of the citizen is at stake, it shall issue subject to the provisions prescribed by law? To this it may be answered that, even in civil cases, the writ of error does not issue of course. In many

entitled as of right to his writ.¹

2. Where Allowed.—Where a statute confers on a designated official the capacity to grant the writ, its allowance does not lie strictly in discretion.² It should be decided with strict refer-

cases there must be a certificate of counsel. In many other cases security must be given to abide the result. In many cases, also, double costs are imposed if the party fails in his writ of error. Thus, many limitations are imposed by law in civil cases. It may be asked, also, if a writ of error ought, in cases not capital, to issue at the pleasure of the party convicted, why not at the pleasure of the party convicted of a crime which takes his life? Writs of error are, in capital cases, and always have been, writs of grace. The answer is plain: If A and B have a dispute about property, though it is to be wished that all litigation should be settled without unnecessary delay, yet the public have no great interest in it, especially if security be exacted that justice be finally done. Adequate bail will insure this. A compensation in property is all that can be exacted for civil injuries. Not so with crimes. The person of the criminal must answer for his crime. Public justice, therefore, and the great interests of society, require that criminals should be properly punished. Nor is there any danger that innocence will suffer for want of a writ of error. Criminal proceedings have thrown around the innocent so many guards that the writ of error is almost useless. First: A grand jury interposes, twelve of whom, at the least, must concur in finding an indictment. Second: If the indictment be manifestly bad in law, it may be quashed by the court. Third: The party is entitled to a public trial, to produce his witnesses, and to be defended by counsel. Fourth: The jury are judges of the law and the fact, and must be unanimous. Fifth: If they entertain a reasonable doubt of the guilt of the accused they must acquit. Sixth: As the statute of jeofails does not apply to criminal cases, the smallest departure from the established forms is fatal, and the court must arrest the judgment. Finally, if there be the least irregularity in the proceedings, the court must either grant a new trial, or recommend the party to a pardon. It may be said with truth that

probably an instance cannot be found on record of an innocent man suffering for want of a writ of error in a criminal case."

Effect of Special Allowance.—A law requiring the special consent of the attorney-general to a writ of error in a criminal case does not change otherwise the character of the writ. It remains a common-law writ and subject to the rules of law regulating it. *Schoeppe v. Com.*, 65 Pa. St. 51.

Commonwealth Not Subject to Rule.—Where the commonwealth sues out a writ of error in a proper case, no special allowance is required. *Com. v. Wallace*, 114 Pa. St. 405; *Com. v. Capp*, 48 Pa. St. 53.

Allowance cannot be Waived.—As the jurisdiction depends upon the allowance of the writ, it cannot be waived. *Farris v. State*, 1 Ohio St. 188.

1. *Mitchell v. State*, 3 Mo. 283. See also *Calloway v. State*, 1 Mo. 211; *Jim v. State*, 3 Mo. 148; *Com. v. Loud*, 3 Met. (Mass.) 328.

Implied Abrogation.—And the ancient rule is considered so far abrogated in some statutes, even without an express statute, that a writ of error may be sued out as of right by the defendant in cases where in *England* the defendant might have had it either with or without the consent of the crown. *Mitchell v. State*, 3 Mo. 283.

In New York it was formerly held that in criminal cases, not capital, writs of error were writs of right and issued of course, subject to the established practice, according to which practice it was necessary to obtain the fiat of the attorney-general. *Lavett v. People*, 7 Cow. (N. Y.) 339.

2. *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370; *Colt v. People*, 1 Park. Cr. Rep. (N. Y.) 611; *Webster v. Com.*, 5 Cush. (Mass.) 396; *Com. v. Pennock*, 3 S. & R. (Pa.) 199; *People v. Hartung*, 17 How. Pr. (N. Y. Oyer & T. Ct.) 151; *Com. v. Immell*, 6 Binn. (Pa.) 403.

"The power conferred by the statute to allow a writ of error in a capital case is a high judicial power, and the exercise of such power depends, not upon the discretion of the judge, but

ence to the material errors alleged.¹ Where prejudicial error has been committed the allowance should be granted.² It will not be granted for technical reasons,³ nor because the judgment was decided on a wrong reason.⁴

3. By Whom Allowed.—The allowance where required must be made by the officer designated by statute—usually a justice of the court from which the writ of error is sued out.⁵ Where grantable by the clerk it is a ministerial act.⁶

upon the particular case out of which such power arises." *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370.

1. *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370; *Webster v. Com.*, 5 Cush. (Mass.) 396.

2. *Com. v. Ferrigan*, 44 Pa. St. 386.

On the examination of a bill of exceptions taken by the defendant upon a criminal trial, it is well settled that if a legal error, or an error in law, has been committed, it is the duty of a judge, on proper application, to allow a writ of error and stay the execution of the judgment against the defendant. And, further, where, on such examination, the judge has grave doubts of the correctness of the rulings of the court at the trial, it is equally his duty, in the exercise of the judicial discretion with which he is clothed, to allow the writ and stay the execution of the judgment. *People v. Hartung*, 17 How. Pr. (N. Y. Oyer & T. Ct.) 151.

3. *Com. v. Ferguson*, 32 Leg. Int. (Pa.) 127.

"Writs of error ought not to be allowed merely for the sake of reversing a judgment where the merits have been fairly tried and the defendant has suffered no wrong by the judgment." *Com. v. Pennock*, 3 S. & R. (Pa.) 199.

"This provision of the statute [requiring allowance of the writ] necessarily implies a duty on the part of the officer to whom the application for the allowance of the writ is made to disallow the same if he has no reason to doubt the legality of the conviction of the prisoner." *Colt v. People*, 1 Park. Cr. Rep. (N. Y.) 617.

4. *Tempel v. Dodge* (Tex. 1895), 33 S. W. Rep. 222.

5. *Harben v. Congdon*, 1 Coldw. (Tenn.) 221; *Butler v. Gage*, 138 U. S. 52.

Where Judge Is a Party.—Where the first judge is a party to the suit, any other judge of the Common Pleas who was present at the trial may grant the

certificate to authorize the bringing of a writ of error. *Thompson v. Smith*, 1 Den. (N. Y.) 638.

Under U. S. Practice.—Under U. S. practice a writ of error to the Supreme Court of a state returnable to the Supreme Court of the U. S. must be allowed either by a justice of the Supreme Court of the U. S. or of the state Supreme Court. *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588; *Callan v. May*, 2 Black (U. S.) 541; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Gleason v. Florida*, 9 Wall. (U. S.) 779.

"It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the states, that the writ of error should be allowed either by a justice of this court or by the proper judge of the state court after ascertaining by an examination of the record that a question cognizable here was made and decided in the state court and that such allowance was justified." *Butler v. Gage*, 138 U. S. 52.

By Associate Justice.—Allowance of the writ by the associate justice who, by statute or rule of court, becomes chief justice is a sufficient compliance with section 999, Rev. Stat. U. S., providing that allowance must be made by the chief justice of the court rendering the judgment. *Butler v. Gage*, 138 U. S. 52.

In *Bartemeyer v. Iowa*, 14 Wall. (U. S.) 26, it was held that when the Supreme Court of a state is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a justice of the Supreme Court of the United States.

6. *Miller v. Cunningham*, 1 Tex. App. Civ. Cas., § 958.

Clerk cannot Allow in Criminal Cases.—Unless by statute the allowance of a writ of error by a clerk in a criminal case is not sufficient. It must be by

4. Time of Allowance.—It may be granted, in the absence of a restraining statute, at any time during the period within which the writ of error may be sued out.¹

5. How Allowance Shown.—The allowance should be shown of record by an express indorsement by the judge of allowance on the writ.²

Implied Allowance.—A formal allowance, however, is not always required, as it may be implied from the signature of a judge.³

XVI. ISSUANCE OF THE WRIT—**1. Where Brought.**—The writ of error must be brought in the same county or other statutory appellate district in which the judgment sought to be reviewed was rendered.⁴

the fiat of a judge or court of competent jurisdiction. *Rockhold v. State*, 5 How. (Miss.) 291. See also *Loftin v. State*, 11 Smed. & M. (Miss.) 358.

1. *Norwood v. Wooley*, 9 Ohio Cir. Ct. Rep. 195.

Allowance in Vacation.—The judge of a Circuit Court in vacation allowed a writ of error to a judgment of a County Court; but the writ was dismissed at the next term of the Circuit Court as improvidently allowed, since the judge in vacation had no authority to allow it; then a writ was prayed in term time and denied. It was held that the writ of error allowed by the judge in vacation was properly dismissed; but as the judgment of the County Court was erroneous, it was error in the Circuit Court not to allow the writ prayed in term time. *Amis v. Koger*, 7 Leigh (Va.) 221.

In *Virginia* a judge was held to have no authority to award a writ of error in a criminal case in vacation. *Baker v. Com.*, 2 Va. Cas. 353; *Jones v. Com.*, 2 Va. Cas. 224.

2. *Warner v. Texas, etc.*, R. Co., 54 Fed. Rep. 920; *Lincoln v. Bishop*, 13 Ohio 249; *Wilbur v. Ramsey*, 1 How. Pr. (N. Y. Supreme Ct.) 10; *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588.

Indorsement of the Petition Sufficient.

—The indorsement of the petition for the writ of error is sufficient, but it is better practice to indorse both the petition and the writ of error as allowed. *Warner v. Texas, etc.*, R. Co., 54 Fed. Rep. 920.

By Whom Obtained.—Where the allowance of a writ of error upon petition therefor must be first obtained, it is no part of the clerk to obtain it for the parties. It is the duty of parties or

their counsel. *Warner v. Texas, etc.*, R. Co., 54 Fed. Rep. 920.

Must be Entered on the Minutes.—Application for a writ of error in term time must be made in court, and its allowance entered on the minutes. *Lincoln v. Bishop*, 13 Ohio 249.

Special Allowance or Consent — How Shown.—The special allowance or consent "shall be in writing, and certified on said writ." *Com. v. Immell*, 6 Binn. (Pa.) 403.

Insufficient Indorsement.—The ordinary order indorsed on a writ of error, staying proceedings on the judgment and exception, etc., for the purpose of removing a cause by writ of error, is not sufficient. A proper "allowance" of the writ should be indorsed. *Wilbur v. Ramsey*, 1 How. Pr. (N. Y. Supreme Ct.) 10.

Need Not be Indorsed.—In *Massachusetts* and *New Hampshire* it is held that being judicial writs, indorsement of a writ of error is not necessary. *Grosvenor v. Danforth*, 16 Mass. 74; *Tracy v. Perry*, 5 N. H. 172; *Rochester v. Roberts*, 25 N. H. 501.

3. *Hillhouse v. Dunning*, 7 Conn. 142.

4. *Curtice v. Mason*, 1 Root (Conn.) 259; *Pembroke v. Abington*, 2 Mass. 142; *Ide v. Cleworth*, 10 Cush. (Mass.) 415. *Compare* *Smith v. Franklin*, 1 Mass. 480, in which case it was held that a writ of error may be returned and determined in a county other than that in which the original judgment was rendered. *Goforth v. Adams*, 11 Ill. 52.

Construction of Statutes.—A statute limiting writs of error to the respective appellate districts extends to the county in which the trial was held by change of venue rather than to the

2. From Whence Issued.—Unless a statute otherwise provide, a writ of error can issue only from the office of the clerk of the court of errors.¹ Under modern practice a writ of error is generally, as a matter of convenience, made issuable out of the office of the clerk of either the trial or the appellate court,² and that court is the sole judge of whether they have been issued in the manner, time, or form allowed by law.³

3. To Whom Directed.—The writ should be directed to the chief justice of the court whose record is to be examined,⁴ or to the

county in which the cause originated. *State v. Carothers*, 1 Greene (Iowa) 465.

In *Chipman v. Waterbury*, 59 Conn. 496, it was held that under Gen. Stat. Conn., § 1145, providing that "writs of error for error in matters of law only may be brought from the judgment and decrees of the superior court * * * to the Supreme Court of Errors in the judicial district or county where the judgments are rendered or the decrees passed." This is the only authority the court of errors has to hear and determine any writ of error, and accordingly it cannot, by consent of parties, hear and determine a writ sued out from a judgment rendered in a different judicial district.

On Change of Venue.—Where a case is removed to another court for trial, and the accused is tried and convicted there, a writ of error cannot properly issue to the court in which the action was commenced, to bring up the proceedings had in that court prior to the change of venue. *Kneifle v. State*, 13 Wis. 368.

1. *West v. Barnes*, 2 Dall. (U. S.) 401; *Mussina v. Cavazos*, 6 Wall. (U. S.) 357; *Natchez Ins. Co. v. Stanton*, 4 How. (Miss.) 7.

Circuit Courts have no power to issue writs of error. *Teller v. Wetherell*, 6 Mich. 46.

"Courts of Common Pleas are creatures of statute, and in every sense inferior courts. They cannot entertain a writ of error *coram nobis*, nor a writ of error of any description." *People v. Oneida C. P.*, 20 Johns. (N. Y.) 22. See also *Arnold v. Sandford*, 14 Johns. (N. Y.) 417.

Under English Practice.—Under English practice the writ issued out of the court of chancery. 2 Tidd Pr. 1134.

New Jersey.—"Under the Act of April 5, 1845, regulating the proceedings of New Jersey Court of Error and Ap-

peals, writs of error from that court to the Supreme Court must issue out of courts of chancery." Anonymous, 20 N. J. L. 495; *Gardner v. State*, 21 N. J. L. 561, note.

2. **Florida.**—*Orlando First Nat. Bank v. King*, 36 Fla. 25.

Mississippi.—*Natchez Ins. Co. v. Stanton*, 4 How. (Miss.) 7.

United States.—*Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 748; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 200.

Prior to 1791 the writ of error could only issue from the office of the clerk of the Supreme Court of the United States. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 748; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355.

But since the Act of May 8, 1792, § 1004, Rev. Stat. U. S., the writ of error may issue by the clerks of the circuit or district courts under the seals of their respective courts. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 748; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 200; *Buel v. Vanness*, 8 Wheat. (U. S.) 312.

Territorial Supreme Courts.—Under the Act of June 12, 1838, § 9 (5 Stat. at L. (U. S.) 237), the clerk of the Supreme Court of the Territory of Iowa could issue a writ of error to bring a record of that court to the U. S. Supreme Court. *Sheppard v. Wilson*, 5 How. (U. S.) 210.

Writs Returnable to U. S. Circuit Court of Appeals.—Under Act of March 3, 1891 (26 Stat. at Large, p. 826, c. 517), establishing the U. S. Circuit Court of Appeals, writs of error returnable thereto may be issued by the clerks of the circuit courts of the United States. *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881.

3. *State v. Smith*, 104 Mo. 423; *Jes-sup v. Cook*, 1 N. J. L. 124; *State v. Farlee*, 1 N. J. L. 96.

4. *Rochester v. Roberts*, 25 N. H.

trial court by its proper style.¹

4. Service—*a. GENERALLY.*—Service of a writ of error is properly made by lodging it with the clerk of the trial court in which the judgment to be reviewed was rendered.²

b. HOW SHOWN.—Appropriate service of the writ of error should be shown by the record,³ but may be shown as a matter of fact by evidence *dehors* the record,⁴ although the writ is not indorsed as so served upon the proper clerk.⁵

c. FAILURE TO SERVE—EFFECT OF.—A writ of error not served expires on the day on which it is returnable,⁶ and no valid proceeding can therefore be taken under it,⁷ but an alias writ must be sued out.⁸

XVII. RETURN OF THE WRIT—**1. In General.**—After the lodgment of the writ of error with the trial court its chief justice must sign the certificate of return, and the writ and the transcript should then be sent to the court of errors.⁹

503; *Atherton v. Fowler*, 91 U. S. 143; *Hunt v. Palao*, 4 How. (U. S.) 590; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246; *McGuire v. Com.*, 3 Wall. (U. S.) 382; *Green v. Van Buskerk*, 3 Wall. (U. S.) 450; *Miller v. Joseph*, 17 Wall. (U. S.) 655.

Where the writ of error, returnable to the Supreme Court of the United States, is sued out to a judgment of a state Supreme Court, reversing and remanding a cause to the trial court, with directions to enter a judgment, the writ of error is properly directed to the trial court, as the record remains there, and not to the state Supreme Court. *Polleys v. Black River Imp. Co.*, 113 U. S. 81. See also *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246; *Atherton v. Fowler*, 91 U. S. 146; *Webster v. Reid*, 11 How. (U. S.) 457.

Direction to Clerk.—It cannot properly be directed to the clerk, unless the statute so provides. *Ward v. Price*, 1 Pin. (Wis.) 57.

Addressed to Both Courts.—In *New York*, where the judgment of the Supreme Court sought to be reviewed had been remitted to the court of Oyer and Terminer, the writ of error was addressed to both courts. *Hartung v. People*, 26 N. Y. 154.

1. Cummings v. State, 1 Har. & J. (Md.) 340.

2. Mussina v. Cavazos, 6 Wall. (U. S.) 358; *Davidson v. Lanier*, 4 Wall. (U. S.) 447; *Wood v. Lide*, 4 Cranch (U. S.) 180; *Rochester v. Roberts*, 25 N. H. 498; *Kennesaw Mills Co. v. Bynum*, 34 Fla. 360; *State v. Mitchell*, 29 Fla. 302.

Statutory Requirements.—"The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered." *Wood v. Lide*, 4 Cranch (U. S.) 180.

Original should be Served.—The original must generally be served on the clerk, as that must be returned. *Rolke v. State*, 12 Wis. 570. See XVII. *Return of the Writ*.

Contra.—Under federal practice the lodgment of a copy with the clerk has been held sufficient. *Davidson v. Lanier*, 4 Wall. (U. S.) 447.

3. Kennesaw Mills Co. v. Bynum, 34 Fla. 360.

Indorsement by Clerk.—The indorsement by the clerk on the writ of error is evidence of the lodgment and service in the proper office. *Kennesaw Mills Co. v. Bynum*, 34 Fla. 360.

4. Sanchez v. Haynes, 36 Fla. 96.

5. Sanchez v. Haynes, 36 Fla. 96; *Grosvenor v. Danforth*, 16 Mass. 74.

6. Mussina v. Cavazos, 6 Wall. (U. S.) 355.

7. Mussina v. Cavazos, 6 Wall. (U. S.) 355.

8. Mussina v. Cavazos, 6 Wall. (U. S.) 355.

9. Rochester v. Roberts, 25 N. H. 495.

"When deposited with the clerk of the (trial) court, to whose judges it is directed, it is served; and the transcript which the clerk sends here is the return to the writ, and should be accompanied by it." *Mussina v. Cavazos*, 6 Wall. (U. S.) 355.

Writ Mandatory.—As the writ is

2. What Return Consists of.—The return to the writ of error consists of the writ of error and a certified copy of the judgment record, including the pleadings, bill of exceptions, verdict and judgment.¹

Original Writ to be Returned.—The writ returned should be the original and not a copy.²

3. Signature.—It need not be returned under the signatures and seals of the judges to whom it is directed, unless a statute so provides.³

4. Necessity for Return.—Until the writ of error is properly served and returned the court of errors does not acquire

mandatory upon the court to which it is directed, the court cannot exercise any discretion in acting on the writ. Its commands must be obeyed. *Thompson v. M'Kim*, 6 Har. & J. (Md.) 302.

Refusal to Return.—In *U. S. v. Booth*, 18 How. (U. S.) 478, the Supreme Court of the United States held that where a recalcitrant state court clerk refused to return a writ of error to it properly sued out, the court might make a suitable order to bring up the case notwithstanding; but that a rule would first be laid upon the clerk to make the required return by a given time, or show cause for his refusal.

And, where the clerk disobeyed, the court permitted one of the attorneys (the U. S. Attorney-General) to file a record obtained for his private use, and ordered that it should "have the same effect and legal operation as if returned by the clerk with the writ of error." *Ableman v. Booth*, 21 How. (U. S.) 512.

Failure to Make, Contempt of Court.—Where a statute requires a clerk of the court to make a return his failure is a contempt of court; he is not excused because he was ignorant of the law, nor because he intended no contempt. *State v. Simmons*, 1 Ark. 265.

Practice in Different States.—In *New York* the writ of error is returned by the clerk of the court to which the writ is directed, under the seal thereof. 2 N. Y. Rev. Stat. 599, § 4.

In *Massachusetts* it is said that the writ, with the transcript of the record of the suit therein named annexed, and with a written return indorsed thereon by the judge, under his seal, is by him returned to the clerk's office of the Supreme Court, at the specified time. *Howe's Prac.* 479.

In *Maine* it is held that the regular authentication of the record, under the

hand of the judge and seal of the court below, cannot be dispensed with, even by consent of parties. *Jewett v. Hodgdon*, 2 Me. 335.

1. *Washington County v. Lucas*, 30 Wis. 276; *Rochester v. Roberts*, 25 N. H. 503; *Mussina v. Cavazos*, 6 Wall. (U. S.) 358.

In *Maryland* a transcript of the record certified under the hand of the clerk and seal of the court, with the writ of error annexed, is a legal and sufficient return of the writ. *State v. Buchanan*, 5 Har. & J. (Md.) 317.

New Jersey.—The same rule obtains in New Jersey. *Stevens v. Chetwood*, 17 N. J. L. 353. Compare *M'Courry v. Doremus*, 10 N. J. L. 245, in which it is held that in making a return to a writ of error the schedule should contain simply a transcript of the record from the book of judgments. See *supra*, XVII. *Return of the Writ*. And see article APPEALS—*The Transcript on Appeal*, vol. 2, p. 258.

Assignment of Errors—Failure to Return.—In the U. S. Supreme Court a writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of section 997, Rev. Stat. *Gumbel v. Pitkin*, 113 U. S. 545; *Ackley School Dist. v. Hall*, 106 U. S. 428.

2. *Mussina v. Cavazos*, 6 Wall. (U. S.) 355; *Wells v. Woodley*, 5 How. (Miss.) 484.

Original Papers Constituting Record Should Not be Sent.—The return to a writ of error should contain not the original papers constituting the judgment record, but certified copies thereof. *Washington County v. Lucas*, 30 Wis. 276; *Crilley v. State*, 20 Wis. 231.

3. *Stevens v. Chetwood*, 17 N. J. L. 353; 2 Tidd Pr. 1160.

jurisdiction of the cause sent up to it¹

5. **When Returnable**—*a.* **AT WHAT TERM.**—The writ should be made returnable to the next succeeding term after it is issued,² unless the time be otherwise fixed by statutory regulations.³

Term—How Shown.—The term to which the writ is returnable must

1. *Lane v. Goldsmith*, 23 Iowa 240; *Stone v. Murphy*, 2 Iowa 35; *Rhodes v. De Bow*, 5 Iowa 260; *Vance v. Kirfman*, 20 Iowa 13; *People v. Baron*, 6 How. Pr. (N. Y. Supreme Ct.) 81. See article APPEALS.

Loss of Original Writ.—But where the transcript is duly returned in accordance with the writ the court will have jurisdiction although the original writ has been lost or destroyed. *Mussina v. Cavazos*, 6 Wall. (U. S.) 360; *Ableman v. Booth*, 21 How. (U. S.) 506.

2. *Rochester v. Roberts*, 25 N. H. 504; *Brace v. Squire*, 2 D. Chip. (Vt.) 52; *Wilson v. Adams*, 50 Tex. 11; *Carleton v. Goodwin*, 41 Ala. 154.

United States Supreme Court.—The same rule obtains in the United States Supreme Court. *Castro v. U. S.*, 3 Wall. (U. S.) 50; *Villabolas v. U. S.*, 6 How. (U. S.) 90; *Wood v. Lide*, 4 Cranch (U. S.) 180.

Failure to Return to Proper Term.—If a writ of error was not returned to the term to which the same was returnable, the suit will not be dismissed on that account. Where such writ was issued shortly before its return and the record has been removed the court will presume that it was presented during the sitting of the court to which it was directed. *Gailey v. Beard*, 4 Yeates (Pa.) 418.

Term Intervening.—Where a whole term intervenes between the issuance of the writ and its return it is absolutely void and unamendable. *Hamilton v. Moore*, 3 Dall. (U. S.) 371. See also *Carroll v. Dorsey*, 20 How. (U. S.) 204; *Blair v. Miller*, 4 Dall. (U. S.) 21.

"For if a process may be made returnable past one term it may past ten; and the rights of the other party suspended and jeopardized by it for any period." *Brace v. Squire*, 2 D. Chip. (Vt.) 52.

Contra.—In *Blackwell v. Patten*, 7 Cranch (U. S.) 277, it was held that a writ of error, issued in September, and bearing teste of the February term preceding, and returnable to the next February term, notwithstanding the

intervention of the August term between the teste and return of the writ, was valid.

3. *Dias v. Munos*, 17 Tex. 518.

Rule in Texas.—In Texas, under statutes prior to the Act of Feb. 11, 1850, concerning proceedings in the Supreme Court (*Paschal's Dig.*, art. 1587), the return term or term at which the transcript was to be filed was the "term next succeeding the taking the appeal or writ of error." See *Roberts v. Landrum*, 3 Tex. 16; *Mills v. Gooding*, 8 Tex. 152. But by the Act of 1850, the time at which the transcript is to be filed is regulated by the time of the service of the citation in error, and under that act, accordingly, it has been held that the return term is fixed by the service of citation in error. *Wilson v. Adams*, 50 Tex. 12; *Davenport v. Field*, 12 Tex. 94; *Chambers v. Shaw*, 16 Tex. 146; *White v. Proctor*, 17 Tex. 407; *Crunk v. Crunk*, 23 Tex. 605; *Stephens v. Thayer*, 25 Tex. 341.

Under this act the defendant in error may have the case stricken from the docket for defective citation or defective service, and yet, in such cases, the plaintiff in error may have alias citations issued and served to bring up the case on the same writ of error to the next ensuing term. *Wilson v. Adams*, 50 Tex. 12; *Holloman v. Middleton*, 23 Tex. 537; *Batey v. Dibrell*, 28 Tex. 174; *Beavers v. Butler*, 30 Tex. 24.

The writ of error retains vitality although not returned to the first term. *Wilson v. Adams*, 50 Tex. 13.

Where the citation in error is promptly issued and served, the return term is fixed, and after it has passed, neither party can file the transcript, nor can the defendant in error file a certificate. *Wilson v. Adams*, 50 Tex. 13; *Scott v. Allen*, 1 Tex. 561; *Hicks v. Harlan*, 1 Tex. 560; *Urbane v. Johnson*, 3 Tex. 191; *Weathered v. Lee*, 3 Tex. 189; *Walea v. McLean*, 14 Tex. 18; *Dias v. Munos*, 17 Tex. 518; *Cunningham v. Perkins*, 28 Tex. 490; *Mills v. Gooding*, 8 Tex. 153; *Wilson v. Truehart*, 13 Tex. 287.

be shown by the transcript.¹

b. ON WHAT DAY OF TERM.—At common law the writ must be made returnable on a general return day,² and fifteen days must intervene between the teste and return day of the writ.³

Under American practice, in the absence of other provisions, the writ should be made returnable on the first day of the term.⁴

6. Filing of Return.—The return should be made to and filed with the clerk of the appellate court at least by its return day, as evidence of its proper issuance and service;⁵ but where filed subsequently, but before a motion to dismiss has been made on account of its absence, the failure to file the return will not support the motion to dismiss, where it appears on its face to

1. *Mills v. Bagby*, 4 Tex. 320.

2. *Featherston v. Wilson*, 3 Ark. 387; *Delany v. Pennywit*, 5 Ark. 676.

Therefore, where the term commences on the first Monday of July, a writ returnable "on the first day of the next term of said Supreme Court, which will be held on the second Monday of July," is bad and will be quashed on motion. *Featherston v. Wilson*, 3 Ark. 387.

3. *Delany v. Pennywit*, 5 Ark. 676; *Featherston v. Wilson*, 3 Ark. 387; 2 Tidd Pr. 1067, 1069.

If there are less than fifteen days between the teste and return day of a writ of error, it will be quashed. *Rutherford v. State Bank*, 3 Ark. 493.

In Florida it is held that twenty-five days at least must elapse between the issuing of the writ of error and the first day of the term of the court to which it is returnable. *Driggs v. Higgins*, 19 Fla. 104. See also *Orlando First Nat. Bank v. King*, 36 Fla. 25.

4. *Delany v. Pennywit*, 5 Ark. 676; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355; *Washington v. Dennison*, 6 Wall. (U. S.) 496; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 195.

"In our system of jurisprudence, we know of no law or rule of practice applicable to the Supreme Court which recognizes any other than the first day of the term as a general return day." *Featherston v. Wilson*, 3 Ark. 387.

Illegal Day.—A writ made returnable to a day to which such writs are not returnable by law, cannot be amended by striking out the day to which by its own terms it is returnable and inserting another day now past, and to which it is impossible to make

it returnable and give it effect by service. *Driggs v. Higgins*, 19 Fla. 105.

A writ of error made returnable to a day different from the return day fixed by statute as the day on which the term commences, will be dismissed. *Puget Sound Agricultural Co. v. Pierce County*, 6 Wall. (U. S.) 246. See also *Carroll v. Dorsey*, 20 How. (U. S.) 204; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 200. See *infra*, XXIII. *Amendment of the Writ.*

A motion to remand the case to the court below, with leave to amend the writ of error and citation, will not be granted where the writ of error is made returnable at an illegal time, as there is no case before the appellate court upon which it can act. *Porter v. Foley*, 21 How. (U. S.) 393.

When Sued Out after First Day.—Where sued out after the first day of the term the writ must be made returnable to the first day of the succeeding term. *Washington v. Dennison*, 6 Wall. (U. S.) 495.

Amendment.—In *Heath v. Wright*, 1 How. Pr. (N. Y. Supreme Ct.) 250, a writ of error served after return day was held amendable by making it returnable subsequent to the return day on giving a new bond and costs.

Returnable to Any Day of Term.—In *Virginia* it has been held that a writ of error awarded during term, to a judgment in a case of felony, may be made returnable to any day of the term. This is under the Code, p. 642, § 2, which provides that "process awarded in court may be returnable as the court shall direct." *Lazier v. Com.*, 10 Gratt. (Va.) 708.

5. *Orlando First Nat. Bank v. King*, 36 Fla. 25.

have been properly issued and served.¹

7. How Return Shown.—A proper return must be shown by the record.²

XVIII. ALLEGING DIMINUTION OF THE RECORD—1. Generally.—Where the record sent up from the inferior court upon a writ of error is incomplete the parties may suggest a diminution of the record,³ and may pray a writ to the justices of the court below to certify the whole record.⁴

1. *Orlando First Nat. Bank v. King*, 36 Fla. 25; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Gailey v. Beard*, 4 Yeates (Pa.) 418.

Relation to Citation.—Where a writ of error was duly filed it will not be dismissed because, through an oversight, not made returnable on the same day as the citation according to statute. *McClellan v. Pyeatt*, 49 Fed. Rep. 259.

Michigan.—In Michigan a writ of error will not be dismissed for delay in filing return if filed before the motion is heard, but where the motion to dismiss was made before the filing of the return, and there had been failure to comply with the rules, costs were allowed the moving party although the motion was denied. *Woodmansie v. Hollon*, 16 Mich. 379.

Where Defined by Rule of Court.—Where the time within which a writ of error is made returnable is defined by a rule of court the appellate court has power to relieve an appellant from its operation, and file a return after the time has expired. But the appellant must show a good cause without default. *Doyle v. Mizner*, 41 Mich. 549.

Where Leave Denied.—Leave to file a return after the time therefor has expired will be denied where it is manifest that the assignment of errors proposed to be filed therewith were such as the appellate court could not notice. *Webster v. Fisk*, 9 Mich. 250.

An affidavit seeking to excuse delay as due to the negligence of the clerk must show that the clerk was requested or notified to make a timely return by counsel for the plaintiff in error. *Webster v. Fisk*, 9 Mich. 250.

2. *People v. Baron*, 6 How. Pr. (N. Y. Supreme Ct.) 81.

3. *Bouv. L. Dict.*; *Bacon's Abr.*, tit. Error.

4. *Bacon's Abr.*, tit. Error; *Bassler v. Niesly*, 1 S. & R. (Pa.) 472; *Sockwell v. Bateman*, 4 N. J. L. 417; *State*

v. Reid, 1 Dev. & B. L. (N. Car.) 377; *Ballard v. Carr*, 4 Dev. L. (N. Car.) 575; *Pelletreau v. Jackson*, 7 Wend. (N. Y.) 478.

Upon the return of the writ of error, if the plaintiff wishes to avail himself of any error not contained in the record, but the evidence of which appears upon the files or records of the court to which the writ of error was directed, he may assign errors generally, and also specially, by a separate pleading, and in such special assignment allege diminution; and, upon filing an affidavit of the service of a copy of such allegation of diminution, he may enter a rule of course, awarding a certiorari, which certiorari he may cause to be returned within the rule to plead. This he is not obliged to do, unless compelled by a rule taken by the defendant. If the defendant plead *in nullo est erratum* he admits the facts stated in the allegation of diminution; but not that they are cause of error. If he does not choose to make that admission he must rule the plaintiff to return his certiorari. If such rule is not obeyed the plaintiff will be non-prossed. If a return be made to the certiorari the defendant may plead such plea as he shall be advised by his counsel. *Pelletreau v. Jackson*, 7 Wend. (N. Y.) 481.

"When a trial is authorized on a transcript, it is presumed to give the tenor of the record; but, as it may not, either party, upon a proper suggestion of a diminution of the record, may have the proceedings stayed until a more perfect transcript be obtained. And this is usually done by a certiorari." *State v. Reid*, 1 Dev. & B. L. (N. Car.) 382.

Two Contradictory Transcripts.—"In extraordinary cases, as where two transcripts are sent contradictory to each other, and the parties do not agree which is correct, the court, instead of ordering a certiorari, will direct the

2. Upon What Writs.—Diminution of the record cannot be alleged upon a writ of error brought on a judgment in any inferior court.¹

Diminution Contrary to the Record.—A party cannot allege diminution contrary to the record which is certified.²

3. When Diminution to be Alleged.—Diminution of the record must be alleged and a certiorari prayed before joinder in error,³ since, by a joinder in error, the return is admitted to be perfect.⁴

XIX. PROCESS IN ERROR—1. In General.—To perfect a writ of error, process in error must be issued and served upon the defendant in error within the time prescribed by law.⁵

officer to attend with the original record." *State v. Reid*, 1 Dev. & B. L. (N. Car.) 383.

1. 2 Tidd Pr. 1167; Bac. Abr., tit. Error; *Hale v. Clare*, 1 Salk. 266. In this case the judgment was of a borough court, and it was held that "if such variance had been in a record of the common pleas, diminution might have been alleged, and a good writ certified; but in records out of inferior courts no diminution can be alleged, and the court must take them as they find them."

2. 2 Tidd Pr. 1167; Bac. Abr., tit. Error. See also *Cheetham v. Tillotson*, 4 Johns. (N. Y.) 508.

"As if, on a writ of error, it be certified that the judgment was that the defendant should be *in misericordia*, the defendant cannot allege for diminution that the record is *quod capiatur*, because this is contrary to the record certified." 2 Tidd Pr. 1168. See also 1 Roll. Abr. 764.

3. *Rew v. Barker*, 2 Cow. (N. Y.) 408.

4. *Rew v. Barker*, 2 Cow. (N. Y.) 408; *Pelletreau v. Jackson*, 7 Wend. (N. Y.) 480; *Cheetham v. Tillotson*, 4 Johns. (N. Y.) 499; *Meredith v. Davies*, 1 Salk. 270.

Award of Certiorari by Court ex Officio.—It is true that notwithstanding the parties are concluded, after this stage of the controversy, yet this court, in the plenitude of its power, may at any time, *ex officio*, award a certiorari to supply a defect in the body of the record, as well as in its branches. *Cheetham v. Tillotson*, 4 Johns. (N. Y.) 509.

5. *Texas, etc., R. Co. v. Lennox*, 1 Tex. App. Civ. Cas., § 531; *Christopher v. Newnham*, 34 Fla. 370; *Oppenheimer v. Guckenheimer*, 34 Fla. 13; *Joost v. Elliott*, 20 Fla. 924; *Bergen v. Riggs*,

40 Ill. 61; *Natchez Ins. Co. v. Stanton*, 4 How. (Miss.) 7; *Tiernan v. Richards*, 7 Mo. App. 597; *Davenport v. Hannibal*, 110 Mo. 574; *Com. v. Emery*, 2 Binn. (Pa.) 257; *Lloyd v. Alexander*, 1 Cranch (U. S.) 365; *Kitchen v. Randolph*, 93 U. S. 87; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 201; *Wiley v. Neal*, 24 Neb. 141.

Writ of Error Affects Record Only.—A writ of error acts only upon the record, and not upon the parties. It must therefore be accompanied by appellate process or general appearance to bring the defendants in error into court. *Nations v. Johnson*, 24 How. (U. S.) 205; *Wilson v. Adams*, 50 Tex. 5.

Jurisdictional.—In *Florida* "the settled rule of construction adopted by this court is that a *scire facias* to hear errors, returnable with the writ of error, is essential to the validity of such writ." *Christopher v. Newnham*, 34 Fla. 370; *Wiley v. Neal*, 34 Neb. 141. Compare *Oppenheimer v. Guckenheimer*, 34 Fla. 13, where it is said to be essential to the jurisdiction of the person, but not of the cause, consequently a general appearance waives appellate process.

Ex Parte Proceedings without Notice.—An *ex parte* proceeding in error, without notice to defendant in error, is a nullity. *Sprote v. Marshall*, 4 Greene (Iowa) 344.

Notice of Writ of Error.—Notice of a writ of error, given in open court at the same term judgment is rendered, is not equivalent to a citation. *U. S. v. Phillips*, 121 U. S. 254.

Notice need Not Appear of Record.—The notice of the application need not, unless a statute requires it, appear of record, as it will be presumed to have been properly had. *Lindell Glass Co. v. Hanneman*, 46 Mo. App. 614.

2. Scire Facias ad Audiendum Errores.—Under common-law practice this process is called a *scire facias ad audiendum errores*; its office is analogous to that of a summons in an action at law.¹ Under modern practice such process is termed variously *citation in error* and *summons in error*, and the statutes of the respective states variously provide for its service and character.

a. OF WHAT COURT A PROCESS.—It is a process of the appellate court, whether issued by the clerk of the trial or the Supreme Court.²

b. HOW TESTED.—The process bears the teste of the court's chief justice.³

c. WHENCE ISSUED.—The process issues as a matter of course out of the office of the clerk of the lower court or of the court of error.⁴

d. HOW DIRECTED.—The *scire facias* is directed to the sheriff of the county, commanding him to make known to the defendant in error the pendency of the writ of error, and requiring him to appear at a specified term to hear errors and show cause, etc.⁵

e. NOTIFICATION OF TIME FOR APPEARANCE.—The process must notify and require the defendant in error to appear on the return day of the writ of error.⁶

f. WHEN RETURNABLE.—The process should be made return-

1. *Tandy v. Rowell*, 54 N. H. 386.

When Issued.—Where a statute does not otherwise provide, a citation on a writ of error should immediately issue after the writ is sued out. *Roberts v. Landrum*, 3 Tex. 16.

2. *Knight v. Weiskopf*, 21 Fla. 157; *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 514.

3. *Rochester v. Roberts*, 25 N. H. 495; *Joost v. Elliott*, 20 Fla. 924.

Such a writ cannot therefore be tested in the name of the clerk issuing it. *Knight v. Weiskopf*, 21 Fla. 157.

Served by Sheriff.—It must be served therefore, unless otherwise provided by law, by the sheriff of the Supreme Court or his legally authorized deputy. *Knight v. Weiskopf*, 21 Fla. 157.

The sheriff of the county where the Supreme Court sits is the sheriff of the Supreme Court. *Knight v. Weiskopf*, 21 Fla. 157.

Signature.—Statutory provisions, as to signature of the citation or *scire facias ad audiendum errores*, must be strictly followed. *Palmer v. Donner*, 7 Wall. (U. S.) 541; *U. S. v. Hodge*, 3 How. (U. S.) 534.

Where the citation is not signed by the person designated by statute it is

void, and the writ of error will be dismissed. *U. S. v. Hodge*, 3 How. (U. S.) 534.

4. *Knight v. Weiskopf*, 21 Fla. 161; *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 514; *Tandy v. Rowell*, 54 N. H. 386; *Rochester v. Roberts*, 25 N. H. 495.

5. *Tandy v. Rowell*, 54 N. H. 386; *Rochester v. Roberts*, 25 N. H. 495; *Sammis v. Wightman*, 25 Fla. 547.

Direction to Defendant in Error.—It should not be directed to the defendant in error. *Sammis v. Wightman*, 25 Fla. 547.

Direction to Coroner.—In *Chenault v. Bush*, 3 Stew. & P. (Ala.) 342, it was held that a writ will not be dismissed because the citation returned executed is directed to the coroner instead of the sheriff, even if no part of the record shows the sheriff to be a party in interest.

Direction to Deputy.—Where directed to the sheriff and "his lawfully-authorized deputies," the words quoted are a mere error of form, correctible by amendment. *Sammis v. Wightman*, 25 Fla. 547.

6. *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 201; *Rochester v. Roberts*, 25 N. H. 504.

able at the same term as the writ of error.¹

g. SERVICE—(1) *Necessity for*.—There must be legal service of the *scire facias* or citation within the time prescribed before the return day of the cause, otherwise the writ of error fails and will be dismissed.² And a defendant in error is not bound to take notice of the writ of error and act thereon until the time within which the *scire facias* is made returnable has expired.³

(2) *Time of Service*.—Where the writ is duly filed, issuance and service of the *scire facias* within the time defined for bringing the writ is not required,⁴ and it may be issued and served after the expiration of the time for bringing the writ of error,⁵ provided it is served within the number of days required by law before its return day.⁶

1. *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 201; *Rochester v. Roberts*, 25 N. H. 505; *Gerig v. Diamond Phosphate Co.* (Fla. 1896), 19 So. Rep. 877; *Orlando First Nat. Bank v. King*, 36 Fla. 25; *Villabolos v. U. S.*, 6 How. (U. S.) 90; *Driggs v. Higgins*, 19 Fla. 103.

No Return.—Where there is no return upon the citation in error, and the writ itself is defective in not stating the time at which the defendant in error is notified to appear, the cause will be stricken from the docket. *Morris v. Grapevine* (Tex. Civ. App. 1894), 25 S.W. Rep. 60.

2. *Gerig v. Diamond Phosphate Co.*, 37 Fla. 335; *Joost v. Elliott*, 20 Fla. 924; *Knight v. Weiskopf*, 21 Fla. 157; *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 514; *Williams v. Hutchinson*, 26 Fla. 513; *Oppenheimer v. Guckenheimer*, 34 Fla. 13; *Christopher v. Newnham*, 34 Fla. 370; *Weston v. Bonney*, 37 Fla. 374.

In Illinois it is held that the validity of a writ of error does not depend upon the *scire facias*. If the latter is informal or insufficient, an alias may issue to the proper parties, which, when served, gives the court jurisdiction. Jurisdiction will also be acquired by the appearance of the parties. *Birkby v. Solomons*, 15 Ill. 120.

3. *Christian v. Com.*, 5 Met. (Mass.) 334.

4. *Orlando First Nat. Bank v. King*, 36 Fla. 25; *Sammis v. Wightman*, 25 Fla. 547; *Villabolos v. U. S.*, 6 How. (U. S.) 90.

5. *Orlando First Nat. Bank v. King*, 36 Fla. 25; *Sammis v. Wightman*, 25 Fla. 547.

6. *Orlando First Nat. Bank v. King*, 36 Fla. 25. In this case the court said:

"Our conclusion is that where the writ of error is issued and lodged with the clerk of the inferior court whose judgment is to be reviewed, within the six months limited for the bringing of such writs, and is made returnable to the proper time, it is not necessary that the *scire facias* to hear errors shall be either issued or served within such limited six months, but may be effectually and properly issued and served after such limited six months have expired, provided it is made returnable at the same time with the writ of error, and is served twenty-five days before the return day."

When the time intervening between the bringing of a writ of error to a judgment of the Circuit Court and the first term of the Supreme Court thereafter will not admit of service being made of the *scire facias ad audiendum errores* at least twenty-five days before the first day of such term, the writ of error and *scire facias ad audiendum errores* should be made returnable to the first day of the term next succeeding such first term of the Supreme Court. *Sammis v. Wightman*, 25 Fla. 547.

Massachusetts.—As a *scire facias ad audiendum errores* is an original writ, it was held in *Christian v. Com.*, 5 Met. (Mass.) 334, that where no specific provision was made for its service it came within the general provisions of Rev. Stat. Mass., c. 90, § 21, requiring all original writs to be served fourteen days before they were returnable.

Nebraska.—In Nebraska, if the summons is issued within the year in which to sue out a writ of error, it need not be served until afterward. *Hendrickson v. Sullivan*, 28 Neb. 790.

(3) *Upon Whom Served.*—The process in error may, unless otherwise provided by statute, be served upon the defendant in error or his attorney of record.¹

Several Defendants.—Where there are several defendants in error, service should be made upon each.²

1. *Bacon v. Hart*, 1 Black (U. S.) 38; *Wilcox v. Mitchell*, 4 Smed. & M. (Miss.) 744; *Love v. Hall*, 3 Yerg. (Tenn.) 408.

Attorney of Record.—Service upon the attorney of record is sufficient, although he does not appear in the case in the Supreme Court. *Kinney v. Hickox*, 24 Neb. 167.

Service on One of Several Attorneys.—Where there are several attorneys of record for the defendants in error, service of summons in error on one, or his waiver of service, is sufficient. *Comstock v. Cole*, 28 Neb. 470.

On Husband.—Where the defendant marries after judgment and before the service of the writ of error, the service of the citation upon the husband is sufficient. *Fairfax v. Fairfax*, 5 Cranch (U. S.) 19.

Husband and Wife.—Where a writ of error is sued out by a party below, from a judgment against him in favor of husband and wife, a citation in error must be served also upon the husband, although the suit affects only the separate property of the wife. *Hunter v. Nichols*, 1 Tex. App. Civ. Cas., § 1054.

Service upon Representatives of Defendant in Error.—Where the defendant in error dies after a writ of error sued out, the *scire facias* may be served upon his personal representatives without abatement of the writ of error or necessity for its revival. *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 215; *New Orleans, etc., R. Co. v. Rollins*, 36 Miss. 384.

Service upon Representatives of Attorney.—Where the attorney is dead the process cannot be legally served upon his personal representatives, nor is service on one who had been his partner valid. *Bacon v. Hart*, 1 Black (U. S.) 38.

Statutory Provisions Mandatory.—Where the statute designates the person upon whom service should be made, it can be made upon that person and no other. *Lopez v. Flores*, 34 Tex. 235.

Thus, where a statute requires a notice of suing out a writ of error to be directed to the adverse party, a direc-

tion to his attorney is defective. *Driver v. McAllister*, 1 Wash. Ter. 367.

In Texas, under a statute authorizing service of a citation in error on an attorney of record only where the defendant in error is a nonresident of the state or cannot be found, it was held that service on the attorney of record in other cases was unauthorized and required the dismissal of the writ of error on motion. *Holloman v. Middleton*, 23 Tex. 538; *Adkins v. Forehand*, 10 Tex. 270; *Hughes v. Burleson*, 10 Tex. 290; *James v. Gray*, 3 Tex. 514; *Roberts v. Sollibellus*, 10 Tex. 352; *Covitt v. Anderson*, 34 Tex. 262; *Lopez v. Flores*, 34 Tex. 234; *Cassells v. Kinney*, 39 Tex. 432.

In Florida the *scire facias* to hear errors cannot be legally served upon the attorney of record in the court below of the defendant in error, when the latter is a resident of the state and in the state at the time of the service of such writ. *Christopher v. Newnham*, 34 Fla. 370.

Evasion of Personal Service.—The mere evasion by defendant of a *scire facias* to hear errors, by concealing himself, is not equivalent to actual service. Where actual service cannot be had upon the resident defendant in error, returns of two *nilis* upon writs issued to different terms of court will be regarded as actual personal service. *Cameron v. Savage*, 40 Ill. 124; *Marshall v. Moses*, 40 Ill. 126.

Two Returns of Non Est Inventus.—At common law a writ of error may be heard *ex parte* on two returns of *non est inventus*. *Vandegrift v. Page*, 5 Harr. (Del.) 439.

2. *Leidecker v. Ratto*, 1 Tex. App. Civ. Cas., § 824; *Thompson v. Pine*, 55 Tex. 427.

Where Defendants Are Partners.—Where the statute requires each of the defendants to be served with a citation in error, the fact that the defendants are a partnership does not change or modify the rule. *Leidecker v. Ratto*, 1 Tex. App. Civ. Cas., § 824; *Clark v. Thompson*, 42 Tex. 128; *Thompson v. Pine*, 55 Tex. 427.

(4) *Irregular Service*.—Where process is irregularly served, the writ of error will be dismissed.¹

3. *Alias Scire Facias*, etc.—Where the first *scire facias*, etc., is not seasonably served, or is defective, successive *scire facias*—called alias and pluries—may issue immediately thereafter, and may be made returnable at a subsequent day in the term or even at the next term.²

4. *Contents and Sufficiency of Process*.—As to contents and form of citation in error and summons in error, see article APPEALS, vol. 2, p. 211.³

Where any party defendant is omitted the writ may be dismissed on motion. *Leidecker v. Ratto*, 1 Tex. App. Civ. Cas., § 824; *Clark v. Thompson*, 42 Tex. 128; *Crunk v. Crunk*, 23 Tex. 605; *Summerlin v. Reeves*, 29 Tex. 85; *Lewis v. Mills*, 29 Tex. 124; *Chambers v. Shaw*, 16 Tex. 143.

In *Griffin v. Wilson*, 19 Ala. 27, it was held that if a writ issues against three defendants, which is served upon two of them only, and an alias is issued and served upon all, an erroneous judgment by default may be reversed on a writ of error properly sued out in the names of all the defendants.

1. *Lewis v. Mills*, 29 Tex. 124; *Christopher v. Newnham*, 34 Fla. 370; *Joost v. Elliott*, 20 Fla. 924; *Knight v. Weiskopf*, 21 Fla. 157; *Comte v. Toale*, 24 Fla. 19; *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 514; *Williams v. Hutchinson*, 26 Fla. 513; *Jensen v. Walther*, 26 Fla. 448; *Ellsworth v. Haile*, 29 Fla. 256.

Insufficient Scire Facias.—The mere fact that a *scire facias ad audiendum errores* purports to be such, although not tested nor served by an authorized officer, does not validate it, and the writ of error will be dismissed. *Knight v. Weiskopf*, 21 Fla. 157; *Joost v. Elliott*, 20 Fla. 924. Compare *Dayton v. Lash*, 94 U. S. 112, where it was held that where a legal citation was issued and not served, an appeal could not be dismissed, but a new citation might after the term to which the appeal was returnable be issued and served.

In *Joost v. Elliott*, 20 Fla. 924, it was said that the distinction between that case and *Dayton v. Lash*, 94 U. S. 112, was that in the latter case there was a legal citation not served, while in the former there was no legal citation. See also *Knight v. Weiskopf*, 21 Fla. 164.

United States.—The service of citation of a writ of error to the court of a state, made upon the defendant in error in another state by the marshal of the latter state, is irregular, but must be promptly taken advantage of on a motion to dismiss, or it will be deemed waived. *Renaud v. Abbott*, 116 U. S. 277.

2. *Roberts v. Landrum*, 3 Tex. 16; *Tandy v. Rowell*, 54 N. H. 384; *Rochester v. Roberts*, 25 N. H. 495.

Due Diligence must have been Used in Serving Original.—An alias citation will not be awarded unless due diligence is shown to have been used in trying to serve the original citation. *Natchez Ins. Co. v. Stanton*, 4 How. (Miss.) 7.

Order or Rule of Court Not Necessary.—In *Florida* it is not material that a second, or alias, *scire facias ad audiendum errores* was issued without an order or rule of court, the first, or original, not having been served. *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 210.

3. *Assignment of Error in Scire Facias*.—The assignment of error should be filed and inserted in the *scire facias*. *Rochester v. Roberts*, 25 N. H. 504.

"In the ordinary forms it recites that the record is before the court issuing the *scire facias*; but this is not so in point of fact when the *scire facias* issues before the return of the writ of error. Whenever, then, the errors shall be assigned and the *scire facias* be issued at the same time with the issuing of the writ of error, the form should be changed accordingly, and, instead of saying that the record is before the court, simply say that it has been directed to be brought before the court." *Rochester v. Roberts*, 25 N. H. 495.

Texas.—The citation in error must describe the judgment substantially as it is described in the petition in error, or the writ will be dismissed for insuffi-

5. **Waiver.**—It is a well-established principle of appellate procedure, that process in error may be waived, either expressly or by a general appearance of the defendant in error.¹

XX. EFFECT OF WRIT OF ERROR—1. **As a Supersedeas.**—See article SUPERSEDEAS AND STAY OF PROCEEDINGS.

2. **What is Brought Up by the Writ.**—A writ of error to a final judgment brings up the whole record.² But it does not bring up proceedings subsequent to the judgment rendered.³

cient service. *Crane v. Hogan* (Tex. 1887), 7 S. W. Rep. 57.

Error Amendable.—An error in the citation in misnaming the county where the Supreme Court will be held is amendable. *Armistead v. Barker*, 4 Ga. 170.

1. *Florida.*—*Williams v. La Penotiere*, 26 Fla. 333.

Georgia.—*Bliss v. Stevens*, 13 Ga. 401.

Illinois.—*Birkby v. Solomons*, 15 Ill. 120.

Tennessee.—*McBee v. McBee*, 1 Heisk. (Tenn.) 558.

Texas.—*Seybold v. Boyd*, 14 Tex. 460; *Chambers v. Hodges*, 3 Tex. 517; *Bingham v. Wyse*, 14 Tex. 241.

United States.—*Aldrich v. Aetna Co.*, 8 Wall. (U. S.) 491; *Buckingham v. McLean*, 13 How. (U. S.) 150; *Chaffee v. Hayward*, 20 How. (U. S.) 208; *McDonogh v. Millaudon*, 3 How. (U. S.) 693; *Carroll v. Dorsey*, 20 How. (U. S.) 204.

Effect of Process.—The validity of the writ of error does not depend on the proper service of process; consequently service may be waived by a general appearance of the defendant in error, or at common law an alias citation might issue even after the record filed in the appellate court. *Birkby v. Solomons*, 15 Ill. 120.

Waiver Invalidated by Death of Defendant in Error.—Death of the defendant in error, before a petition in error is filed, invalidates a waiver of the service of process on him, indorsed by his attorney of record. *McGuire v. Ranney*, 49 Ohio St. 372.

2. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17; *Wehle v. Kerbs*, 6 Colo. 167.

By One Party.—Although it be sued out by one party only. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17; *Day v. Murdoch*, 1 Munf. (Va.) 460; *Defarges v. Lipscomb*, 2 Munf. (Va.) 451; *Lomax v. Picot*, 2 Rand. (Va.) 247; *Burton v. Brown*, 22 Gratt. (Va.) 14.

Consolidated Actions.—Where actions have been consolidated and brought up by one writ of error, separate matters preceding the writ will be carried up thereby. *Harris v. Sweetland*, 48 Mich. 110.

"But it is not to be assumed that it would regularly so operate in a case not within any law permitting consolidation." *Harris v. Sweetland*, 48 Mich. 110.

Highway Proceedings—New Jersey.—On a certiorari in highway proceedings the Supreme Court can review the entire proceedings in laying out the road, but in proceedings on writ of error only the judgment of the inferior court and the correction of specific errors are brought up. *State v. Vanderveer*, 25 N. J. L. 669.

3. *Thayer v. Finley*, 36 Ill. 263; *Hunt v. People*, 76 N. Y. 89; *People v. Casey*, 72 N. Y. 393; *Polk v. Butterfield*, 9 Colo. 325.

Proceeding by Sheriff.—So a proceeding taken by the sheriff or other officer, after judgment rendered, cannot be taken advantage of to reverse the judgment. *Hitchcock v. Hahn*, 60 Mich. 459.

Or where the execution issued upon the judgment, and levy made was defective for lack of indorsement. *Hitchcock v. Hahn*, 60 Mich. 459.

Cap. ad Resp.—So proceedings on a motion to set aside a *capias ad respondendum* constitute no part of the record proper, and cannot be reviewed on a writ of error from the final judgment. *Miller v. Rosier*, 31 Mich. 475.

Orders Subsequent to Judgment.—So errors cannot be assigned on orders made after final judgment in a case brought by the writ of error. *Hughes v. Felton*, 11 Colo. 489; *Polk v. Butterfield*, 9 Colo. 325.

Order Setting Aside Previous Order.—Where the validity of a judgment or decree rested on a subsequent order setting aside a previous order, which in turn set aside the decree, it was

3. Effect on Jurisdiction of Person or Subject-matter.—A party who sues out a writ of error waives all question of the jurisdiction of the appellate court over his person.¹

On Subject-matter.—And where the writ of error has been properly prosecuted, citation in error properly served, and writ of error bond, where required, perfected, the trial court ceases to have jurisdiction over the subject-matter.²

XXI. SECOND WRIT OF ERROR.—A second writ of error does not lie to determine any question which was raised and determined on a prior writ of error to the same judgment.³ After a case has been decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate,⁴ and none of

held that a writ of error brought up such subsequent proceedings as the validity of the decree rested thereon. *McGowan v. James*, 12 Smed. & M. (Miss.) 445.

1. *Shawang v. Love*, 15 Neb. 142; *Adams Express Co. v. St. John*, 17 Ohio St. 641.

2. *Smith v. Haynes*, 30 Tex. 501.

In Criminal Case.—The allowance of a writ of error in a criminal case does not deprive the lower court of its jurisdiction, but only stays the authority to act or proceed until the determination of the writ of error. *Perteet v. People*, 70 Ill. 173.

3. *Alabama*.—*Evans v. St. John*, 9 Port. (Ala.) 186.

Georgia.—*Thornton v. Lane*, 11 Ga. 459; *Hargraves v. Lewis*, 6 Ga. 207.

Iowa.—*Davis v. Alexander*, 1 Greene (Iowa) 86.

Kansas.—*Headley v. Challiss*, 15 Kan. 602.

Kentucky.—*Lillard v. Lillard*, 5 B. Mon. (Ky.) 340.

Massachusetts.—*Hopkins v. Com.*, 3 Met. (Mass.) 460; *Booth v. Com.*, 7 Met. (Mass.) 285.

New York.—*Hartshorne v. Slegt*, 3 Johns. (N. Y.) 554.

Ohio.—*Pollock v. Cohen*, 32 Ohio St. 519.

Pennsylvania.—*Gibson v. Cummings*, 25 Pa. St. 231.

Texas.—*Southern Kansas R. Co. v. Loffoon* (Tex. Civ. App. 1895), 33 S. W. Rep. 584; *Harris v. Simmang* (Tex. Civ. App. 1895), 29 S. W. Rep. 668.

Virginia.—*Marshall's Case*, 5 Gratt. (Va.) 693.

Wisconsin.—*Zimmerman v. Turner*, 24 Wis. 483; *Pierce v. Kneeland*, 9 Wis. 23.

United States.—*Tyler v. Magwire*, 17 Wall. (U. S.) 289; *Ames v. Quimby*, 106 U. S. 342; *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Hogan v. Ross*, 11 How. (U. S.) 294; *Roberts v. Cooper*, 20 How. (U. S.) 467; *Martin v. Hunter*, 1 Wheat. (U. S.) 355.

New Petition in Error.—In *Texas*, where the plaintiff in error has failed to describe the judgment properly in his petition in error, he may file a new one and have the defendant cited thereon, where returnable and actually returned at the same time as the first. *Davis v. Darling*, 20 Tex. 804.

By Wife after Death of Husband.—When husband and wife prosecute a writ of error, and reverse a decree, no second writ of error lies in favor of the wife after the death of the husband to have a second reversal of the same decree. *Banton v. Campbell*, 9 B. Mon. (Ky.) 587. See article APPEALS—*Law of the Case*, vol. 2, p. 373.

Effect of Another Writ and Citation Not Served.—The fact that another writ of error and citation have been issued, but not served, cannot prejudice a writ and citation which have been duly issued and served. *Davidson v. Lanier*, 4 Wall. (U. S.) 453.

4. *Roberts v. Cooper*, 20 How. (U. S.) 481. See *Martin v. Hunter*, 1 Wheat. (U. S.) 355; *Ames v. Quimby*, 106 U. S. 342; *Supervisors v. Kinnicott*, 94 U. S. 498; *Sibbald v. U. S.*, 12 Pet. (U. S.) 492.

"It is a well-established doctrine, in the federal courts at least, that a second writ of error or a second appeal in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and that it

the questions which were before the court on the first writ of error can be reheard or examined upon the second.¹ Where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter be assigned for error.² The fact that in the former decision of the appellate court certain points might have been but were not raised, will not bar a second writ of error based upon such points.³

XXII. DISMISSAL, QUASHAL, OR DISCONTINUANCE—1. Involuntary Dismissal—*a. IN GENERAL.*—Dismissal or quashal of the writ is the general remedy for any informality or irregularity therein.⁴

does not authorize a reconsideration of any questions, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same." *Balch v. Haas*, 73 Fed. Rep. 975.

1. *Roberts v. Cooper*, 20 How. (U. S.) 481.

"To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." *Roberts v. Cooper*, 20 How. (U. S.) 481.

Reargument of Adjudicated Points Conceded as of Favor.—"As to the right of a party to reassign upon another writ of error, in the same case, points which have already been determined, we wish the position of this court to be distinctly understood; and this is rendered the more necessary, from the fact that its own authority is invoked for the new feature now for the first time to be engrafted in our judicial system. Let it not be supposed for a moment that parties are entitled to this privilege as matter of right; and that if it be conceded in any case it is of favor only." *Thornton v. Lane*, 11 Ga. 489.

2. *Booth v. Com.*, 7 Met. (Mass.) 286; *Hopkins v. Com.*, 3 Met. (Mass.) 460; *Wilde v. Com.*, 2 Met. (Mass.) 408.

3. *Balch v. Haas*, 73 Fed. Rep. 974; *Hargraves v. Lewis*, 7 Ga. 110. See also *Arnold v. Arnold*, 11 B. Mon. (Ky.) 85.

Contra.—In *Pollock v. Cohen*, 32 Ohio St. 514, it is held that where a case is brought up a second time, on the same record, by petition in error, all questions on such record will be deemed settled by the first adjudication. This rule extends not only to

questions actually presented, but to all questions existing on the record that might have been presented for adjudication in the first petition in error.

Taxation of Costs.—A second writ of error sued out to correct alleged errors of trial court in the taxation of costs after the rendition of judgment, where the judgment has been reversed on a prior writ, will be dismissed as unnecessary, as all the questions involved might have been raised on the prior writ. *St. Louis, etc., R. Co. v. McLelland*, 62 Fed. Rep. 118. See also *Gibson v. Cummings*, 25 Pa. St. 231. Except to examine whether the mandate of the appellate court has been executed correctly or not. *Tyler v. Magwire*, 17 Wall. (U. S.) 289.

4. *King v. Simmonds*, 1 H. L. Cas. 754; *Van Ness v. Cheeseborough*, 11 Ga. 377; *National Bank of Republic v. Miller*, 25 L. ed. (U. S.) 529; *Van Meter v. Lovis*, 29 Ill. 488; *Bostwick v. Williams*, 40 Ill. 113; *Seybold v. Boyd*, 14 Tex. 460; *Graham v. Sterns*, 16 Tex. 153; *Horton v. Wheeler*, 17 Tex. 52; *Mays v. Forbes*, 9 Tex. 436; *People v. Brooklyn*, 13 Wend. (N. Y.) 130; *Hartshorne v. Sleght*, 3 Johns. (N. Y.) 554.

Texas.—The motion to dismiss a writ of error on the ground that the citation does not show when the petition for writ of error was filed, and on the ground that it does not give the description of the judgment contained in the petition for writ of error, cannot be sustained further than to strike the cause from the docket for want of proper citation, and this does not prejudice the plaintiff's right to have proper citation thereafter issued and served. *Thompson v. Anderson*, 82 Tex. 237.

Not Confined to Formal Defects.—It is not confined to formal defects, but may be resorted to where for any reason the plaintiff is not entitled to a review on the merits.¹

Right to Sue.—And the right of the plaintiff to sue out the writ may be contested on the motion.²

Where Affirmance Proper.—When no error appears on the face of the record, dismissal is not proper, but the judgment will be affirmed on motion of the defendant in error.³

Continuance.—Or in a proper case the hearing may be continued as the court may direct.⁴

b. SPECIFIC GROUNDS.—Dismissal or quashal may be had for

United States Practice.—Where a writ of error is sued out from the Supreme Court of the United States to a state court, and the record presents no federal questions, dismissal is the proper remedy; but where the case is brought from the Circuit Court of the United States the Supreme Court may affirm, although no question for revision is presented. *Taylor v. Morton*, 2 Black (U. S.) 482.

Michigan.—In *Leland v. Blair*, 97 Mich. 612, a motion to dismiss a writ of error for want of prosecution will not be granted where neither party noticed the case for hearing.

How Objection Raised.—The ground of the motion to dismiss or quash must be specifically defined in the motion papers, so that the adverse party may have fair notice of the objection. *Boyd v. Weeks*, 6 Hill (N. Y.) 71.

1. *Hartshorne v. Sleght*, 3 Johns. (N. Y.) 563; *Wilson v. Territory*, 1 Wyoming 114; *U. S. v. More*, 3 Cranch (U. S.) 159.

What Not Ground for Dismissal.—Whatever constitutes a good cause for the modification or reversal of a judgment cannot be urged as a cause for quashing the writ. *Vance v. Rockwell*, 3 Colo. 240; *Tower v. Detroit*, etc., R. Co., 7 Mich. 10.

Fact Apparent on Record.—Matters of fact in bar of the writ not apparent on the record may be brought before the court either by plea or motion to quash. *Showers v. Showers*, 27 Pa. St. 491.

Estoppel.—Where, since the judgment complained of was rendered, the plaintiff has done some act which would in law prevent him from obtaining the fruits of a writ of error, and the estoppel is in form cognizable by the appellate court, his writ of error

will be dismissed. *Bradley v. Ewart*, 18 W. Va. 598.

Where the plaintiff in error is claimed to be estopped to pursue his remedy by writ of error, by matters of fact outside the record, they may be shown either by a plea setting forth the facts relied on, *Showers v. Showers*, 27 Pa. St. 491; *Martin v. Ives*, 17 S. & R. (Pa.) 364; or by motion to quash, *Showers v. Showers*, 27 Pa. St. 491.

2. *Hagar v. Coup*, 50 Mich. 54.

Application to Set Aside.—Under the English practice of issuing a writ of error out of the chancery court, applications must be made to set it aside. The court to which the writ of error was sued out had no authority to set the writ of error aside. *Jones v. De Lisle*, 10 Moore 617; *Boreman v. Brown*, 1 Dowl. N. S. 281.

But it was held with great refinement, in *Halmer v. Newlands*, 2 Dowl. N. S. 716, that the court might quash the allowance of the writ, although it could not quash the writ, as the allowance was the act of its own officer.

Sufficient Remedy Below.—Or, where the plaintiff in error had a sufficient remedy by motion at the trial term for the correction of the error, the writ will not be dismissed. *McIntire v. Carr*, 59 N. H. 207.

3. *McGuire v. Com.*, 3 Wall. (U. S.) 382; *Hecker v. Fowler*, 1 Black (U. S.) 95; *Suydam v. Williamson*, 20 How. (U. S.) 427.

4. *Conkling v. Cameron*, 3 Okla. 525.

In Criminal Case.—When the prisoner escapes pending a writ of error in a criminal case the trial court may either dismiss the writ or continue the hearing at its discretion. *McGowan v. People*, 104 Ill. 100.

want of prosecution,¹ want of jurisdiction,² or where sued out prematurely,³ or for want of necessary parties to the writ of error,⁴

1. *Georgia*.—Steele Lumber Co. v. Laurens Lumber Co. (Ga. 1896), 24 S. E. Rep. 755; McDougald v. Rutherford, 12 Ga. 602 (not filed in time); Cloudis v. Tennessee Bank, 6 Ga. 481; Leak v. McDowell, 6 Ga. 264; Hightower v. Hightower, 13 Ga. 204; Boyd v. Ham, 2 Ga. 190; Beall v. Powell, 4 Ga. 525; Anderson v. Darien Bank, 5 Ga. 582; Perry v. Higgs, 6 Ga. 43; Crawford v. Perryman, 7 Ga. 558; Turner v. Collins, 8 Ga. 252.

Maryland.—Cummings v. State, 1 Har. & J. (Md.) 340.

Michigan.—Lathrop v. Hicks, 2 Dougl. (Mich.) 223.

Mississippi.—Newell v. Briggs, 3 How. (Miss.) 45.

Nebraska.—Moore v. McCollum, 43 Neb. 617.

New York.—Clark v. McClaughry, 22 Wend. (N. Y.) 627.

Texas.—Glavaecke v. Delmas, 13 Tex. 495; Lewis v. Mills, 29 Tex. 124.

United States.—Burr v. Des Moines R., etc., Co., 1 Wall. (U. S.) 99; Bacon v. Hart, 1 Black (U. S.) 38; McGuire v. Com., 3 Wall. (U. S.) 382.

Security.—Or where appeal security required by law is not supplied. Mills v. Conner, 1 Blackf. (Ind.) 5; Patrick v. Nelson, 2 Head (Tenn.) 507.

Assignment of Error.—An uncertainty or informality in the assignment of errors constitutes no ground, except by statute or rule of courts, for quashing the assignment or dismissing the writ. So held in *Michigan*. Teller v. Wetherell, 6 Mich. 46.

Improper Execution.—Or, where the writ is not properly attested or sealed, it may be quashed. State v. Boyle, 25 Md. 509.

Before Motion Heard.—Where the return is filed before the motion is heard, the writ of error will not be dismissed because it was delayed, but the moving party will be allowed his costs. Woodmansie v. Hollon, 16 Mich. 379.

2. *Alabama*.—Reid v. Owen, 9 Port. (Ala.) 435.

Arkansas.—Jackson v. Wight, 6 Ark. 387.

Georgia.—Loyd v. Welch, 35 Ga. 104.

Illinois.—Woodside v. Woodside, 21 Ill. 207.

Indiana.—Robinson v. Tousey, 6 Blackf. (Ind.) 256.

Kansas.—Christie v. Carter, 56 Kan. 166.

Minnesota.—Hawke v. Deuel, 2 Minn. 58; Babcock v. Banning, 3 Minn. 191.

Missouri.—State v. Brown, 41 Mo. 491.

New York.—Hartshorne v. Slegt, 3 Johns. (N. Y.) 554.

Ohio.—Spitler v. State, Wright (Ohio) 106.

Texas.—Dillingham v. Richards, 87 Tex. 247; Wetzel v. Simon, 87 Tex. 403.

Wisconsin.—Crilley v. State, 20 Wis. 232.

United States.—Suydam v. Williamson, 20 How. (U. S.) 427; Semple v. Hagar, 4 Wall. (U. S.) 431; Minor v. Tillotson, 1 How. (U. S.) 287; California v. Holladay, 159 U. S. 415; Hoadley v. San Francisco, 124 U. S. 639; Hoadley v. San Francisco, 94 U. S. 4; Eustis v. Bolles, 150 U. S. 361; Beatty v. Benton, 135 U. S. 244; San Francisco v. Itsell, 133 U. S. 65.

Heard on the Merits.—Unless the question of jurisdiction is so involved with other questions that it cannot be decided without an examination of a voluminous record and a review of the merits of the case; in which case it will be reserved until the case is heard on the final argument on the merits. Semple v. Hagar, 4 Wall. (U. S.) 431.

3. Marsh v. Com., 16 S. & R. (Pa.) 319; Van Ness v. Cheeseborough, 11 Ga. 377; Thomas v. Thomas, 64 Mo. 353.

4. Wesson v. Crook, 24 Ala. 478; Whitaker v. Patton, 1 Port. (Ala.) 9; Yerkes v. McGuire, 54 Kan. 614; Pitman v. Elwood (Kan. 1896), 44 Pac. Rep. 685; Marburg v. Douglass (Kan. 1896), 45 Pac. Rep. 599; Pratt v. Fairfield, 56 Kan. 144; Hughes v. Miller, 56 Kan. 183; Matthewson v. Senior, 3 Kan. App. 117; Barber Asphalt Paving Co. v. Botsford, 50 Kan. 331; Steele v. Baum, 51 Kan. 165; Bonebrake v. Aetna L. Ins. Co., 3 Kan. App. 708; Norton v. Wood, 55 Kan. 559; Graham v. Blackburn, 10 Tex. 314; Chandler v. Tanner, 20 Tex. 1; Cruik v. Crunk, 23 Tex. 604; Davenport v. Field, 12 Tex. 94; Thompson v. Pine, 55 Tex. 427; Summerlin v. Reeves, 29 Tex. 85; Clark v. Thompson, 42 Tex. 128; Kail v. Wetmore, 6 Wall. (U. S.)

or for a misjoinder of parties,¹ or where sued out contrary to agreement,² or without authority of the parties,³ or where brought unseasonably,⁴ or where no actual controversy any longer exists between the parties,⁵ or where the judgment below has been satisfied,⁶ or where the order sought to be reviewed is interlocutory,⁷ or because the record is incomplete,⁸ or where the proceedings below are so informal and irregular that the jurisdiction of the court cannot attach,⁹ or where the judgment is not properly described

451; *Masterson v. Herndon*, 10 Wall. (U. S.) 416; *Simpson v. Greeley*, 20 Wall. (U. S.) 152. Unless substantial relief can be afforded in the appellate court without affecting the rights of parties not joined. *Flint, etc., Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 455.

Plea.—A motion to dismiss for lack of proper parties is in the nature of a plea in abatement. *Loring v. Wittich*, 16 Fla. 327.

Guardian.—It is good ground for quashing a writ of error, that a guardian appointed to defend minors below is not joined therein. *Whitaker v. Patton*, 1 Port. (Ala.) 9.

1. *Roberts v. Taylor*, 4 Port. (Ala.) 421; *Stevens v. Stevens*, 2 Dana (Ky.) 428; *Hudspeth v. State*, 1 Ark. 20; *Hill v. Hill*, 6 Ala. 166; *Loring v. Wittich*, 16 Fla. 323.

2. *Com. v. Johnson*, 6 Pa. St. 136; *Smith v. Com.*, 14 S. & R. (Pa.) 69.

3. *Anonymous*, 11 Ill. 488.

4. *U. S. v. Gwyn* (N. Mex. 1888), 42 Pac. Rep. 167; *Compton v. Ashley* (Tex. Civ. App. 1895), 28 S. W. Rep. 924; *Davis v. Pender*, Minor (Ala.) 57; *Webster v. Gaff*, 6 Colo. 475.

Return Day.—Or where the writ of error is not allowed until the return day of the writ of error has expired. *Cummings v. State*, 1 Har. & J. (Md.) 340.

5. *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138.

6. *Babcock v. Banning*, 3 Minn. 191.

7. *Mathis v. Weaver*, 94 Ga. 730.

8. *Overton v. Cheek*, 22 How. (U. S.) 46; *Smith v. Hearne*, 2 Stew. (Ala.) 169; *Cowles v. Clark*, 3 Ga. 381; *Smith v. Justices*, 4 Ga. 156; *Goneke v. Garrett*, 6 Ga. 119; *Heaston v. Miller*, 1 Kan. App. 157; *Cook v. Challiss*, 55 Kan. 363; *Champion v. State*, 9 Ohio Cir. Ct. Rep. 315; *Van Meter v. Lovis*, 29 Ill. 488; *Baker v. Kloster*, 41 Neb. 890; *Ward v. Urmson*, 40 Neb. 695. Or where the transcript is filed too late. *Record v. Butters*, 42 Neb. 786.

Service of Bill of Exceptions.—Or for

failure to properly serve a bill of exceptions. *Waycross v. Neal*, 94 Ga. 731; *Davis v. Peel* (Ga. 1895), 22 S. E. Rep. 525.

Brief.—Or for failure to furnish a copy of brief to counsel for defendant in error as required by rules of court. *Paden v. Worrell* (Okla. 1896), 43 Pac. Rep. 1059. Or where the writ of error is not filed in time. *McDougald v. Rutherford*, 12 Ga. 602.

Certificate.—Or for lack of a proper certificate where required. *Packard v. Packard*, 56 Kan. 132; *Russell v. March*, 6 Ga. 491; *Duke v. Trippe*, 6 Ga. 317; *Arnold v. Wells*, 6 Ga. 380; *Anderson v. Darien Bank*, 5 Ga. 582. Or because the transcript is not properly certified. *Crawford v. Perryman*, 7 Ga. 558; *Otis v. Butters*, 46 Neb. 492; *Moore v. Waterman*, 40 Neb. 498; *McDonald v. Grabow*, 46 Neb. 406.

Case Made.—Or because there is not attached and filed with the petition any case made, or a certified transcript of the record of the trial court. *Byers v. Leavenworth Lodge*, No. 2, etc., 54 Kan. 321; *Garneau v. Omaha Printing Co.*, 42 Neb. 847; *Russell v. Thompson*, 1 Kan. App. 467; *Jandt v. Deranlieu*, 43 Neb. 422.

Incomplete Abstract.—Or where the abstract contains no part of the record to which reference is made in the assignment of errors. *Gottlieb v. Frost* (Colo. App. 1895), 41 Pac. Rep. 508.

9. *Reid v. Owen*, 9 Port. (Ala.) 435.

Confused Record.—Where a case was brought before a court and argued on its merits, and the counsel on both sides erroneously supposed that they had brought up a case stated, when in fact they brought up nothing but a mass of evidence, and also erroneously supposed that they would obtain an opinion and judgment of the court on the case as by common consent they presented it, the court dismissed it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be

in the writ of error,¹ or for failure to give proper notice of the issuance of a writ of error,² or because an appeal has been brought to the same judgment,³ or where there is no longer an existing cause of action,⁴ or because a writ of error is not served according to law,⁵ or because the same questions have been decided on a prior review of the same case,⁶ or because not sued out in good faith,⁷ or because no bond in error is given as required by law,⁸ or for failure to pay costs.⁹

c. TIME OF MAKING MOTION.—A motion to dismiss a writ of error must be made at the earliest opportunity,¹⁰ and cannot, unless for some cause going to the jurisdiction of the appellate court over the subject-matter, be made after joinder in error.¹¹

d. NOTICE OF MOTION.—The motion must be made on notice.¹²

properly reviewed. But the dismissal was with costs. *Burr v. Des Moines R., etc., Co.*, 1 Wall. (U. S.) 99.

1. *Davenport v. Fletcher*, 16 How. (U. S.) 142.

2. *Schnelle v. Devanny*, 61 Mo. App. 453; *Davenport v. Field*, 12 Tex. 94; *Bacon v. Hart*, 1 Black (U. S.) 38; *Davenport v. Fletcher*, 16 How. (U. S.) 142.

3. *Hawke v. Deuel*, 2 Minn. 58.

4. *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138.

5. *Turner v. Collins*, 8 Ga. 252; *Perry v. Higgs*, 6 Ga. 43; *Beall v. Powell*, 4 Ga. 525.

6. *Hartshorne v. Sleght*, 3 Johns. (N. Y.) 554.

7. *Ames v. Webber*, 11 Wend. (N. Y.) 186.

8. *Davenport v. Fletcher*, 16 How. (U. S.) 142.

9. *De Loach v. Richards*, 94 Ga. 730.

10. *Michigan*.—*O'Flynn v. Eagle*, 7 Mich. 306; *Smith v. Mitchell*, 9 Mich. 261; *Powers v. Irish*, 23 Mich. 429; *Wattles v. Warren*, 7 Mich. 309.

New York.—*How v. Gilbert*, 1 How. Pr. (N. Y. Supreme Ct.) 107.

Tennessee.—*Linch v. Linch*, 1 Lea (Tenn.) 526; *Gillespie v. Goddard*, 1 Heisk. (Tenn.) 777.

Texas.—*Ricker v. Collins*, 81 Tex. 662; *Horton v. Wheeler*, 17 Tex. 52.

So in *Tennessee* it must be made at the first term of the court after the defendant in error has notice of the writ of error. *Gillespie v. Goddard*, 1 Heisk. (Tenn.) 777.

So a motion to dismiss a writ of error for want of sufficient bond or for defective bond must be made at the next term after notice of grant of writ,

or the delay be satisfactorily accounted for and explained. *Linch v. Linch*, 1 Lea (Tenn.) 526.

Return Day.—A writ of error cannot generally be quashed before return day. But in *Davis v. Hood*, 13 Pa. St. 171, it was held that where it is *prima facie* apparent on the record that there is no error in the judgment a motion to quash the writ before return day may be granted.

In Criminal Case.—A motion to set aside a stay of proceedings and to quash a writ of error in a capital case may be made by the district attorney, and the prisoner's counsel cannot avail himself of the objection that such motion should have been made by the attorney-general. *Carnal v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 262.

11. *Tombeckbee Bank v. Freeman*, Minor (Ala.) 285; *Koin v. McIlvaine*, 1 Port. (Ala.) 285; *Turnly v. Stinson*, 1 Ala. 456; *Hallett v. Allaire*, Minor (Ala.) 360; *Downing v. Baldwin*, 1 S. & R. (Pa.) 298; *Fenner v. Bettner*, 22 Wend. (N. Y.) 621.

Where Made after Joinder.—So, where it appears that the cause of action has ceased to exist by its discharge, the error complained of waived or removed or released, the writ of error will be dismissed at any stage before final judgment. *Ferguson v. Millender*, 32 W. Va. 30; *Woodside v. Woodside*, 21 Ill. 207.

12. *Jewell v. Schouten*, 1 N. Y. 241; *Webb v. Brown*, 19 Johns. (N. Y.) 453.

Motion to Affirm.—Where defendant in error moved to affirm the judgment for lack of notice, and the plaintiff moved to withdraw the writ of error, the Supreme Court held it to lie at

e. HEARING ON MOTION.—The motion to dismiss may be denied where a cross-motion is made to amend a curable defect.¹ The court, upon the hearing, will take notice of the rights of parties to the record only,² and a dismissal may be coupled with leave to move for a reinstatement at a stated time.³ The plaintiff may, on such a motion to dismiss, show that he is within the exceptions to the general rule requiring the dismissal of the writ.⁴ And where the allegations of his affidavit are controverted the court may, at discretion, resort to such measures as may be fitting to decide the truth of the issues.⁵

2. Voluntary Dismissal.—A plaintiff in error is entitled, as a matter of right, to dismiss the writ,⁶ and it has been held that the motion may be made at any time before a judgment is rendered on the merits.⁷

Filing Record.—And the discontinuance may be had even without filing the record.⁸ After judgment permission will be refused.⁹

By Coplaintiff.—A coplaintiff may terminate the proceeding in error as to himself,¹⁰ and leave his remaining coplaintiffs to continue

discretion, which motion it would grant. *Rogers v. Alexander*, 2 Greene (Iowa) 237.

A motion to dismiss a writ of error, in a cause not on the docket of the term when the motion is made, will not be heard without notice. *Hill v. Bowers*, 21 Mich. 303.

1. *Peadro v. People*, 57 Ill. App. 45.

Where Dismissal Had.—The writ can only be dismissed or quashed in the court where it is returnable. *Hartshorne v. Slegt*, 3 Johns. (N. Y.) 562.

2. *Gallagher v. Miller*, 2 W. N. C. (Pa.) 241.

3. *Davenport v. Fletcher*, 16 How. (U. S.) 142.

4. *Teller v. Willis*, 12 Mich. 268.

How Shown.—His defense should be set forth by affidavit. *Teller v. Willis*, 12 Mich. 268.

5. *Teller v. Willis*, 12 Mich. 268.

6. *Becker v. Henderson*, 5 Colo. 346; *Birch v. Brown*, 5 Mich. 31; *State Bank v. Citizens' Bank*, 66 Ga. 752; *Hancock County v. Marsh*, 3 Ill. 491; *Vandyke v. Tenbroke*, 1 N. J. L. 144.

Failure to Perfect the Judgment Roll.—It is no objection to the motion to *non pros*, a writ of error, that the judgment roll has not been perfected by the defendant in error, so that the plaintiff might transcribe the record, because it was in the power of the plaintiff in error, by an application to the court below, to compel the defendant in error

to complete the record. *Dunbar v. Parker*, 9 Price 592.

7. *Hancock County v. Marsh*, 3 Ill. 491.

After Argument.—Plaintiff in error may withdraw the writ after argument thereon if the motion to withdraw is made before any written decision has been prepared. *State Bank v. Citizens' Bank*, 66 Ga. 752.

By Operation of Law.—The vacation of a judgment (in ejectment), upon taking a new trial in the court below under a statute, will not operate to discontinue a writ of error pending at the time, brought by the parties taking the new trial, or reverse the judgment, and the court will release jurisdiction of the cause. *Rees v. Chicago*, 40 Ill. 107.

8. *Vandyke v. Tenbroke*, 1 N. J. L. 144.

After Motion to Affirm.—After a motion has been made by the defendant in error to affirm for the want of notice, etc., a plaintiff may be allowed to withdraw only in the discretion of the court. *Rogers v. Alexander*, 2 Greene (Iowa) 237; *Farquhar v. McFarland*, 13 Tex. 92. Except where the prosecution of the writ of error is prevented by the act of appellee, in which case his motion for affirmance will be denied, and the dismissal allowed. *Mitchell v. Russell*, 3 Stew. (Ala.) 53.

9. *State Bank v. Citizens' Bank*, 66 Ga. 752.

10. *Thorp v. Thorp*, 40 Ill. 113.

the suit in error.¹ But a part of the coplaintiffs in error cannot dismiss as to their remaining coplaintiffs without their consent.²

By Nominal Party.—Nor can a nominal party to the record dismiss the writ without the acquiescence of the party in whose favor the writ is prosecuted.³

3. Dismissal on Court's Own Motion.—Where neither party appears the writ of error may be dismissed on the court's own motion.⁴

4. Costs.—The plaintiff in error will be required to pay costs upon dismissal or discontinuance of a writ of error, whether it be voluntary or involuntary,⁵ unless the dismissal is had for a cause which neither party could avoid.⁶

5. Effect of Dismissal.—The dismissal of a writ of error for irregularity in procedure does not bar a second writ of error to the same judgment.⁷

Dismissal for Want of Evidence.—The authorities are not agreed as to the effect of dismissal of a writ of error for want of prosecution. According to some decisions such dismissal operates as a bar to the prosecution of a second writ.⁸ Other decisions maintain the

1. *Thorp v. Thorp*, 40 Ill. 113.

2. *Hyde v. Tracy*, 2 Day (Conn.) 491.

3. *Ragland v. Wickware*, 4 J. J. Marsh. (Ky.) 531.

4. *Newport v. Rowen*, 4 Hayw. (Tenn.) 195.

5. *Birch v. Brown*, 5 Mich. 31; *Thorp v. Thorp*, 40 Ill. 113. Although the court has no jurisdiction of the subject-matter. *Hawke v. Deuel*, 2 Minn. 58.

6. *Chosen Freeholders v. Chosen Freeholders*, 44 N. J. L. 438.

7. *Alabama*.—*Roebuck v. Dupuy*, 2 Ala. 352; *U. S. v. Haden*, 5 Port. (Ala.) 533.

Colorado.—*Western Union Tel. Co. v. Graham*, 1 Colo. 182; *Hax v. Leis*, 1 Colo. 187.

Florida.—*Johnson v. Polk County*, 24 Fla. 28.

Michigan.—*Taff v. Hosmer*, 14 Mich. 253; *Beller v. Stevens*, 40 Mich. 168.

Mississippi.—*Sherman v. Lovejoy*, 30 Miss. 105.

Missouri.—*State v. Finn*, 87 Mo. 310.

Nebraska.—*Cahill v. Cantwell*, 31 Neb. 158.

Texas.—*Mays v. Forbes*, 9 Tex. 436; *Holloman v. Middleton*, 23 Tex. 538.

Transcript.—Or where dismissed for want of a transcript another writ of error may be prosecuted in the time allowed by law. *Roberts v. Tucker*, 1 Wash. Ter. 179.

Lack of Cost Bond.—If a writ of error is dismissed for want of a cost bond, a

new writ may issue in the same cause. *Western Union Tel. Co. v. Graham*, 1 Colo. 182; *Martin v. Hartwell*, 1 Tex. App. Civ. Cas., § 493.

Refusal to Join.—When a codefendant has refused to join in suing out a writ of error, he is not precluded by its dismissal from suing out a new writ. *Taff v. Hosmer*, 14 Mich. 249.

Reinstatement.—Where a writ of error has been dismissed because of failure to file an assignment of errors, the court may, at the same term, reinstate the cause in the exercise of its discretion. *Allen v. Tison*, 18 Fla. 628.

Record.—In *Welsh v. Brown*, 42 N. J. L. 323, it was held that a writ of error directed to the Circuit Court having been dismissed for want of prosecution, the plaintiff in error cannot sue out a second writ of error commanding it to certify and return the record, as it would be nugatory where the first writ of error is irregularly dismissed. The remedy of the plaintiff in error is by motion to set aside the order of dismissal.

8. *Hartop v. Holt*, 1 Salk. 263; *Garr v. Paulmier*, 21 N. J. L. 681; *Welsh v. Brown*, 42 N. J. L. 323; *Hitchcock v. Pratt*, 51 Mich. 263.

Voluntary Dismissal.—Where the cause is regularly before the appellate court, a voluntary dismissal by the plaintiff in error, of his own writ, operates as an affirmation of the judgment, and a second writ of error cannot be

opposite view.¹

XXIII. AMENDMENT OF THE WRIT—1. At Common Law.—Writs of error were originally unamendable at common law.²

2. **Under Statute.**—This was changed by the Statute of 5 Geo. I., c. 13, which provided "that all writs of error wherein there shall be any variance from the original record may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error were made returnable."³

Where in Force.—The principles of this statute are generally in force in the American courts unless abrogated or superseded by new legislation.⁴

3. **What Defects Amendable.**—Where the writ is colorable, it will operate as a writ of error, the court having power to amend it in so far as it is informal.⁵

sued out. *Western Union Tel. Co. v. Graham*, 1 Colo. 182.

1. *Freas v. Engelbrecht*, 3 Colo. 377; *Power v. Frick*, 2 Grant's Cas. (Pa.) 306; *Birch v. Triste*, 8 East 412. See also *Monti v. Bishop*, 3 Colo. 605.

Effect on the Record.—The effect of dismissal or discontinuance is to remove the entire cause from the jurisdiction of the court of errors. *Goforth v. Adams*, 11 Ill. 52.

Avoids the Writ.—The effect of quashing or dismissing the writ is to declare it a nullity and avoid it for all purposes. *Hartshorne v. Sleght*, 3 Johns. (N. Y.) 563.

Effect of Discontinuance.—Discontinuance of a writ of error does not vacate the judgment below, and when there is no agreement vacating it it remains a lawful adjudication, the payment or settlement of which does not impair its judicial force. *Cummerford v. Paulus*, 66 Mich. 648.

2. *Fremont v. Carondelet*, 25 Mo. 62; *Jaques v. Cesar*, 2 Saund. 100, note 1.

A writ of error was not amendable at common law, upon the principle of its being in the nature of a commission, since no court was allowed to amend its own commission. *Cooper v. Ginger*, 1 Stra. 607.

Amendments Allowed Only in Affirmance of Judgment.—"Great certainty was formerly required in making the writ of error agree with the record, for as the writ was the sole authority by which the judges were empowered to act they could proceed only on that record which the writ or commission authorized them to examine. Nor could any defects therein be amended

(before the Stat. of 5 Geo. I., c. 13), because, by the former statutes of amendment, the judges were only enabled to amend in affirmance of the judgment." 2 Tidd Pr., p. 1094; *Walker v. Slackoe*, 5 Mod. 69. See also *Fremont v. Carondelet*, 25 Mo. 62.

3. *Loring v. Wittich*, 16 Fla. 323; *Rochester v. Roberts*, 25 N. H. 495; *Tandy v. Rowell*, 54 N. H. 388; *Finney v. Crawford*, 2 Watts (Pa.) 294; Report of Judges, 3 Binn. (Pa.) 626; *Giggeer's Case*, 1 Salk. 264, note a.

4. *Finney v. Crawford*, 2 Watts (Pa.) 294; Report of Judges, 3 Binn. (Pa.) 626; *Rochester v. Roberts*, 25 N. H. 495; *Tandy v. Rowell*, 54 N. H. 385; *Loring v. Wittich*, 16 Fla. 323; *Lowe v. Morris*, 13 Ga. 158; *Carey v. Rice*, 2 Ga. 408.

5. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 750; *Mossman v. Higginson*, 4 Dall. (U. S.) 12; *Course v. Stead*, 4 Dall. (U. S.) 22; *National Bank v. Bank of Commerce*, 99 U. S. 608; *Sea v. Connecticut Mut. L. Ins. Co.*, 100 U. S. 680, 25 L. ed. (U. S.) 772; *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486; *McVeigh v. U. S.*, 8 Wall. (U. S.) 640; *Castleman v. Holmes*, 7 T. B. Mon. (Ky.) 592; *Chambers v. Wilkins*, 2 Litt. (Ky.) 145; *Weiskoph v. Dibble*, 18 Fla. 22; *Loring v. Wittich*, 16 Fla. 323; *Nash v. Haycraft*, 34 Fla. 449; *Heath v. Wright*, 1 How. Pr. (N. Y. Supreme Ct.) 250; *Clapp v. Bromaghian*, 9 Cow. (N. Y.) 304; *Ellison v. State*, 8 Ala. 273; *Colvin v. Owens*, 22 Ala. 782; *Knox v. Steele*, 18 Ala. 815; *Hearne v. Harbison*, 9 Ala. 731; *Toulmin v. Hamilton*, 7 Ala. 362; *Hillebrant v. Brewer*, 5 Tex. 567; *Beall v. Fox*, 4 Ga. 403; *Lowe v. Morris*, 13

A writ of error may, however, be so void of color as a writ from the appellate court as to be unamendable.¹

Ga. 147; *Cox v. Macon, etc., R. Co.*, 12 Ga. 270.

In *Clapp v. Bromaghan*, 9 Cow. (N. Y.) 304, it was said, respecting the inherent power of a court to amend a writ of error: "The statute of jeofails in its terms includes this court; but without it it seems to me to be a power incidental to every court to correct its own proceedings at any time before final judgment."

"No writ of error, assignment of error, or other proceeding in any of the courts of error, shall be quashed or dismissed for any defect, omission, or imperfection, 'but said courts shall and may, from time to time, allow either of the parties to amend the same, as other amendments are allowed of in the other courts of this state.'" *Asdell v. Sutherland, Peck* (Tenn.) 121.

Petition in Error Amendable.—So where a petition in error is substituted by statute for the writ it is equally amendable. *Hillebrant v. Brewer*, 5 Tex. 567; *Spencer v. Thistle*, 13 Neb. 201; *Hastings, etc., R. Co. v. Ingalls*, 13 Neb. 279.

Variance between Writ and Transcript.—Where a writ of error and the transcript of the error vary in the character in which parties to the proceedings sue, the writ of error may be amended in the Supreme Court under Rev. Stat. Colo., p. 50, § 12. *Vance v. Rockwell*, 3 Colo. 240.

Variance between Scire Facias and Writ.—So a variance between the *scire facias*, etc., and the writ of error is amendable. *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 215; *Loring v. Wittich*, 16 Fla. 323; *Weiskoph v. Dibble*, 18 Fla. 22; *Johnson v. Polk County*, 24 Fla. 28; *Sammis v. Wightman*, 25 Fla. 547.

Writ Served after Return Day.—A writ of error served after return day, may be amended by making it returnable subsequently to the return day, on giving a bond and payment of costs. *Heath v. Wright*, 1 How. Pr. (N. Y. Supreme Ct.) 250.

Omission of Seal.—A writ of error without a seal may be amended by attaching a seal thereto. *Lowe v. Morris*, 13 Ga. 147; *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 750.

1. *Cotter v. Alabama G. S. R. Co.*,

61 Fed. Rep. 750; *Bondurant v. Watson*, 103 U. S. 278; *Brace v. Squire*, 2 D. Chip. (Vt.) 52.

In *Nash v. Haycraft*, 34 Fla. 449, it was said, as to the amendment of a writ of error by the addition of the name of an omitted plaintiff in error: "The amendment here applied for does not involve a question of the obtainment of jurisdiction by this court over the cause, as would be the case were there no writ of error at all, or if it were made returnable to the wrong time, or improperly executed, or as if there were no accompanying *scire facias*, or no service thereof, to give the court jurisdiction over the person of the defendant in error. The writ of error has been sued out within, and is made returnable to, the proper time, and was properly served by lodgment in the office of the clerk of the court below. It gives to this court jurisdiction over the cause or the subject-matter thereof. Citation to the defendant in error has been properly served, and gives us jurisdiction over his person. The defect is a matter of form simply. The omission of the name as a plaintiff in error of a party who should have been joined therein does not make the writ any the less a valid one as to those parties who are named therein as plaintiffs. Nor does such omission directly affect any right of the defendant in error. The only party directly affected by the omission is the party omitted, and if brought in in the manner applied for and given his day in court, either to prosecute the writ of error or to signify his unwillingness to do so, no one can thereby be injuriously affected."

Made Returnable on Day Unauthorized.—So where a writ of error is illegal because it is made returnable on a day unauthorized by law, it is held in *Florida* not amendable. *Driggs v. Higgins*, 19 Fla. 103.

Defective Direction.—Nor an omission to direct the writ of error to the proper person, as to the trial court clerk. *Ellis v. Brown*, 1 Ark. 82.

Under United States Practice—Void Writ.—A writ on appeal to the United States Supreme Court which did not purport to be issued under the authority of the Supreme Court of the United States or of the President of the United

4. Amendment Discretionary.—The allowance of the amendment lies in the discretion of the appellate court,¹ unless the statute is in terms mandatory,² and the court may therefore impose reasonable terms as a condition of granting the application to amend.³ The appellate court will not, however, amend on its own motion.⁴

How Discretion Exercised.—The discretion will be liberally exercised, unless it prejudices the rights of adverse parties.⁵

States, but was a mere command of the chief justice of the Supreme Court of Louisiana, under his teste and seal of his court, to send up the transcript, was held void and unamendable. *Bondurant v. Watson*, 103 U. S. 278.

Writ Not Void.—On the other hand, a writ running in the name of the President of the United States, but not tested by the chief justice of the United States nor signed by the clerk of the Supreme Court of the United States, and bearing no seal of the Supreme Court of the United States or District Court of the United States, but tested by the chief justice of the Supreme Court of Texas, sealed with the seal of that court and signed by the clerk, was held a colorable writ and amendable. *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486.

1. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 750; *Pearson v. Yewdall*, 95 U. S. 294; *Leavenworth, etc., R. Co. v. Whitaker*, 42 Kan. 634.

2. *Lunsford v. Richardson*, 5 Ala. 618.

3. "This right of amendment is not an absolute one. It rests in the sound discretion of the court, and upon such terms as the court may deem just." *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 750. See also *Pearson v. Yewdall*, 95 U. S. 294; *Gasquett v. Berry*, 6 Ark. 246.

4. *Sea v. Connecticut Mut. L. Ins. Co.*, 154 U. S. 659.

5. *Beall v. Fox*, 4 Ga. 403; *Loring v. Wittich*, 16 Fla. 327; *Verelst v. Rafael*, Cowp. 425; *Sword-blade Co. v. Dempsey*, 2 Stra. 892; *Hampton v. Rouse*, 15 Wall. (U. S.) 684; *Estis v. Trabue*, 128 U. S. 225; *Inland, etc., Coasting Co. v. Tolson*, 136 U. S. 572; *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486; *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 749.

Prior to the passage of the act now found in U. S. Rev. Stat., § 1005, writs of error were not amendable in the

federal courts. *Carroll v. Dorsey*, 20 How. (U. S.) 206; *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486; *Walton v. Marietta Chair Co.*, 157 U. S. 342; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. (U. S.) 195; *Porter v. Foley*, 21 How. (U. S.) 393.

Amendments Affecting Parties.—A misdescription of the writ of error of parties is generally amendable. *Clapp v. Bromaghan*, 9 Cow. (N. Y.) 304.

So a writ sued out in the name of "A and others" may be amended by the transcript of the record, and the proper names inserted. *Ellison v. State*, 8 Ala. 273; *Colvin v. Owens*, 22 Ala. 782; *Beall v. Fox*, 4 Ga. 403.

Insertion of Names.—So the names of parties duly served below, and shown by the record, may be inserted in *Georgia*. *Cox v. Macon, etc., R. Co.*, 12 Ga. 270; *McNulty v. Pruden*, 62 Ga. 138; *Higgs v. Huson*, 8 Ga. 317. But his consent must first produced. *Carey v. Rice*, 2 Ga. 408.

So in *Michigan*. *Spencer v. Fish*, 43 Mich. 226. The *contrary* is held in *Arkansas* under the usual statute. *Gasquett v. Berry*, 6 Ark. 246.

Striking Out Names.—The name of a defendant in error, against whom no judgment was rendered, may be stricken out of the writ of amendment. *Verelst v. Rafael*, Cowp. 425; *Chambers v. Wilkins*, 2 Litt. (Ky.) 145; *Loring v. Wittich*, 16 Fla. 323; *Castleman v. Holmes*, 7 T. B. Mon. (Ky.) 592. But not by striking out one party and inserting another. *Arnold v. Wells*, 6 Ga. 380.

So in *Hodge v. Williams*, 22 How. (U. S.) 88, an amendment making the defendants in error plaintiffs in error, and the plaintiffs in error defendants in error, was refused on the ground that amendment presupposed jurisdiction of the case, and the writ, being sued out in the name of the wrong parties, could not confer jurisdiction.

5. Amendment Based on Record.—The corrections proposed to be made by the amendment must be shown by the record.¹ Since the court has no jurisdiction of the record below, it cannot amend that part of the writ which accurately copies the trial court record below, until that record is amended.²

Adding Parties Joined Below.—A writ of error may be amended by adding parties joined below by supplemental pleadings. *Toulmin v. Hamilton*, 7 Ala. 366.

Names of Judges.—Where a citation was issued in the names of two judges of the Supreme Court, and one is omitted in violation of a rule of court, it may be amended. *Williamson v. Nabers*, 14 Ga. 285.

Omitted Parties.—Where a part of the sureties who had appeared in an action for breach of a bond, sued out a writ of error to a judgment entered against the principal and all the sureties, without joining the principal or those sureties who had made default, a motion to amend the writ by adding the omitted parties, or for a severance of those parties, will be denied. *Mason v. U. S.*, 136 U. S. 581.

Wrong Teste and Seal.—Under the act now constituting section 1005, Rev. Stat. U. S., the court has allowed a writ of error to be amended which bore a wrong teste and seal. *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486; *Course v. Stead*, 4 Dall. (U. S.) 25.

Wrong Return Day.—Or which contained a wrong return day. *Hampton v. Rouse*, 15 Wall. (U. S.) 684; *Semmes v. U. S.*, 91 U. S. 21; *National Bank v. Bank of Commerce*, 99 U. S. 608. Or no return day at all. *Atherton v. Fowler*, 91 U. S. 143; *Mossman v. Higginson*, 4 Dall. (U. S.) 12; *Evans v. Brown*, 109 U. S. 180.

Describing Party by Partnership Name.—Or which described either party by the name of a partnership, and not by the names of the individuals composing it. *Moore v. Simonds*, 100 U. S. 145; *Gumbel v. Pitkin*, 113 U. S. 545; *Estis v. Trabue*, 128 U. S. 225; *U. S. v. Schoverling*, 146 U. S. 76.

Error in Christian Name.—Or gave the Christian name of the plaintiff below and defendant in error as Henry, when it appeared from the record that it should have been George. *Pacific Bank v. Mixer*, 114 U. S. 463.

Naming Only One Defendant in Error.—

Or named only one defendant in error when there were more. *Knickerbocker L. Ins. Co. v. Pendleton*, 115 U. S. 339.

Substitution of One Name for Another.—In *Walton v. Marietta Chair Co.*, 157 U. S. 342, the name Lowell W. Ellenwood was allowed to be substituted, as a party to the writ of error, for W. N. Walton.

Failure to Attach Writ to Transcript.—So the failure to attach the writ of error to the transcript is an amendable defect. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. Rep. 749.

Omission to Name District.—A writ of error addressed "to the judges of the Circuit Court holden in and for the district aforesaid," whereas no district was previously named, is amendable. *Course v. Stead*, 4 Dall. (U. S.) 25.

1. *Anderson v. Darien Bank*, 5 Ga. 582; *Cox v. Macon, etc., R. Co.*, 12 Ga. 270; *Beall v. Fox*, 4 Ga. 403; *Parks v. Johnson*, 79 Ga. 567; *Ellison v. State*, 8 Ala. 273; *Hearne v. Harbison*, 9 Ala. 731; *Lyon v. Malone*, 4 Port. (Ala.) 414; *Branch Bank v. Murphy*, 7 Ala. 577; *Finney v. Crawford*, 2 Watts (Pa.) 294; *McVeigh v. U. S.*, 8 Wall. (U. S.) 640; *Hamilton v. Moore*, 3 Dall. (U. S.) 371.

By the Citation.—A substitutionary petition in error may be amended by the citation in error. *Hillebrant v. Brewer*, 5 Tex. 566.

2. See article APPEALS—*The Transcript on Appeal*, vol. 2, p. 258. See also article CERTIORARI. *Smith v. Hornback*, 3 A. K. Marsh. (Ky.) 379; *Hobbs v. Staples*, 19 Me. 219; *Hutchinson v. Crossen*, 10 Mass. 251.

So in *Judson v. Blanchard*, 3 Conn. 579, it was held that on a writ of error sued out to the Supreme Court from a judgment of a superior court, rendered on a writ of error from a county court, the Supreme Court could not allow the writ of error to be amended by inserting a true copy of the county court decree, instead of a false one, as this would be to change the record of the superior court.

6. Where Amendment Unnecessary.—Immaterial variations between the record and the writ of error, or trifling defects, will not support a motion to dismiss the writ. They will be disregarded by the appellate court.¹

1. United States.—Peale *v.* Phipps, 8 How. (U. S.) 256; Mills *v.* Paul, 4 Tex. Civ. App. 503.

So a writ of error which describes the judgment of the court below to be for five hundred dollars and a specified amount of costs, will apply to a judgment for five hundred dollars and costs in that behalf expended generally, rendered in the same court, on the same day, and between the same parties, as specified in the writ of error; the variance is immaterial. Sherman *v.* Lovejoy, 30 Miss. 105.

Surplusage.—Thus surplusage may be disregarded as immaterial. Mills *v.* Paul, 4 Tex. Civ. App. 503.

Clerical Errors.—Mere clerical errors,

which might have been amended below, are not ground for dismissal. Allen *v.* Traylor, 31 Tex. 124.

Unless a party is misled thereby. Davidson *v.* Lanier, 4 Wall. (U. S.) 447.

Initial Name.—So where the middle initial of a plaintiff in error, as described in the original writ, was omitted in the writ of error, this was held to constitute immaterial variance. Bletch *v.* Johnson, 40 Ill. 116.

Rule of Court as to Clerical Inaccuracies.—Clerical inaccuracies are amendable under a rule of court so providing, without express authority of statute. Demoss *v.* Camp, 5 How. (Miss.) 516.

ESCAPE, PRISON BREAKING, RESCUE.

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I. DEFINITION.—An escape is where one in lawful custody gains his liberty before he is delivered by the course of the law. Where the liberation of the party is effected either by himself or by others without force, it is more properly called an *escape*; where it is effected by the party himself with force, it is called *prison breaking*; and where it is effected by others with force, it is commonly called a *rescue*.¹

II. IN CRIMINAL CASES—1. **Indictment or Information**—*a.* **FOR THE ESCAPE ITSELF.**—An indictment or information against a prisoner for effecting his escape should show the original cause of imprisonment,² and by what authority he was delivered into custody—so that the lawfulness of the custody will appear³—and that the prisoner did escape and go at large.⁴

1. 1 Russ. Cr. (9th Am. ed.) 581. See also 3 Bac. Abr. 391.

2. *Rex v. Fell*, 1 Salk. 272; *Wightman v. Mullens*, 2 Stra. 1226; 1 Chitty's Crim. Law 228; Bac. Abr., Indictment, G, 1.

3. 2 Chitty's Crim. Law (5th Am. ed.) 159.

Sufficient Information.—An information at common law, alleging "that Doud, in pursuance of a judgment of the court, was, on the 27th of December, 1828, lawfully imprisoned in the common gaol of Litchfield county, for a certain assault and battery by him before that time committed; and, being so imprisoned, did, on said 27th of December, with force and arms, wilfully, unlawfully, and feloniously escape from and out of said gaol, against the will and without the license and consent of the keeper thereof; which doings of said Doud were against the peace, contrary to the laws of this state, and of evil example to others in like manner offending," was held sufficient. *State v. Doud*, 7 Conn. 385.

Kansas Statute.—In *State v. Hollon*, 22 Kan. 580, an information which did not show that the sheriff had, at the time of the alleged escape, or at any other time, a certified copy of the sentence, as is required under section 256 of the Criminal Code of Kansas (Gen.

Stat. 861), or that he had any other paper by which to hold the defendant in custody, was held defective and rightfully quashed.

Allegation of Former Conviction Traversable.—Where a convict is indicted for escape, and it is alleged that he was convicted and sentenced for a certain crime in a certain county, the fact that the accused is the same person who was convicted or sentenced in the said county is a material and traversable averment in the indictment, and pleading the general issue is not an admission of identity in respect to that conviction or sentence. Such conviction must be shown by the record, and the identity of the person by other evidence. *State v. Murphy*, 10 Ark. 74. The correctness of this decision is questioned in *State Bank v. Minikin*, 12 Ark. 719.

4. In an indictment for an escape it is sufficient to set out that the prisoner did escape, and this may be expressed by other words than *exivit ad largum*. *State v. Maberry*, 3 Strobb. (S. Car.) 144.

For the Earlier Practice, that every such indictment must expressly show that the prisoner went at large, which was most properly expressed by the words *exivit ad largum*, see 2 Hawk. P. C. 19, § 5.

Contract of Service to Secure Payment of Fine.—An indictment under a statute for escape from a contract of service to secure the payment of a fine should follow the statute strictly.¹

b. FOR AIDING AN ESCAPE.—An indictment for aiding a prisoner to escape should show that the defendant had knowledge that the prisoner was in legal custody.² But when the facts alleged show a guilty knowledge it may not be necessary to allege such fact.³ If, however, the acts charged are in their nature innocent, and are only made criminal by a knowledge that the prisoner was in custody, such knowledge should be alleged.⁴

1. An indictment under the *Alabama* statute (Acts 1882-83, p. 166), for escape from a contract of service entered into to secure the payment of a fine, should show with certainty that the contract was in writing, that it was signed in open court, and that it was approved by the justice or judge who rendered the judgment of conviction, or a lawful custody is not shown. *Smith v. State*, 81 Ala. 74.

Fine and Costs and Other Advances.—An indictment against a convict which alleges that he left or escaped from the service of the surety before the said fine and costs and *other advances* were paid, is fatally defective, as the statute only includes the fine and costs. *Wynn v. State*, 82 Ala. 55.

2. *Rex v. Young*, 1 Russ. on Crimes 604, note (x). See also *infra*, II. 1. e. *For Rescue*.

Confined by Order of State or City Court.—An information charging the defendant with aiding, counseling, and advising certain persons confined in the city prison, under conviction for misdemeanors, to make their escape therefrom, contrary to the ordinances of the city, need not allege whether the persons so confined were held under convictions by city or state courts. If such an information substantially follows the language of the ordinance under which it is framed, it will be sufficient. *De Soto v. Brown*, 44 Mo. App. 148.

3. *Com. v. Filburn*, 119 Mass. 299.

Alabama Statute.—The offense defined—section 4130, Code of Alabama—has three main ingredients: First, a prisoner confined under a lawful charge or conviction of felony; second, the conveying into the jail, etc., some disguise or instrument useful to aid the escape; and, third, the intent thereby to facilitate the escape of such prisoner; and an indictment charging the

offense substantially in the language of the statute is sufficient, though it does not aver that the defendant knew that the prisoner was confined on the charge of felony. *Wilson v. State*, 61 Ala. 151. See also *Holland v. State*, 60 Miss. 939.

4. *Com. v. Filburn*, 119 Mass. 299.

In *State v. Lawrence*, 43 Kan. 125, the court, by Johnston, J., said: "An indispensable ingredient of the offense sought to be charged is the knowledge of the accused that the person assisted was in legal custody; and unless this knowledge is alleged, or the acts charged to have been done by the defendant necessarily imply knowledge, an offense is not adequately pleaded. * * * For instance, if the defendant had furnished a prisoner confined in the jail instruments which could only have been intended to facilitate an escape, or had broken the prison door, or had forcibly assaulted or obstructed an officer who had a prisoner in charge, an express allegation of knowledge that the prisoner was in legal custody might not be necessary; but where the acts done are in their nature innocent, such knowledge should be stated."

Michigan.—But in Michigan it is held that the information is sufficient if it charges the offense substantially in the language of the statute, with a statement of the facts out of which the offense arose, and that the information need not, in express terms, allege that the respondents had knowledge that the prisoner was in custody, or that the acts were done with an intent to aid his escape. *People v. Murray*, 57 Mich. 396.

Texas.—In *Vaughan v. State*, 9 Tex. App. 563, it is held that an indictment in such a case, to be sufficient, should allege that the defendant, knowing that the sheriff had the custody of a prisoner, and with intent to aid in the es-

Aiding Felon.—Where the offense is aiding a prisoner confined upon a charge of felony, the indictment must clearly show that the prisoner is confined upon a charge of felony.¹ It need not, however, set out at length the indictment against the prisoner to whom aid was given, the substance of the charge being sufficient.²

All the Essential Elements of the Offense, as defined by the particular statute under which the indictment is drawn, must be clearly alleged.³

cape of said prisoner, did wilfully make an assault upon the sheriff, describing the character of the assault, and that the assault so made was calculated to effect the escape of the prisoner.

1. *Kyle v. State*, 10 Ala. 236; *People v. Washburn*, 10 Johns. (N. Y.) 160.

Under the *Alabama* Crim. Code, §§ 4002 and 4003, it is essential that the indictment charging the offense of aiding an escape should aver that the prisoner was confined on a charge for a felony or a misdemeanor, as the case may be. *Trammel v. State* (Ala. 1896), 20 So. Rep. 631.

Aiding Prisoners Charged with Different Crimes.—An indictment under section 12, chapter 167, Rev. Stat. Wis., charging that defendant at a certain time aided two prisoners to escape who were charged respectively with murder and larceny, does not charge two offenses, although the statute provides a greater penalty for aiding the escape of a prisoner charged with murder than of one charged with larceny. On conviction the defendant would be liable only to the greater punishment. *Oleson v. State*, 20 Wis. 58.

Particular Felony.—In *State v. Addcock*, 65 Mo. 590, it was ruled to be unnecessary under the *Missouri* statute to set out the particular felony with which the prisoner was charged whose escape was sought to be facilitated.

2. *Gunyon v. State*, 68 Ind. 79.

3. *Alabama.*—In an indictment under Code of Ala. 1886, § 4002, Code of 1876, § 4130, after setting out the acts which were done, it is safest in all cases to add the qualifying words, "useful to aid the prisoner in making his escape." The averment that it was done "with the intent to facilitate the escape" is indispensable. *Hurst v. State*, 79 Ala. 58; *Walker v. State*, 91 Ala. 32; *Wilson v. State*, 61 Ala. 151; *Ramsey v. State*, 43 Ala. 404.

Texas—"Conveying"—"*Furnishing*."—In *Francis v. State*, 21 Tex.

280, it was held that if a statute forbids the "conveying" of a thing to a prisoner to aid his escape, an allegation that the defendant "furnished" it will not suffice. And see *Clayton v. State*, 4 Tex. App. 517, for an indictment which was held sufficient to charge the offense of conveying instruments into a jail to aid the escape of a prisoner, notwithstanding its tautology and surplusage.

Setting out Names of Officer's Posse.—An indictment for the crime of aiding and assisting a prisoner in an attempt to escape from the custody of an officer need not set out the individual names of those comprising the officer's posse, and the state may prove that defendant obstructed one of the posse while the prisoner was attempting to escape, though his name is not set out in the indictment. *Perry v. State*, 63 Ga. 402.

Alleging Time of Escape.—It is not a good objection to an indictment for aiding prisoners to escape, that no time is specifically laid in the indictment for the commission of the crime, in view of section 3013 of the *Mississippi* Code of 1880, which provides that "no indictment for any offense shall be held insufficient for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the offense imperfectly, nor stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened." *Holland v. State*, 60 Miss. 939.

Setting out "Means" of Aiding Escape.—By the Statute of Geo. IV., c. 64, § 43, if any person shall deliver to a prisoner in any prison any instrument proper to facilitate his escape, such person shall be deemed to have delivered it with intent to aid and assist such prisoner to escape; and "if any

Several Counts.—The pleader may file several counts with reference to the same offense in order to meet the different aspects of the case and avoid a variance.¹

c. FOR SUFFERING AN ESCAPE—(1) *In General.*—An indictment for suffering an escape, whether negligently or voluntarily, should set out the facts showing that the defendant had the legal custody of the prisoner named;² but it has been held unnecessary

person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape, from any prison, every person so offending; whether an escape be actually made or not, shall be guilty of felony.” It was held, under this statute, that the indictment need not set out the means which were used by the defendant to assist the prisoner to escape. *Reg. v. Holloway*, 15 Jur. 825, 5 Eng. L. & Eq. 310; *Holloway v. Reg.*, 2 Den. C. C. 287.

1. In *Murray v. State*, 25 Fla. 528, the court, by Mitchell, J., said: “The first count of the information charges the defendant with carrying into the jail of Orange county a certain tool, to wit, a saw, with the intent to facilitate the escape of one Raymond, then legally confined in said jail. The second count charges the defendant with an attempt to assist the said Raymond to escape from jail, stating what the attempt was. The contention is that the information charges the defendant with two separate and distinct offenses; but is this correct? Both counts refer to the same transaction, * * * and we cannot see how the defendant could have been misled or how he could have been injured by the information containing the two counts. The pleader, by filing two counts, only did so for the purpose of meeting the different aspects of the case.”

2. *Kavanaugh v. State*, 41 Ala. 399; *State v. Ritchie*, 107 N. Car. 857; *State v. Baldwin*, 80 N. Car. 390; *Weaver v. Com.*, 29 Pa. St. 445; *Bouches's Case*, Cro. Eliz. 200; *Rex v. Bootie*, 2 Burr. 864.

Authority of Officer Issuing Warrant.—No indictment can be maintained against a sheriff for permitting the escape of a person held under arrest by warrant unless the officer issuing the warrant had jurisdiction or legal authority to issue the writ, and this should appear from the indictment. *Martin v. State*, 32 Ark. 129; *Bass v. State*, 29 Ark. 142.

Charged with a Crime—Committed for That Crime.—Judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, charged with a certain crime, but it did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. 1 Russ. on Crimes 587, citing *Rex v. Fell*, 1 Ld. Raym. 424, 1 Salk. 272.

Legal Custody Shown.—In *State v. Baldwin*, 80 N. Car. 393, Dillard, J., said: “The bill charges ‘that at spring term, 1876, of the Superior Court of Macon county, one William A. Shepherd and one Henry W. Watson, charged with the murder of one James P. Luckey, were duly committed to the care, etc.,’ of the defendant. From these words used in the bill, we think it sufficiently appears that the commitment was to the defendant as keeper of the jail, upon a specific charge of murder, and by authority of the Superior Court of Macon county at term, and these essential facts being contained in the bill, the offense is well charged.” Citing *State v. Jones*, 78 N. Car. 420; *State v. Shaw*, 3 Ired. (N. Car.) 20.

Arrest without Warrant.—Where the offense is such that a constable may lawfully have the custody of the prisoner without a warrant, it is not necessary that the indictment in such case should charge that the officer had the prisoner in his custody by virtue of a sufficient warrant, or that a copy of the warrant should be set out. *State v. Sparks*, 78 Ind. 166, 3 Crim. L. Mag. 884.

Prisoners Received by Defendant as Jail Keeper.—An indictment against the keeper of the common jail need not allege that prisoners legally committed to his care were received by him as such keeper; the commitment, the office, and the custody necessarily include the reception. *Weaver v. Com.*, 29 Pa. St. 445.

to allege the particulars of the prisoner's crime and arrest, trial, etc.,¹ nor is it necessary to aver or prove that the keeper had knowledge of the guilt of the prisoner committed to his custody and allowed to escape.² The indictment must show that the prisoner went at large.³ The inapt use of the word "feloniously" when the offense is a misdemeanor is not sufficient ground for quashing the indictment.⁴

The Particular Averments Necessary in drawing the indictment are now largely controlled by statute. If the indictment conforms substantially to the statute it is generally sufficient, but it is always better to follow the exact wording of the statute where it embraces all the essential elements of the offense.⁵

(2) *Duplicity*.—The indictment for suffering a prisoner to escape must, as in other cases, be free from duplicity.⁶

1. In *State v. Hedrick*, 35 Tex. 486, the court, by Walker, J., said: "The indictment does declare that the sheriff had the prisoner Long in his legal custody. It was not only unnecessary, but it would have been improper, and only could have been treated as surplusage, had the pleader averred the particulars of Long's crime and arrest, trial, etc."

2. In *Weaver v. Com.*, 29 Pa. St. 445, the court, by Knox, J., said: "That the guilt is charged is all the knowledge that is required to be brought home to the keeper, and this is sufficiently stated in the averment that the prisoners were committed to his custody, charged with the commission of the offenses named in the indictment."

3. 1 Russ. on Crimes 588. See *supra*, II. 1. a. *For the Escape Itself*.

4. *State v. Sparks*, 78 Ind. 166.

5. **North Carolina — Negligent Escape**.—It is not necessary, in an indictment under the North Carolina statute for negligently permitting an escape, to charge that it was wilfully or unlawfully done; it is sufficient if the act is alleged to have been "negligently" done. *State v. McLain*, 104 N. Car. 894.

An indictment alleging that defendant, a jailer, did negligently permit the escape of prisoners charged by the Superior Court with murder, and that said prisoners were duly committed to his custody as jailer, is sufficient. *State v. Baldwin*, 80 N. Car. 390.

Alabama—Against Hirer of Convict.—An indictment for a negligent escape against the hirer of a county convict is sufficient if it pursues substantially the form prescribed for a negligent escape

by an officer. Code of Alabama, p. 996, form 44. *Smith v. State*, 76 Ala. 69.

Kentucky.—In an indictment against a jailer for voluntarily and wilfully permitting the escape of a prisoner, the allegations that the peace officer who had the prisoner in his custody delivered him to the jailer, with the order of commitment, made out in writing, signed by the magistrate who rendered the judgment, in the manner prescribed by section 60, Criminal Code, are sufficient under section 2, article 16, chapter 28, 1 Stanton's Revised Statutes 396. *Com. v. Mitchell*, 3 Bush (Ky.) 30.

Texas—"Wilfully" Permitting Escape.—Where it is a statutory offense to "wilfully permit" an escape, it will not be sufficient to charge that the defendant did "unlawfully, voluntarily, and unjustly" permit a prisoner to escape. *Barthelow v. State*, 26 Tex. 176.

6. **"Wilfully and Negligently"**.—In *State v. Dorsett*, 21 Tex. 656, the court, by Wheeler, J., said: "The indictment charges that the defendant did 'wilfully and negligently' permit the escape. 'Wilfully' is a word of equivalent or a broader meaning than 'voluntarily.' It certainly includes it. If the word 'wilfully' be stricken out of the indictment, it is a good indictment for a negligent escape, under article 551 of the Digest; and if, on the other hand, that word be retained, and the word 'negligently' be stricken out, it will be a good indictment for a voluntary escape, under article 549 of the Digest. It is therefore demonstrably obnoxious to the objection of duplicity."

Aid, Assist, and Suffer.—A count in

(3) *Variance*.—Under an indictment against an officer for voluntarily permitting an escape, a conviction may be had for a negligent escape, because the greater offense includes the less;¹ but there seems to be doubt as to whether a conviction can be had on proof of a voluntary escape, under an indictment which charges a negligent escape.² The verdict and conviction must in other respects follow the indictment.³

d. FOR PRISON BREAKING.—It must appear on the face of an indictment charging the offense of prison breaking, that the prisoner was in lawful custody,⁴ and an actual breaking must be

an indictment charging that the defendant, as an employee in a penitentiary, did "aid, assist, and suffer" the escape of a prisoner, charges only one offense; the words "aid and assist" being mere surplusage, or expressive of an act by which the defendant "did voluntarily suffer" the convict to escape. *Clemons v. State*, 4 Lea (Tenn.) 25.

1. *Kavanaugh v. State*, 41 Ala. 399; *Nall v. State*, 34 Ala. 262; *Fairchild v. Case*, 24 Wend. (N. Y.) 383.

2. In *Nall v. State*, 34 Ala. 262, it is held that there can be a conviction on such indictment. But in *Kavanaugh v. State*, 41 Ala. 399, Justice Byrd questions that decision.

3. Under an indictment framed on section 87 of the Ill. Crim. Code, making it a penitentiary offense to set at liberty or rescue a person charged with a capital offense, etc., no conviction can be had of one who procures tools to be conveyed to a prisoner for the purpose of facilitating his escape. The indictment should be drawn under section 92, providing imprisonment in the county jail as punishment for such an offense. *Patrick v. People*, 132 Ill. 529.

An indictment against W., under Mississippi Code of 1871, § 2552, charged him with "feloniously aiding and assisting in the escape of a prisoner confined in jail for a felony." The jury found the following verdict: "We, the jury, on our oaths, do find the defendant guilty of negligently permitting the escape of the convict named in the indictment, but not guilty of feloniously aiding or assisting him to escape." It was held that the verdict of the jury acquitted the accused of the offense with which he was charged in the indictment, and found him guilty of an offense defined in section 2557 for which he was not indicted, and that he should be dis-

charged. *Westbrook v. State*, 52 Miss. 777.

The bill charged that the defendant escaped from arrest made under an indictment against him and one D. for an affray; the jury found by special verdict that the prisoner had escaped from the custody of the officer, but that the indictment was for an assault and battery upon D. This was held not a material variance, since, first, the gravamen of the charge was the escape from custody, and, secondly, one may be convicted of an assault and battery under a bill charging an affray by mutual fighting. *State v. Brown*, 82 N. Car. 585.

4. *State v. Jones*, 78 N. Car. 422.

Ancient and Present Practice.—It was commonly the case in ancient times that imprisonments for felony were made by inferior officers and private persons, without a legal *mittimus* in writing and under the seal of a justice of the peace; and in an indictment for a breach of the prison and escape from such imprisonment, it was necessary to aver and prove that a felony was committed, and that there was good ground to suspect the prisoner. But it is now commonly the case that commitments for felony are made by a *capias* on an indictment, or by a regular *mittimus* under the hand and seal of a justice of the peace, for a felony or suspicion thereof, and it is not necessary to aver or prove more than such indictment or lawful *mittimus*, and thus show that the imprisonment was lawful and well grounded. *Com. v. Miller*, 2 Ashm. (Pa.) 67.

Assisting Prisoner to Break Jail.—An indictment for assisting prisoners to break jail, which does not allege that such prisoners had committed any offense, or state facts or circumstances from which the court can see that they were lawfully in prison, is fatally

alleged.¹ It need not be alleged that the prison breach was committed feloniously or unlawfully, if neither of these terms forms part of the statutory definition of the offense, or unless the offense is a felony.² It is, as a general rule, sufficient to charge the offense in the phraseology of the statute.³

e. FOR RESCUE.—The indictment for this offense, as in other forms of escape, should show by what authority the prisoner was held in custody,⁴ and that the defendant, with knowledge that the prisoner was in lawful custody,⁵ did, by force, rescue him.⁶

defective. *State v. Jones*, 78 N. Car. 420.

Attempting to Break Prison.—An indictment for an attempt to escape is sufficient if it alleges that the defendant, while lawfully confined in prison under a judgment of a competent court, for a particular crime, did make an overt attempt to escape therefrom. *State v. Angelo*, 18 Nev. 425.

Jurisdiction of Court Committing Prisoner.—In *State v. Whalen*, 98 Mo. 222, the court, by Barclay, J., said: "Objection was made to the indictment because it charged that defendant was in jail under the judgment and order of a particular court, without any allegation of that court's jurisdiction to commit him. Where the jurisdiction of a court is defined by public statute, as in this instance, it is not necessary to state it in an indictment. 'No indictment shall be deemed invalid * * * for want of the averment of any matter not necessary to be proved.' Rev. Stat. 1879, § 1821. Facts of which the courts take judicial notice are of this character. Among others, the terms of a public law."

1. *Rex v. Burrige*, 3 P. Wms. 484.

"**Breaking out of**" Prison for "**Breaking.**"—In *Randall v. State*, 53 N. J. L. 488, the court, by Dixon, J., said: "The indictment is further objected to because it charges the plaintiff with breaking out of prison instead of breaking prison. Although the latter form of expression is the one sanctioned by the usage of both the common law and the statutes, and therefore is preferable in all legal proceedings, yet we are unable to conjecture how, as applied to a person in prison, his breaking out of prison can mean anything different from his breaking prison."

2. *Randall v. State*, 53 N. J. L. 489.

3. *State v. Johnson*, 93 Mo. 317. And see *Com. v. Barker*, 133 Mass. 399.

An Information for Breaking and Escaping from a "City Prison" is insufficient to convict a prisoner under a statute (§ 182, c. 31, Kansas Comp. Laws 1881) making it a criminal offense to break and escape from "any county jail;" and this notwithstanding the person was lawfully confined in the city prison. *State v. Chapman*, 33 Kan. 134.

4. *Hart's Case*, Cro. Jac. 472; *State v. Hilton*, 26 Mo. 199.

Setting out Process.—In *Com. v. Lee*, 107 Mass. 207, the indictment alleged that the defendant attempted forcibly to rescue Richard Burke, a "prisoner held in the lawful custody of" Ransom F. Clayton, a police officer, on a charge "of the offense of breaking and entering the dwelling house of one Richard Nagle with intent to steal therein;" and that in such attempt the defendant "did take hold of said Burke." It was held that as the offense was a felony, and the arrest might be lawfully made without a warrant, it could not be necessary to set forth in the indictment the process by which he was held or the manner or circumstances of the holding.

Prisoner in House of Correction.—In *Rex v. Freeman*, 2 Stra. 1226, where the defendant was convicted of the rescue of A. from the house of correction, the court arrested the judgment because the indictment did not show for what A. was committed, so as to make the house of correction a proper prison (which *prima facie* it is not for all offenses).

5. *Rex v. Young*, 1 Russ. on Crimes 604, note (x). See *supra*, c. For Suffering an Escape.

6. **Vi et Armis.**—In early English practice *vi et armis* was a necessary allegation in the indictment for rescue. *Hart's Case*, Cro. Jac. 472. But in *Rex v. Cramlington*, 2 Bulst. 208, it is said: "An indictment for a *rescous* will be

Time of Arrest and of Rescue.—It has been held in a number of old cases that an indictment for the offense of rescue must show the day and the year both of the arrest and the rescue;¹ but this doctrine can have little force in view of modern practice and legislation concerning statements of the time of the commission of the offense.

Place of Rescue.—An indictment for rescue will be sufficient although it does not set out the place of the rescue, for it shall be intended where the arrest is made.²

Under Statutes.—Where a statute describes the offense of rescue with legal certainty, an indictment may well charge the offense in the words of the statute;³ and a complaint was held sufficient although it did not charge that the defendant knew that the person alleged to have been rescued was in the lawful custody of a duly authorized officer.⁴

good, though it does not say *vi et armis*, for *rescussit* imports it."

Rescussit or Some Other Word Showing Force.—In *Rex v. Burridge*, 3 P. Wms. 484, Hardwicke, C. J., said: "I believe no man ever saw, either in authority, practice, or precedent, an indictment for a rescue without the word *rescussit*; and certainly that must be charged, or something equivalent to it, to show that it was forcible, and against the will of the officer who had the prisoner in his custody. So in *Foxe's Case*, 2 Dyer 164, *b*; *West's Precedents*, tit. Indictment, §§ 176, 181."

1. "It has been holden," says Chitty, 1 Chit. Crim. Law. 222, "that a sheriff's return of a rescue, as well as indictment for that offense, is bad without showing the day and year both of the arrest and the rescue, and that the time of the latter is not sufficiently shown by showing that of the former. 2 Hawk. P. C., c. 25, § 77; *Foxe's Case*, 2 Dyer 164, *b*. *Contra*, *Rex v. Cramlington*, 2 Bulst. 208. And where an indictment for rescue sets forth that a third person at a certain time and place committed a felony for which the officer took and arrested him, and in his safe custody then and there had and kept him, it is doubtful whether it be not insufficient; because no time of the arrest is alleged in the same sentence, and it is not clear whether the time of the custody can, by force of the conjunction, be applied to the arrest; but the contrary seems to be the better opinion. *Foxe's Case*, 2 Dyer 164, *b*. And see *Rex v. Burrigidge*, 3 P. Wms. 484; *Rex v. Forsyth, R. & R.* 274."

And an indictment for rescue was held insufficient "because the arrest was not laid to be before return of writ." *Rex v. Hoskins*, 12 Mod. 323.

2. *Rex v. Cramlington*, 2 Bulst. 208.

3. *Com. v. Malloy*, 119 Mass. 349; *Williams v. State*, 24 Tex. App. 17. See also *U. S. v. Clapox*, 35 Fed. Rep. 575.

In *Com. v. Malloy*, 119 Mass. 350, the court, by Morton, J., said: "The complaint alleges with sufficient certainty that Curren was arrested and held in the lawful custody of a police officer duly authorized, for the crime of drunkenness, and that, while so in custody, the defendant, 'with force and arms, did forcibly rescue and take out of the lawful custody' of said officer the body of said Curren. These allegations include all the acts necessary to constitute the offense intended to be punished by the statute."

4. **Massachusetts.**—An indictment for rescue under the Massachusetts statute need not allege knowledge upon the part of the defendant that the person alleged to have been rescued was in the lawful custody of an authorized officer. *Com. v. Malloy*, 119 Mass. 347.

Officer or Private Person.—In *State v. Hilton*, 26 Mo. 199, the court said: "The indictment should also state whether the person from whom the rescue was made was a public officer or a private person. (1 Hale P. C. 606.) For, whilst the custody of a person in the hands of a public officer would imply notice that the prisoner was lawfully held and the rescue would be at the peril of the party making it, the

Amendment.—In some jurisdictions the indictment cannot be amended.¹

2. Arraignment and Trial—At Common Law.—At common law a person who has suffered another to escape cannot be arraigned for such an escape as a felony until the principal be convicted or attainted, as he is only punishable in that degree as an accessory to the felony, but he may be indicted and tried for a misdemeanor before any conviction of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape.² The same rules are applicable to the punishment of rescuers.³ But a party may be arraigned for prison breaking before he is convicted of the crime for which he was imprisoned.⁴

Under Statutes.—Where by statute the act of aiding a prisoner to escape is declared to be a felony, a trial may be had of such offense before the trial of the principal offender.⁵ It may also be stated

offense would not exist if the rescue was made from the custody of a private person, unless the defendant knew that the prisoner was under arrest for a felony or misdemeanor."

1. In *Patrick v. People*, 132 Ill. 529, after the conclusion of the argument, the state's attorney was allowed by the court to strike out of the indictment the words "and rescue," and to enter a *nolle prosequi* as to the charge of "attempt to rescue." It was held that this was error, Justice Scholfeld saying: "There is nothing in our statute that purports to authorize any one to change or modify the language of an indictment as presented by the grand jury." See generally, as to amendment of indictment, article AMENDMENTS, vol. 1, p. 688.

2. 1 Russ. on Crimes 587; 4 Black. Com. 130; *Martin v. State*, 32 Ark. 124. See *Com. v. Miller*, 2 Ashm. (Pa.) 61.

Committed for High Treason.—If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is that there are no accessories in high treason. 2 Hawk. P. C., c. 19, § 26.

3. 1 Russ. on Crimes 598; *State v. Cuthbert*, T. U. P. Charlt. (Ga.) 13.

May be Indicted but Not Tried.—Sir Matthew Hale says: "In cases of felony for wilful escape, or rescue of a person committed to prison for felony, though the party that voluntarily permits such escape, or rescues the pris-

oner, may be indicted for these offenses as felonies, before the principal felony in him that escapes or is rescued be tried, yet he shall not be arraigned nor put upon his trial till the principal be convicted or attainted; and the reason is, because possibly the person escaping may be found not guilty, or, if guilty, yet of such a fact as is not capital; for the rescuer and officer that permits the escape are a kind of accessories." 1 Hale P. C. 598.

4. This is so on the ground that it is not material whether the prisoner be guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison itself. 1 Russ. on Crimes 595; 1 Hale 611; 2 Hawk. P. C., c. 18, § 18.

Acquitted of Principal Felony.—But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though, while the principal felony was untried, it was indifferent whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offense, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony. 1 Russ. on Crimes 595, citing 1 Hale 612. See, however, *State v. Lewis*, 19 Kan. 260, where, after the prisoner had been acquitted of the offense for which he was committed, he was convicted of the offense of prison breaking.

5. *State v. Lewis*, 19 Kan. 260; *Reg. v. Holloway*, 15 Jur. 825.

that accessories may now be tried before their principals.¹

Escape Pending Trial.—If a defendant escapes while the trial is pending the verdict may be legally received in his absence.²

3. Summary Proceedings.—At common law an attachment will not be granted against an officer for suffering an escape,³ but a rescue is deemed an offense of such a nature that, whenever the sheriff makes return of any one having been guilty of it, the court will grant an attachment against such person in the first instance;⁴ and as a sheriff's return of a rescue was held not traversable, the court might proceed to punish the rescuers, without going through the ordinary course of examining them upon interrogatories.⁵ The authorities do not agree, however, as to the practice, in the Court of King's Bench, of putting interrogatories where a defendant was brought up on an attachment for rescuing a person from the custody of a public officer.⁶

But the rescue must be returned upon the writ, and the motion of attachment founded upon that; for it is never the course to grant the attachment upon affidavits.⁷

1. See article ACCESSORIES, vol. I, p. 71.

2. *State v. Wamire*, 16 Ind. 357.

In *Fight v. State*, 7 Ohio (pt. 1) 181, the court, by Wood, J., said: "If the trial, however, is once commenced, and the prisoner in his own wrong leaves the court, abandons his case to the management of counsel and runs away, I can find no adjudged case to sustain the position that, in England, the proceedings would be stayed. Such a case must form an exception to the general rule, and the verdict may be legally received in the absence of the accused. The prisoner cannot be deprived of his right to be present at all the stages of his trial; but that he must be, under all circumstances, or the proceedings will be erroneous, cannot, we think, be sustained."

Judgment for Bastardy.—In *Lucas v. Hawkins*, 102 Ind. 64, Niblack, J., says: "Upon a verdict or finding against him, a circuit court may render the same kind of a judgment against a defendant in a prosecution for bastardy when he is absent upon an escape as it may do when he is in custody, and may then bring him into court upon a bench warrant as a means of requiring him to abide by and perform the judgment against him."

3. In *Gaoler of Shrewsbury's Case*, 1 Stra. 532, the court refused to grant an attachment against the gaoler for a voluntary escape of one in execution

for obstructing an excise officer in the execution of his office, but ordered him to show cause why there should not be an information.

4. *State v. Clerk of Bergen*, 25 N. J. L. 211.

The Return of the sheriff is of itself a conviction of the rescue. *Buckminister v. Applebee*, 8 N. H. 546; *State v. Clerk of Bergen*, 25 N. J. L. 211, *Cas. temp. Hard.* 112.

5. *Rex v. Elkins*, 4 Burr. 2129; *State v. Clerk of Bergen*, 25 N. J. L. 211; *Buckminister v. Applebee*, 8 N. H. 546, *citing* 6 Com. Dig., *Rescous*, D. 4; *Arundell v. Arundell*, Yelv. 34; *Rigdon v. Hedges*, 12 Mod. 246; *Fermor v. Phillips*, Holt 537, 3 E. C. L. 213.

6. Thus it has been held that when a defendant is brought up on attachment for a rescue, it is the practice of the court to put interrogatories to him, though he does not deny the charge in the affidavits, unless the prosecutor waive putting them. *Rex v. Horsley*, 5 T. R. 362. See also *Rex v. Belt*, 2 Salk. 586.

But in *Rex v. Elkins*, 4 Burr. 2129, the court were of opinion that the ordinary course of examination upon interrogatories might be dispensed with, as no denial by defendant, upon such examination, could excuse him, after having been returned "guilty of a rescue" by the sheriff.

7. *Per* Holt, C. J., in *Anonymous*, 2 Salk. 586; *Sheather v. Holt*, 1 Stra. 531.

When a Felony.—But the sheriff's return of a rescue is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment.¹

4. Escape and Recapture—*a.* NEW AWARD OF EXECUTION.—At common law, when a prisoner, after having been sentenced to be executed, escapes and is retaken after the day appointed for his execution has passed, a new award of execution must be made by the court to render the original judgment effectual;² but when it is merely a question of reimprisonment no new award of judgment is necessary, but he may at any time be retaken and confined under the original judgment.³

b. PLEA OF NONIDENTITY.—At common law, when the recaptured prisoner was asked why execution should not be again pronounced against him, he might plead orally that he was not the same person against whom the former sentence was given. Issue was then joined by a reply that he was the identical person.⁴ The issue was decided by jury and might be tried *instantly* unless good cause was shown for delay.⁵ No time was allowed the prisoner to produce his witnesses unless he made oath that he was not the person who was convicted,⁶ neither could any peremptory challenges of the jury be allowed the prisoner.⁷

5. Effect on Pending Appeal—*a.* IN GENERAL.—If a prisoner escape pending his appeal, and such fact is properly brought to the attention of the court,⁸ it is within its discretion, in the absence of

1. 1 Russ. on Crimes 598; 1 Hale 606.

2. Haggerty v. People, 53 N. Y. 476; Bland v. State, 2 Ind. 608; State v. Wamire, 16 Ind. 357; Rex v. Ratcliffe, 1 Wils. 150, Foster's Crown Law 40, 18 How. St. Tr. 430.

New York.—The mode of proceeding in cases where, for any reason, sentence of death is not executed at the time appointed, is now regulated in New York by statute. Haggerty v. People, 53 N. Y. 476.

3. **New York.**—In Haggerty v. People, 53 N. Y. 478, reversing 6 Lans. (N. Y.) 332, Rapallo, J., says: "In cases where, before the expiration of a term of imprisonment, the prisoner escapes, no new award of execution is necessary or proper. The prisoner can be retaken at any time, and confined under the authority of the original judgment until his term of imprisonment has been accomplished. If the wrong person should be taken, or if the prisoner's term has in fact expired, he can obtain relief by *habeas corpus*."

4. Rex v. Rogers, 3 Burr. 1810; Rex v. Ratcliffe, 1 Wils. 150, 18 How. St. Tr. 430; 1 Chitty's Crim. Law 777.

Texas—Appeal from Decision of

Jury.—By Texas Code Crim. Pro., art. 799, it is provided that "when a person who has been convicted of felony escapes after conviction and before sentence, and an individual supposed to be the same is arrested, he may, before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury as to his identity." And it is held that no appeal lies from the decision of the trial court on this question. Washington v. State, 31 Tex. Crim. Rep. 84.

5. Rex v. Rogers, 3 Burr. 1811; 4 Blackstone's Com. 396.

6. 4 Blackstone's Com. 396; 1 Chitty's Crim. Law 777; Rex v. Ratcliffe, 1 Wils. 150, 18 How. St. Tr. 430, Foster's Crown Law 40.

7. 4 Blackstone's Com. 396; 1 Chitty's Crim. Law 777; Rex v. Ratcliffe, 1 Wils. 150, 18 How. St. Tr. 430, Foster's Crown Law 40. Though formerly such challenges were held to be allowable whenever a man's life was in question. Co. Litt. 157; Staundf. P. C. 163; 4 Blackstone's Com. 396.

8. **Bringing Matter to Court's Attention.**—Tendering to the court affidavits of the officers having actual knowledge

any statute regulating the procedure, to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the fugitive,¹ but the general, if not universal, rule is for the court to refuse to consider such appeal,² unless at the instance of the state.³

Case Decided without Knowledge of Escape.—But where the court has heard and reversed a case without having been informed of the escape of the prisoner, it will not afterwards set the judgment aside.⁴

b. DISMISSAL OF APPEAL—In General.—In several cases the

of the escape has been held a proper method of bringing the fact of the escape to the attention of the court. *Gentry v. State*, 91 Ga. 669. In *Madden v. State*, 70 Ga. 383, by affidavit of the jailer. In *Territory v. Trinkhouse*, 4 N. Mex. 158, by affidavit of sheriff. In *Sargent v. State*, 96 Ind. 64, the affidavit of the sheriff set forth the facts showing the lawful commitment of the prisoner to his custody, and his escape therefrom.

1. *State v. Jacobs*, 107 N. Car. 772; *State v. Anderson*, 111 N. Car. 689; *McGowan v. People*, 104 Ill. 100.

In *Smith v. U. S.*, 94 U. S. 97, the court, by Waite, C. J., said: "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case."

2. *Alabama*.—*Warwick v. State*, 73 Ala. 486, overruling *Parsons v. State*, 22 Ala. 50.

California.—*People v. Redinger*, 55 Cal. 290.

Florida.—*Woodson v. State*, 19 Fla. 549.

Indiana.—*Sargent v. State*, 96 Ind. 63.

Kentucky.—*Wilson v. Com.*, 10 Bush (Ky.) 526.

Maine.—Anonymous, 31 Me. 592.

New York.—*Matter of Genet*, 1 Hun (N. Y.) 292; *Matter of O'Byrne*, 55 Hun (N. Y.) 438; *People v. Genet*, 59 N. Y. 80; *People v. Sharkey*, 1 Hun (N. Y.) 300.

North Carolina.—*State v. Anderson*, 111 N. Car. 689.

South Carolina.—*State v. Rippon*, 2 Bay (S. Car.) 100; *State v. Murrell*, 33 S. Car. 83.

Texas.—*Moore v. State*, 44 Tex. 595; *Dement v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 358; *Loyd v. State*, 19 Tex. App. 137.

Utah.—*People v. Tremayne*, 3 Utah 333.

Virginia.—*Leftwich v. Com.*, 20 Gratt. (Va.) 716.

United States.—*Smith v. U. S.*, 94 U. S. 97.

England.—*Reg. v. Caudwell*, 17 Q. B. 503, 79 E. C. L. 503.

Waives Right of Appeal.—In *Com. v. Andrews*, 97 Mass. 543, the court, by Bigelow, C. J., said: "So far as the defendant had any right to be heard under the constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed."

Refusal to Seal Exceptions after Escape.—In *People v. Genet*, 59 N. Y. 80, an application to compel the sealing of a proposed bill of exceptions, where the prisoner was convicted of a felony and had escaped, was denied.

3. *Moore v. State*, 44 Tex. 595.

Contra.—But in *People v. Genet*, 59 N. Y. 80, it is said that "his being in custody is necessary to any step for or against him, except such as may be taken to bring him again into custody." And see *People v. Sharkey*, 1 Hun (N. Y.) 300.

4. *Leftwich v. Com.*, 20 Gratt. (Va.) 716.

writ of error or appeal has been summarily dismissed on motion, upon proper affidavit of the escape of the plaintiff in error;¹ but the usual practice is in the order of dismissal of the writ of error or appeal to allow the convict a reasonable time to surrender himself to the proper custody and submit to the jurisdiction of the court.² In a few cases, however, the courts have refused to dismiss the appeal.³ The court will determine what is a reasonable time to allow for submission to its jurisdiction, from the character and circumstances of the case.⁴

Without Notice to Plaintiff or Attorney.—The appellate court may make such order of dismissal without previous notice to the

1. *Sargent v. State*, 96 Ind. 64; *Wilson v. Com.*, 10 Bush (Ky.) 526; *Zardenta v. State* (Tex. Crim. App. 1893), 23 S. W. Rep. 684; *Gatliff v. State* (Tex. Crim. App. 1894), 28 S. W. Rep. 466; *Dement v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 358; *State v. Anderson*, 111 N. Car. 689; *Territory v. Trinkhouse*, 4 N. Mex. 158; *State v. Craighead*, 44 La. Ann. 968.

2. *Gentry v. State*, 91 Ga. 669; *Smith v. U. S.*, 94 U. S. 97; *Sherman v. Com.*, 14 Gratt. (Va.) 677; *People v. Redinger*, 55 Cal. 290; *Woodson v. State*, 19 Fla. 549; *State v. Sites*, 20 W. Va. 13; *State v. Connors*, 20 W. Va. 1; *McGowan v. People*, 104 Ill. 100.

In *Gentry v. State*, 91 Ga. 669, the court, by Lumpkin, J., said: "In several of these cases the writ of error was summarily dismissed. In others, however, the plaintiff in error was afforded an opportunity to surrender himself to the proper custody and submit to the jurisdiction of the court. On the whole, we are satisfied, after reflection, that the latter method of procedure is the safer and better practice, and accordingly it has been followed in the present case. By observing this practice, a person convicted of crime is not absolutely cut off from all right to have the legality of his conviction tested by the reviewing court; but at the same time he is given to understand that the court will not undertake to decide his case, and leave him free to accept or reject, as he may please, the judgment it may render."

Dismissed after Case has been Argued.—The writ of error, although the case has been argued, if not decided, before the escape takes place, will be dismissed, after giving the accused a reasonable time to surrender himself to the proper custody so as to insure submission to the judgment of this

court when rendered. *Gentry v. State*, 91 Ga. 669.

3. **New York.**—In *People v. Sharkey*, 1 Hun (N. Y.) 300, the court refused to quash the writ of error, and by Davis, P. J., said: "The effect of this act (escape) is to leave the case *in statu quo*, so far as action of the convict is concerned. The court would not, therefore, take any action on his motion or behalf. But it does not follow that courts may, on motion of the people, deprive him of the benefit of proceedings already taken before his escape. We think, therefore, that the writ of error should not be quashed." See also *Matter of Genet*, 1 Hun (N. Y.) 292; *People v. Genet*, 59 N. Y. 80.

North Carolina.—Formerly it was the practice in North Carolina not to dismiss. *State v. McMillan*, 94 N. Car. 945; *State v. Pickett*, 94 N. Car. 971; *State v. Brocksville*, 94 N. Car. 972. But it is now held that the necessity of the rule has been obviated by statute, and that it is in the discretion of the court to dismiss the appeal. *State v. Jacobs*, 107 N. Car. 772; *State v. Anderson*, 111 N. Car. 689.

4. *Moore v. State*, 44 Tex. 595.

Till Next Term of Court.—Until the next term of the court, after the motion to dismiss the writ of error, has been held to be a reasonable time to allow for submission to the jurisdiction. *Woodson v. State*, 19 Fla. 549; *Smith v. U. S.*, 94 U. S. 97.

Texas—Ten Days.—If a convict escapes from jail pending the appeal, and does not voluntarily return to custody within ten days, the appeal will be dismissed. *Hamilton v. State* (Tex. Crim. App. 1893), 23 S. W. Rep. 683; *Loyd v. State*, 19 Tex. App. 137; *Hammons v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 780.

plaintiff in error or his attorney.¹

Conditional Dismissal.—It has been held to be in the discretion of the court to make a conditional dismissal without prejudice to a reinstatement of the appeal,² and unless this method is followed it seems that the dismissal in some jurisdictions is final.³

Return or Recapture before Dismissal.—If, however, the escaped convict voluntarily returns or is recaptured before the appeal is dismissed, the court will then hear the appeal.⁴

III. CIVIL PROCEEDINGS—1. Election of Remedies—*a.* IN GENERAL.—When a debtor escapes from arrest or commitment on execution, the creditor may proceed against the sheriff for the escape, or he may pursue the debtor with fresh process,⁵ and

1. *State v. Sites*, 20 W. Va. 13; *Warwick v. State*, 73 Ala. 486.

2. In *State v. Johnson*, 44 S. Car. 556, it was ordered that "the appeal be dismissed, without prejudice, however, to the appellant's right to move to have his appeal reinstated, if he hereafter shall place himself or be brought within the jurisdiction of the court."

Until Further Orders.—In *Bonahan v. Nebraska*, 125 U. S. 692, the order was that the case be left off the docket until directions to the contrary.

3. *State v. Johnson*, 44 S. Car. 556.

Texas—Jurisdiction Resumed.—The Court of Appeals can resume jurisdiction of an appeal dismissed because of the escape of the appellant from custody after his conviction, and pending his appeal, only when it is made clearly to appear that the appellant's return to custody was voluntary and not compulsory, and that it was made within ten days. *Loyd v. State*, 19 Tex. App. 137. See also *Gresham v. State*, 1 Tex. App. 458.

Rule in General.—For the effect of a dismissal of appeal in general, see article APPEALS, vol. 2, p. 335.

4. *Moore v. State*, 44 Tex. 595; *State v. Stewart*, 47 La. Ann. 410; *State v. Colby* (Iowa, 1894), 61 N. W. Rep. 187.

South Carolina.—An appeal will be dismissed on motion of the state where it is shown that defendant escaped from jail pending the appeal, and that since his recapture, three years later, he has allowed several months to elapse and no action has been taken, either by his attorneys of record or himself, to prosecute his appeal. *State v. Murrell*, 33 S. Car. 83.

5. *Appleby v. Clark*, 10 Mass. 59;

Brown v. Getchell, 11 Mass. 11; *Cheever v. Mirrick*, 2 N. H. 376; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; *Sharp v. Caswell*, 6 Cow. (N. Y.) 65; *McManaman's Petition*, 16 R. I. 358; *Osborne v. Bowman*, 2 Bay (S. Car.) 208; *Stuart v. Hamilton*, 8 Leigh (Va.) 508; *Fawkes v. Davison*, 8 Leigh (Va.) 554; *Taylor v. Thomson*, 5 Pet. (U. S.) 369; *Basset v. Salter*, 2 Mod. 136; *Allanson v. Butler*, 1 Sid. 330.

A New Execution may issue before the return of the first one. *Eads v. Wynne*, 79 Hun (N. Y.) 463. And see, as to the old practice, *Sharp v. Caswell*, 6 Cow. (N. Y.) 65.

In *Stuart v. Hamilton*, 8 Leigh (Va.) 509, the court held that upon the escape of the debtor it was competent to the creditor either to retake him by an escape warrant, or to waive his *ca. sa.* and sue out a *scire facias*, and so proceed by *elegit* to extend the lands and tenements which were of the debtor at the date of the original judgment.

Early English Practice.—Under the early English practice, when a defendant escaped, the plaintiff's remedies were first, by taking out fresh process against him; second, by obtaining an escape warrant for retaking him; and, third, by action or attachment against the sheriff or officer for an escape; which remedies could be pursued as well where the escape was voluntary as where it was only negligent. 2 Bac. Abr., tit. Escape, C. E. 3. And see Stat. 8 & 9 Wm. III., c. 26; 7 Moore 552; *Ibbotson v. Tindal*, 1 Bing. 156, 8 E. C. L. 449, 1 Tidd's Pr. 235.

Method of Taking out New Process.—When the commitment of the debtor appeared of record by the return of the execution, the English practice was for the creditor, if he wished to reimprison

these alternative remedies are available to the plaintiff notwithstanding the fact that when the escape of the debtor is voluntary the sheriff cannot of his own motion lawfully retake him.¹

b. AFTER SURRENDER.—If the prisoner, after escape, surrenders himself to the sheriff, the plaintiff may elect to bring his action against the sheriff for the escape, or to affirm the prisoner in custody under the original commitment.²

the debtor, to sue for a new execution against him in *scire facias*. *McManaman's Petition*, 16 R. I. 360. As to suing out new process in this connection, see article EXECUTION AGAINST THE PERSON AND ARREST IN CIVIL CASES.

1. *Farnsworth v. Tilton*, 1 D. Chip. (Vt.) 297. See also *Appleby v. Clark*, 10 Mass. 59; *Brown v. Getchell*, 11 Mass. 15; *Cheever v. Mirrick*, 2 N. H. 376; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Littlefield v. Brown*, 1 Wend. (N. Y.) 405; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; *Wesson v. Chamberlain*, 3 N. Y. 331; *Windrum v. Parker*, 2 Leigh (Va.) 361; *Basset v. Salter*, 2 Mod. 136; *Blomfield v. Roswick*, Cro. Eliz. 555; *Cro. Car.* 75; *Parkhurst v. Powell*, Cro. Jac. 532.

Mesne Process—Escape before Return of Writ.—It has been held that a bailiff who has taken a prisoner under mesne process may retake him before the return of the writ, although the escape was voluntary. *Atkinson v. Matteson*, 2 T. R. 172.

Sheriff's Return—Effect upon Liability as Bail.—If the sheriff to a writ of *capias ad respondendum* returns an escape, this negatives the theory of his having become bail, and an action for the escape will lie. *Lusk v. Falls*, 63 N. Car. 190; *Tuton v. Sheriff*, 1 Hayw. (N. Car.) 485. And in such a case it is said that an action for the escape seems to be the only proper remedy. *Hart v. Lanier*, 3 Hawks (N. Car.) 244; *Swepson v. Whitaker*, 1 Hayw. (N. Car.) 225.

Massachusetts.—A creditor is not under the necessity of taking a prison bounds bond, but may elect to charge the officer in an action for the escape. *Clap v. Cofran*, 7 Mass. 101; *Clapp v. Hayward*, 15 Mass. 276.

Right to Another Ca. Sa. Not Conclusive upon Other Remedies.—In *Jackson v. Hampton*, 6 Ired. (N. Car.) 36, it was held that while a creditor might,

if he chose, have another *ca. sa.* (citing *Jones v. Pope*, 1 Saund. 35, note 1), he was not bound to proceed in this way, but might look at once to the sheriff for the escape, or to any other security he might have, and his omission or refusal to retake the debtor, either on the same or another execution, does not amount to discharging him from lawful arrest.

Action on Bond for Jail Limits Cumulative.—It has been held in *Rhode Island* that the remedy by suit upon a bond for the jail limits, under the statute (R. I. Pub. Stat., c. 225), does not take away the common-law right of recommitment on a new execution, but is merely cumulative. *McManaman, Petitioner*, 16 R. I. 358.

And in *Virginia* the creditor who had an assignment of such bond was not bound to sue upon it, but might have brought his action against the sheriff. *Meredith v. Duval*, 1 Munf. (Va.) 76. See also *Clark v. Moore*, 3 Brev. (S. Car.) 62.

Kansas—Voluntary Escape.—The liability of the sheriff as bail created by sections 164 and 165 of the Civil Code of Kansas is not a liability as a substitute for the common-law liability for an escape, and where there has been a voluntary escape of a person held on mesne process, an action may be prosecuted against the sheriff by the party injured for the actual damage sustained, although the suit in which the debtor was arrested had never been prosecuted to final judgment. *Crane v. Stone*, 15 Kan. 94.

2. *Browning v. Rittenhouse*, 38 N. J. L. 281, 40 N. J. L. 230; *Rawson v. Turner*, 4 Johns. (N. Y.) 469; *James v. Peirce*, 2 Lev. 132.

As to waiving right of action for escape, see *Currie v. Worthy*, 3 Jones (N. Car.) 315; *Browning v. Rittenhouse*, 38 N. J. L. 279; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Hotchkiss v. Whitten*, 71 Me. 578. See also *Am. and Eng. Encyc. of Law*, tit. Escape.

c. DECISION OF ELECTION.—When the plaintiff commences an action against the sheriff, this is said to be decisive of his election.¹

2. What Action Lies—*a.* AT COMMON LAW—CASE.—Under the ancient common law an action on the case was the only action which could be resorted to for an escape, either upon mesne or final process.²

b. UNDER STATUTE—CASE OR DEBT.—But at an early day the remedy was enlarged by statute,³ and, in addition to an action on the case, a party was permitted thereunder to bring an action in debt to recover against an officer for an escape.⁴ And these early English statutes were generally adopted in the United States, and the action of debt was recognized thereunder as a proper remedy for escape under final process in those jurisdictions where imprisonment for debt obtained;⁵ and in some states the

Appearance of Sheriff in Original Suit.—Where a sheriff by leave appeared and defended the original suit, it was held that the proceeding was wholly void except to ascertain the extent of the sheriff's liability, and therefore the plaintiff did not elect to treat the defendant in custody nor discharge the sheriff. *Scarborough v. Thornton*, 9 Pa. St. 452.

1. *Littlefield v. Brown*, 1 Wend. (N. Y.) 405.

And in such a case the creditor cannot insist that the debtor be retaken or continued in custody. *M'Elroy v. Mancius*, 13 Johns. (N. Y.) 121; *Littlefield v. Brown*, 1 Wend. (N. Y.) 398; *Rawson v. Turner*, 4 Johns. (N. Y.) 469; *Ex p. Voltz*, 37 Ind. 175. Though it is also said that the plaintiff may take the property of the debtor pending such an action notwithstanding he cannot take his person. *Littlefield v. Brown*, 1 Wend. (N. Y.) 398.

Election to Sue Sheriff—Effect as to Sheriff.—When the plaintiff elects to sue the sheriff, if he fails in his suit he has no further remedy against the sheriff; but must then pursue his remedy against the original debtor. *Littlefield v. Brown*, 1 Wend. (N. Y.) 405. But where the plaintiff has another legal remedy against a sheriff for an escape, the fact that he does not pursue such a remedy cannot be construed as an abandonment of his legal remedy in an action for an escape. *State v. Lawson*, 2 Gill (Md.) 63.

2. *Illinois*.—*Plumleigh v. Cook*, 13 Ill. 669.

Indiana.—*Gwinn v. Hubbard*, 3 Blackf. (Ind.) 14; *Hall v. Johnson*, 3 Blackf. (Ind.) 363; *State v. Hamilton*,

33 Ind. 502; *State v. Newcomer*, 109 Ind. 243.

Maine.—*Fullerton v. Harris*, 8 Me. 397.

Maryland.—*State v. Lawson*, 2 Gill (Md.) 71.

Massachusetts.—*Burrell v. Lithgow*, 2 Mass. 526.

New Hampshire.—*Lovell v. Belhows*, 7 N. H. 375.

New York.—*Barnes v. Willett*, 19 How. Pr. (N. Y. Supreme Ct.) 564; *Rawson v. Dole*, 2 Johns. (N. Y.) 454.

North Carolina.—*Lusk v. Falls*, 63 N. Car. 189.

Ohio.—*Richardson v. Spencer*, 6 Ohio 13.

Pennsylvania.—*Smith v. Com.*, 59 Pa. St. 320; *Shuler v. Garrison*, 5 W. & S. (Pa.) 456; *Shewel v. Fell*, 3 Yeates (Pa.) 21.

United States.—*Steere v. Field*, 2 Mason (U. S.) 486.

England.—*Bonafous v. Walker*, 2 T. R. 126.

3. *Westminster* 2, c. 11 (13 Edw. I.); *1 Richard II.*, c. 12.

4. *Plummer v. Whitcho*, 2 Mod. 119; *Jones v. Pope*, 1 Saund. 38, note (2); *Rex v. Lenthal*, 3 Mod. 145.

5. *Illinois*.—*Plumleigh v. Cook*, 13 Ill. 669.

Indiana.—*Gwinn v. Hubbard*, 3 Blackf. (Ind.) 14; *State v. Hamilton*, 33 Ind. 504.

Maine.—*Fullerton v. Harris*, 8 Me. 393.

Maryland.—*State v. Lawson*, 2 Gill (Md.) 62.

Massachusetts.—*Porter v. Sayward*, 7 Mass. 377; *Burrell v. Lithgow*, 2 Mass. 526.

remedy is given by express provision of statute,¹ while in other jurisdictions the action of debt for an escape was abolished after it had for some time been an appropriate remedy therein.²

c. VOLUNTARY OR NEGLIGENT ESCAPE.—The action of debt may be resorted to whether the escape is voluntary, that is, with the sheriff's consent, or negligent, without his consent.³

d. ESCAPE ON MESNE PROCESS.—Statutes permitting debt as an additional remedy to case extend only to arrest on final process, and when the escape is from an arrest under mesne

New Hampshire.—*Lovell v. Bel-
lows*, 7 N. H. 375.

New York.—*Rawson v. Dole*, 2
Johns. (N. Y.) 454.

North Carolina.—*Wiley v. Eure*,
8 Jones (N. Car.) 321.

Pennsylvania.—*Shewel v. Fell*, 3
Yeates (Pa.) 17; *Shuler v. Garrison*,
5 W. & S. (Pa.) 456; *Smith v. Com.*,
59 Pa. St. 320; *Duncan v. Klinefelter*,
5 Watts (Pa.) 144; *Karch v. Com.*, 3
Pa. St. 273.

United States.—*Steere v. Field*, 2
Mason (U. S.) 486; *U. S. v. Brent*, 1
Cranch (C. C.) 526.

1. *Sandford v. Colfax*, 4 N. J. L. 134;
Browning v. Flanagan, 22 N. J. L. 574;
Long v. Palmer, 16 Pet. (U. S.) 68.

**Effect of Abolition of Forms of Action
under the Code.**—In *Barnes v. Willett*,
19 How. Pr. (N. Y. Supreme Ct.) 564,
it was held that the abolition by the code
of the forms of action did not take away
the right to recover for an escape by
stating the facts which showed the
right to recover under a statute making
debt a proper action in such a case.
See also *McCreery v. Willett*, 23 How.
Pr. (N. Y. Super. Ct.) 129; *State v.*
Hamilton, 33 Ind. 504.

In *Ohio* it was held that the action of
debt could not be brought for an escape,
because the English statute had not
been adopted in *Ohio*, and no statute
had been passed in that state allowing
the action in such a case. *Richardson*
v. Spencer, 6 Ohio 13.

Difference between Debt and Case.—
The difference between the actions of
debt and case rests in the different
measure of damages applicable to
these two forms of action; in case the
measure of damages being uncertain
and depending upon the actual damage
sustained, while in debt the amount is
fixed. *Stone v. Wilson*, 10 Gratt.
(Va.) 539; *Duncan v. Klinefelter*, 5
Watts (Pa.) 144; *Shewel v. Fell*, 3
Yeates (Pa.) 17; *Plumleigh v. Cook*,
445.

13 Ill. 669; *Browning v. Flanagan*, 22
N. J. L. 576; *Thomas v. Weed*, 14
Johns. (N. Y.) 255. See also Am. and
Eng. Encyc. of Law, tit. Escape.

Jurisdiction of Justice of the Peace.—
There is nothing special in the pro-
ceedings or judgment in an action of
debt against a sheriff for an escape
which can take away the jurisdiction
of a justice of the peace. *Jansen v.*
Stoutenbergh, 9 Johns. (N. Y.) 369;
Wesson v. Chamberlain, 3 N. Y. 331.

2. *Massachusetts.*—Thus in *Massa-
chusetts*, cited *supra* as one of the ju-
risdictions wherein debt was made an
appropriate remedy, a later statute
abolished that action and substantially
left the parties to their common-law
remedies. *Chase v. Keyes*, 2 Gray
(Mass.) 214. See also *Fullerton v.*
Harris, 8 Me. 399, note.

Rule Changed in England.—Even in
England, where the action was first
permitted by statute, a subsequent
statute (5 and 6 Vict., c. 98, § 31) was
enacted which re-established the com-
mon-law rule that an action on the case
was the only proper action for an es-
cape. *Arden v. Goodacre*, 11 C. B.
375, 73 E. C. L. 375.

3. *Adams v. Turrentine*, 8 Ired. (N.
Car.) 147; *Currie v. Worthy*, 2 Jones
(N. Car.) 105.

**Action must be Brought before Recap-
ture.**—An action for a negligent escape
must be brought before recapture.
Adams v. Turrentine, 8 Ired. (N. Car.)
153; *Richtmeyer v. Remsen*, 38 N. Y.
206; *Bonafous v. Walker*, 2 T. R. 126;
Ridgeway's Case, 3 Coke 52.

Sufficient Commencement of Suit.—
Suing out a writ and delivering it to
the proper officer or leaving it at his
house for the purpose of having it exe-
cuted, before the prisoner returns, is a
sufficient commencement of the suit.
Bronson v. Earl, 17 Johns. (N. Y.) 63.
See also *Dunford v. Weaver*, 84 N. Y.
445.

process, the action at common law must still be case.¹

e. ACTION OF DEBT CUMULATIVE.—The right to bring an action of debt does not take away the common-law right to sue in case, but the action of debt is a cumulative remedy.²

f. DEBT ON BOND.—Debt may also be brought on the official bond of the sheriff for damages sustained by an escape, as a common-law remedy, notwithstanding the bond sued on is a statutory one.³

g. SUMMARY PROCEEDINGS.—Where a debtor has been permitted to escape, resort may also be had to any summary remedy against the sheriff which may be provided by statute.⁴

1. *Lovell v. Bellows*, 7 N. H. 387; *Martin v. Bradley*, 1 Cai. (N. Y.) 124; *Lusk v. Falls*, 63 N. Car. 189; *Blower v. Hollis*, 1 Crompt. & M. 393; *Robertson v. Taylor*, 2 Chit. Rep. 454, 18 E. C. L. 394.

Under a statute creating liability on the part of the sheriff, for the escape of a prisoner, to satisfy "the debt or damage for which he is committed," where the escape is by consent or voluntary, when the person is imprisoned for nonpayment of an execution, it is not requisite for the plaintiff to count on the statute in order to entitle him to the benefit of its provisions, because the action is founded on the common law, and the only effect of the statute is to increase the damages. *Bowen v. Huntington*, 3 Conn. 425.

2. *Willey v. Eure*, 8 Jones (N. Car.) 321; *Lusk v. Falls*, 63 N. Car. 189; *Rawson v. Dole*, 2 Johns. (N. Y.) 454; *Lovell v. Bellows*, 7 N. H. 387. See also *Bernard v. Com.*, 4 Litt. (Ky.) 152; *Jones v. Pope*, 1 Saund. 38, note (2).

In *New Jersey* it was held, under a statute which expressly provided that the action of debt was a proper action to be brought for an escape, that case could no longer be brought. *Sandford v. Colfax*, 4 N. J. L. 134.

3. *State v. Lawson*, 2 Gill (Md.) 71; *State v. Baden*, 11 Md. 317. See also *Perkins v. Giles*, 9 Leigh (Va.) 397; *Vanmeter v. Giles*, 1 Rob. (Va.) 348; *State v. Johnson*, 1 Ind. 158; *Brown v. Com.*, 6 T. B. Mon. (Ky.) 621; *Bernard v. Com.*, 4 Litt. (Ky.) 151.

In *State v. Hamilton*, 33 Ind. 502, which was a suit upon the sheriff's bond for an escape from arrest under a *ca. sa.*, the liability of the sheriff was said to be fixed under the English statute Westminster II., c. 11 (13 Edw. I.), and 1 Richard II., c. 12, as to the measure of damages.

Where the Escape Is from Arrest on Mesne Process, the remedies are, first, an action on the case at common law, and, second, an action of debt against the sheriff and his sureties on his official bond, under 8 and 9 William III. *Lusk v. Falls*, 63 N. Car. 189.

Suit on Bond in Name of the State.—An action may be brought on the official bond of the sheriff for a voluntary escape in the name of the state and before the liability of the sheriff has been fixed by any suit against him for the escape. *State v. Leeds*, 31 N. J. L. 185.

4. **Scire Facias.**—A *scire facias* cannot issue at common law against a sheriff or constable for the escape. *Hall v. Johnson*, 3 Blackf. (Ind.) 363.

In *Tennessee sci. fa.* was held to be the proper remedy against a sheriff for an escape on mesne process, because the statute then extant took away the right of action for an escape when the arrest was made under such process. *M'Kee v. Love*, 2 Overt. (Tenn.) 243; *Love v. M'Alister*, 4 Hayw. (Tenn.) 67.

Motion.—By the Act of *Maryland* 1768, c. 10, § 1, a plaintiff in execution could call upon the sheriff on motion to produce the body of the defendant before the court, and on his default could cause judgment to be entered up for the full amount of his claim. *State v. Lawson*, 2 Gill (Md.) 73. See also *Stone v. Wilson*, 10 Gratt. (Va.) 537.

Rule for Escape.—In *Georgia*, by a judiciary act of 1799, a sheriff could be ruled for an escape. *Abbott v. Holland*, 20 Ga. 599.

Louisiana.—Articles 766 and 767 of the Louisiana Code of Practice, which authorized any person entitled to any money recovered by the sheriff, etc., to obtain a judgment against the officer on motion, were held not to apply to a sheriff for illegally releasing the

3. Parties—*a*. PLAINTIFF.—Any person who is injured by the officer's negligence in permitting the escape is a proper party plaintiff to the action against the officer for the negligent escape.¹

***b*. DEFENDANT—In General.**—A sheriff is the proper party defendant to answer for the misconduct of the undersheriffs and bailiffs in permitting escapes.²

Joinder of Sheriff with Debtor.—The sheriff cannot be joined as a party defendant with the escaped prisoner in an action brought for the demand due from the prisoner.³

defendant from arrest, but that the remedy in such a case must be by a regular action. *Dussin v. Delaroderie*, 5 Rob. (La.) 202.

Defense to Scire Facias.—Where *scire facias* is the proper remedy against a sheriff for an escape on mesne process, the sheriff may avail himself of all defenses of which he could have availed himself in an action on the case for the escape. *Love v. M'Alister*, 4 Hayw. (Tenn.) 67.

1. *Pease v. Hubbard*, 37 Ill. 257.

Wife Suing for Escape of Husband.—Where a man has been committed by attachment for not performing a decree for alimony, the wife may, by a *prochein ami*, support an action against the sheriff for a permissive escape. *Prather v. Clarke*, 3 Brev. (S. Car.) 393.

Action by Administratrix.—Where the marshal permitted the escape of a prisoner whom he held in execution on a judgment obtained by the plaintiff as administratrix, she may maintain an action against the marshal in her own name. *Bonafous v. Walker*, 2 T. R. 126.

United States Suing in Name of State.—Under a state statute permitting any party aggrieved to sue on the official bond of the sheriff in the name of the state, the United States may bring an action in the name of the state for the escape of a prisoner who was held under an indictment found by the federal grand jury. *Tennessee v. Hill*, 60 Fed. Rep. 1005.

Equitable Owner of Judgment.—Where the equitable owner of a judgment notifies the sheriff of his interest therein, and the sheriff, after arresting the defendant on a *ca. sa.*, permits him to escape, an action may be maintained against the sheriff by the equitable owner of the judgment in the name of the record plaintiff in the suit in which the judgment was rendered. *Martin v. Hawks*, 15 Johns. (N. Y.) 405.

Nominal Plaintiff in Ejectment.—In

Doe v. Jones, 2 M. & S. 473, it was held that an action for an escape was properly brought in the name of the nominal plaintiff in ejectment, in whose name a judgment for mesne profits had been recovered, on the ground that if the nominal plaintiff may be sued for the mesne profits he may also sue for the escape of the defendant in execution for such mesne profits. But see *contra*, *Chipman v. Sawyer*, 1 Tyler (Vt.) 83, wherein it was held that the nominal plaintiff could not sue for mesne profits, and therefore could not maintain an action for the escape of the defendant in execution for mesne profits recovered by such plaintiff.

2. *Wheeler v. Hambright*, 9 S. & R. (Pa.) 395; *Laicock's Case*, Latch 187. See also Am. and Eng. Encyc. of Law, tit. Escape.

An Escape from the Custody of a Deputy may be declared on as an escape from the sheriff. *Skinner v. White*, 9 N. H. 204.

Escape through Insufficiency of Jail.—The sheriff is the proper party defendant to an action for an escape through the insufficiency of the jail, in the absence of any statute changing his liability under such circumstances. *Brown County v. Butt*, 2 Ohio 349; *Richardson v. Spencer*, 6 Ohio 13; *Burrell v. Lithgow*, 2 Mass. 526.

Action against Sheriff eo Nomine.—Under a statute permitting an action against the sheriff for an escape through the insufficiency of the jail, the action was said to be not for the negligence of the sheriff, but for the negligence of the county, and it is not necessary that the action should be brought against the sheriff, by his own name, during whose term the escape happened, but it lies against the sheriff *eo nomine*, he being merely the representative of the county in the suit. *Stiles v. Dearborn*, 6 N. H. 146.

3. *Graves v. Walker, Sneed* (Ky.) 127.

After Rescue.—When a defendant arrested on mesne process is rescued before commitment, the plaintiff's only remedy is by an action against the rescuers.¹ But where the rescue is after commitment on mesne process, or after arrest on execution, the plaintiff is said to have his action against the officers and the rescuers.²

c. ELECTION TO SUE OLD OR NEW SHERIFF.—If a sheriff coming into office regularly receives a prisoner from his predecessor, he is answerable for any new escape, though a voluntary escape may have been permitted by his predecessor,³ and the plaintiff may sue him for such new escape, or he may consider the prisoner as out of execution and charge the old sheriff for the former voluntary escape.⁴

4. Pleading—*a. SUFFICIENCY OF DECLARATION OR COMPLAINT.*—A declaration or complaint in an action against an officer for an escape should, when the arrest was made upon final process, show the recovery of a judgment;⁵ and when the arrest was upon mesne process, it has been held that the complaint should

A judgment cannot be entered against the defendant in the action and the sheriff upon the return of the sheriff that the writ was executed and that the defendant escaped, but the only remedy against the sheriff for the escape is by a separate suit. *Waugh v. Carter*, 2 Munf. (Va.) 333. See also *Scarborough v. Thornton*, 9 Pa. St. 452.

1. *Buckminster v. Applebee*, 8 N. H. 546; *Cargill v. Taylor*, 10 Mass. 207. See also *Francis v. Wood*, 28 Me. 75.

When the sheriff returned the fact of the rescue, the plaintiff could at common law proceed against the rescuers by an attachment or an action on the case. 1 *Tidd's Pr.* (3d Am. ed.) 237.

2. *Cargill v. Taylor*, 10 Mass. 206.

3. *Rawson v. Turner*, 4 Johns. (N. Y.) 469; *Lenthal v. Lenthal*, 2 Lev. 109; *James v. Peirce*, 2 Lev. 132, 1 Vent. 269; *Grant v. Southers*, 6 Mod. 183.

4. *Rawson v. Turner*, 4 Johns. (N. Y.) 469; *James v. Peirce*, 2 Lev. 132, 1 Vent. 269.

Election Conclusive.—If the plaintiff once makes his election and sues the old sheriff and recovers judgment against him, it is a bar to any action against a new sheriff. *Rawson v. Turner*, 4 Johns. (N. Y.) 469.

5. *Hall v. Johnson*, 3 Blackf. (Ind.) 363; *State v. Johnson*, 1 Ind. 158; *Brown v. Com.*, 6 T. B. Mon. (Ky.) 621; *Jones v. Pope*, 1 Saund. 39. But

the plaintiff need not set out the whole record of the suit in which the judgment was recovered, it being sufficient to begin with the judgment. *Jones v. Pope*, 1 Saund. 39, note (4).

Jurisdiction of Inferior Court.—In *Dakin v. Hudson*, 6 Cow. (N. Y.) 224, it is held that a declaration for an escape from an execution upon a surrogate's decree should set forth the facts necessary to show that the surrogate had jurisdiction to make the decree, because proceedings before such surrogate are contrary to the course of common law.

Complaint under the Code.—A complaint for an escape under a *ca. sa.* is sufficient if it sets forth the facts essential, according to the former practice, to a good declaration in debt, and prays judgment for the amount of the judgment upon which the *ca. sa.* issued. *Renick v. Orser*, 4 Bosw. (N. Y.) 384.

Sufficiency of Complaint.—A complaint which states facts establishing the sheriff's liability for an escape, and concludes by averring that the sheriff thereby became indebted to the plaintiff in the amount of the judgment on which the execution issued, and that the action is brought to recover that sum, and prays judgment for that sum, indicates clearly that the action is brought under 2 Rev. Stat. N. Y. 437, § 63 (embodied in § 158, Code Civil Pro.), to recover the sum authorized by that section. *McCreery v. Willett*, 4 Bosw. (N. Y.) 643. See also *Smith v. Knapp*, 30 N. Y. 581.

allege that the prisoner is indebted to the plaintiff.¹

Arrest and Custody.—It is also necessary, whether the arrest was upon mesne or final process, that the defendant should be shown to have been arrested and in custody under lawful process.²

Escape from Custody.—It is also proper to allege that the arrest of the defendant was upon the execution issued upon the judgment, and that he escaped from custody.³

1. *Cosgrove v. Bowe*, 10 Daly (N. Y.) 353.

2. *Dunham v. Solomon*, 16 N. J. L. 50.
Sufficiency of Allegation of Custody.—In *Gordon v. Ryan*, 1 J. J. Marsh. (Ky.) 59, the court, by Underwood, J., said: "We were doubting whether the declaration was not defective, because it failed to aver that the sheriff had taken Griffith into his custody; but we settled down that the averment that he suffered him to escape necessarily included the idea that he was in the custody of the sheriff."

Declaring on Two Judgments—Recovery on One.—A plaintiff had two judgments against the same defendant, but it appeared from the records that the defendant was ordered into custody on one only. It was held that the plaintiff, in his action of debt against the sheriff for the escape of the defendant, where he declared on both judgments, might recover on one judgment, although he could not on the other. *Lash v. Ziglar*, 5 Ired. (N. Car.) 702.

Mesne Process—Commitment.—A declaration for an escape from prison alleged generally an arrest and commitment of the prisoner, without averring that a copy of the writ was left with the jailer. It was held on motion in arrest of judgment that the declaration was sufficient at this stage of the case, although it might have been more specific. *Atherton v. Gilmore*, 9 N. H. 185.

Formal Objection to Commitment.—In an action on the case by the owner of a slave, committed to jail for safe-keeping, against the sheriff for suffering the slave to escape, the declaration omitted to state the name of the justice who issued the warrant of commitment. It was held that the objection was not available on general demurrer, being a mere matter of form. *Burley v. Griffith*, 8 Leigh (Va.) 442.

3. *Hall v. Johnson*, 3 Blackf. (Ind.) 363; *Richtmeyer v. Remsen*, 38 N. Y. 208; *Barnes v. Willett*, 19 How. Pr.

(N. Y. Supreme Ct.) 564. See also *Gordon v. Ryan*, 1 J. J. Marsh. (Ky.) 59.

Under an Early Act in Kentucky requiring a jailer to assign to the execution creditor the bond taken from the debtor for the limits of the prison, in an action by a judgment debtor against the jailer for refusing to assign such a bond after the escape of the execution debtor, the declaration must allege an escape of the prisoner, because that the prisoner should have escaped is of the essence of the right of the creditor to an assignment of the bond, and in an action against the officer for a failure to assign the bond, the escape is the gist of the action. *Barns v. Williams*, 2 Bibb (Ky.) 565.

For Several Escapes.—Where a plaintiff declares in different counts for several escapes under a *ca. sa.* upon the same judgment, he is entitled to recover upon only one count. *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 733.

Under Order of Arrest—Liability as Bail or for Escape.—Under statute in *New York*, where a prisoner, held under an order of arrest in a civil action, escapes after judgment and before the issuance of a *ca. sa.*, the sheriff is liable as bail or for the escape, and in such a case the plaintiff may sue for the escape or he may sue the sheriff as bail. If he proceeds against the sheriff as bail, he must set forth the proceedings before and including the escape, and allege that the defendant is bail; and he must demand an appropriate judgment. But if he elects to proceed against the sheriff for the escape, the complaint will be the same in its allegations, except that it will omit those as to the character of the defendant as bail, as such allegations would be irrelevant to a cause of action for escape. *Smith v. Knapp*, 30 N. Y. 591.

Effect of Return "Not Found."—In an action of debt for escape under a *ca. sa.* a return of the sheriff upon such a writ, that the execution debtor was not found, is not conclusive upon the plain-

It has been held, however, that a count for a voluntary escape can be supported by evidence which shows a negligent escape.¹

b. VARIANCE.—In an action against a sheriff for an escape, a variance which is not material will not defeat the action,² whether the action is for the escape under mesne process³ or under a *ca. sa.*⁴

tiff. The sheriff's return is no part of the case upon which the action is founded, and the arrest is not necessarily proven thereby. "Indeed, policy strongly demands that the sheriff should not be permitted to set up his own return as conclusive evidence in his own favor." *Browning v. Flanagan*, 22 N. J. L. 574.

Escape on Mesne Process—Failure to Appear.—In an action for an escape on mesne process, there should be an allegation that the defendant in the original suit did not appear at court. *Cady v. Huntington*, 1 N. H. 138.

Mesne Process—Liberties of the Jail.—When the arrest was made under mesne process, and the prisoner had the liberties of the jail limits, a complaint against the sheriff for the escape should show that the prisoner went beyond such limits. *Cosgrove v. Bowe*, 10 Daly (N. Y.) 353.

English Practice under Early Statutes—Several Counts.—Under a statute (23 Henry VI., c. 9) relating to bail in cases of arrest on process other than execution, it was usual, in declaring against the sheriff for an escape, to insert three counts in the declaration; one for the escape, one for not taking the defendant when the officer had the opportunity, and a third for not assigning the bail bond as requested. 1 *Tidd's Pr.*, pp. 221, 236.

1. *Fairchild v. Case*, 24 Wend. (N. Y.) 383; *Dunford v. Weaver*, 84 N. Y. 445; *Stone v. Wilson*, 10 Gratt. (Va.) 539. See also *Skinner v. White*, 9 N. H. 218; *Long v. Palmer*, 16 Pet. (U. S.) 69.

An allegation that the sheriff "suffered and permitted [the prisoner] to escape and go at large," was said to charge a voluntary escape. *Loosey v. Orser*, 4 Bosw. (N. Y.) 391. See also *Long v. Palmer*, 16 Pet. (U. S.) 65.

But in *Toll v. Alvord*, 64 Barb. (N. Y.) 568, it was held that an allegation that the sheriff suffered and permitted the judgment debtor to escape meant that the officer did not prevent the escape, but did not necessarily import

that he consented to the escape or had actual knowledge of it.

Gross Negligence under Count for Voluntary Escape.—In *Smith v. Hart*, 1 Brev. (S. Car.) 146, it was held that an action for a voluntary escape might be supported by evidence of gross negligence on the part of the officer.

2. **Setting out Records.**—The declaration must describe correctly the record it purports to set out, and if the record or proceeding which is described in the complaint does not correspond with that which is produced on the trial, it may be a variance. *Dakin v. Hudson*, 6 Cow. (N. Y.) 221. But where the foundation of the action is not a record, a variance will not be material, unless the discrepancy is so great as to create a strong probability that it is not the record described. *Plumleigh v. Cook*, 13 Ill. 669.

Time Immaterial.—The day of the escape laid in the declaration is not material unless made so by novel assignment. *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 733.

3. **Amount of Debt.**—A variance as to the amount of plaintiff's debt will not be fatal to an action on the case for the escape under mesne process. *Smith v. Hart*, 1 Brev. (S. Car.) 146.

Variance in Name.—Where, in an action on the case for the escape of a slave, the declaration charged the escape of a slave by the name of Bill, and the warrant of the committing justice designated the slave as William Lee, it was held that the variance was immaterial. *Burley v. Griffith*, 8 Leigh (Va.) 442.

4. **Variance in the Amount of the Debt.**—In a declaration in an action of debt against a sheriff for an escape, claiming one hundred and forty dollars damages, and one hundred and ninety-one dollars and sixty-six cents costs, there is no variance by reason of evidence showing that the clerk in his fee bill issued with the execution added twelve and a half cents for the sheriff's return. *Plumleigh v. Cook*, 13 Ill. 669.

c. VENUE.—An action for an escape is transitory, and the venue may be laid in any county in which the plaintiff sees fit to lay it.¹

d. PLEADING IN DEFENSE—(1) *Voluntary Return or Recapture*.—In an action against a sheriff for an escape, a voluntary return or recapture should be specially pleaded, and cannot be shown under a general issue.²

Allegation Stating Substance of Execution.—In an action of debt for an escape, it was set forth in the declaration that the plaintiff recovered a judgment for five thousand four hundred and forty-one dollars and thirty-six cents damages, and that a *ca. sa.* issued for the sum; the execution produced at the trial was for five thousand four hundred and forty-one dollars and thirty-seven cents. It was held that the sheriff could not take advantage of this variance. The declaration only stated the substance of the execution, and did not set it forth *in hæc verba*, and the *ca. sa.* produced in evidence was admissible under the pleadings. *Bissell v. Kip*, 5 Johns. (N. Y.) 89.

Indorsement on Ca. Sa.—In an action of debt upon an escape, the declaration set forth the *ca. sa.* with the usual words "and him safely keep;" the *ca. sa.* produced in evidence did not contain the word "keep." This was held not to be a material variance. In such an action the indorsement on the *ca. sa.* need not be set forth in the declaration, and if set forth it is surplusage. *Jones v. Cook*, 1 Cow. (N. Y.) 309.

1. *Patten v. Halsted*, 1 N. J. L. 322; *Jones v. Pemberton*, 7 N. J. L. 351; *Poor v. Doble*, Quincy (Mass.) 87; *Bogert v. Hildreth*, 1 Cai. (N. Y.) 1; *Platt v. Sheriffs of London*, Plowd. 35; *Griffith v. Walker*, 1 Wils. 336, 1 Crompt. 109.

Change of Venue.—While the action for escape is said to be transitory, as stated in the text, the general statement should be taken in connection with the right of the court to change the place of trial in a proper case. Thus in *Bogert v. Hildreth*, 1 Cai. (N. Y.) 1, the venue was laid in the city of New York, and the defendant moved for a change of venue upon affidavits stating that the cause of action arose in the county of Montgomery, and that his witnesses were numerous and resided in that county. The court held that the action was transitory and that the plaintiff had a right to lay the venue where he pleased in the first

instance, but the defendant enjoyed the common privilege of changing it on proper affidavit.

For venue of actions and laying the venue, see article VENUE. For change of venue, see article CHANGE OF VENUE, vol. 4, p. 373.

Action against Rescuers.—But it has been said that an action on the case against rescuers is local, and must be brought in the county where the rescue took place, and where the conspiracy to rescue was formed. *Poor v. Doble*, Quincy (Mass.) 86.

2. *Howland v. Squier*, 9 Cow. (N. Y.) 91; *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 307.

A plea of the voluntary return of the prisoner into defendant's custody should contain an averment that the defendant did not know where to retake the prisoner during any period of his absence. *Davis v. Chapman*, 5 Bing. N. Cas. 453, 35 E. C. L. 174; *Lane v. Kingsmill*, 6 U. C. Q. B. 579.

Under a Count for an Escape and a Plea of Voluntary Return, the plaintiff may prove a single escape on any day before the suit was brought without a new assignment, and the defendant may thereupon show a return into custody before the suit was brought and apply his plea to such return. But the defendant cannot show a previous escape and return merely, and defend by setting up such previous escape as the escape declared on. *Howland v. Squier*, 9 Cow. (N. Y.) 91.

Several Counts Charging Separate Escapes.—Where a declaration contains three counts, all alike except that the escape in each count is alleged to be on a different day, and the defendant pleads a voluntary return to each count, the defendant is at liberty to show a voluntary return after every escape proved, and the defense is complete on proving such a voluntary return before suit brought, and that the prisoner was in custody when the action was commenced. *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 732; *Howland v. Squier*, 9 Cow. (N. Y.) 91.

(2) *Excuse for Failure to Recapture.*—It is also held that a defendant who may have a legal excuse for not retaking an escaped prisoner must set up in his answer the facts which constitute such an excuse.¹

(3) *Action after Bail.*—Where a sheriff is sued for an escape after he has taken bail, if he wishes to rely upon that fact as a defense under the statute he should plead the facts which bring him under the statute, and he cannot take advantage thereof on demurrer to the declaration or in arrest of judgment.²

(4) *Discharge.*—In an action for escape a plea alleging the legal discharge of the prisoner should set out the particulars of his discharge.³

Escape without Defendant's Knowledge—Affidavit.—Under a statute providing that a plea or notice of retaking on fresh pursuit shall not be received unless the defendant make and file an affidavit that the escape was without his knowledge, privity, etc., a plea of voluntary return was held to be within the equity of the statute and to require the affidavit thereby provided. *Gould v. Bruce*, 6 Cow. (N. Y.) 602.

So also, under the English Statute 8 and 9 Wm. III., c. 27, § 6, an affidavit was required that the prisoner escaped without the consent, privity, or knowledge of the defendant. 1 Tidd's Pr. (3d Am. ed.) 649.

Practice on Failure to File Affidavit.—In *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 312, the chancellor said: "By analogy to the case of dilatory pleas, which equally require, by statute, an affidavit to accompany them, the plaintiff may treat the plea without the affidavit as a nullity, and proceed to his judgment; or he may move the court at bar to set it aside. The latter is the more modern course. But if he does neither, and treats the plea as good in point of form, the court will certainly not interfere and press the defect upon him."

Continued in Custody since Return or Recaption.—It must be averred that the prisoner was in custody when the suit was commenced, but that is all that is necessary after setting out the recaption or return. *Middle Dist. Bank v. Deyo*, 6 Cow. (N. Y.) 732, upon the authority of *Bonafous v. Walker*, 2 T. R. 126, and *disapproving Griffiths v. Eyles*, 1 B. & P. 413, and *Chambers v. Jones*, 11 East 406, in so far as they hold that continued custody since recaption or return should be averred.

In North Carolina it was held that the defense of fresh pursuit and recapture could be shown under a general issue. *Whicker v. Roberts*, 10 Ired. (N. Car.) 485.

1. Fraudulent Action of Plaintiff Preventing Return.—In an action against the sheriff for the negligent escape of a judgment debtor, the defendant cannot set up as a justification at the trial that the prisoner would have returned upon the limits of the jail prior to the commencement of the action if he had not been prevented from so doing by the fraudulent action of the plaintiff, unless such facts are set up as a defense in the answer. *Richtmeyer v. Remsen*, 38 N. Y. 206.

2. *Benson v. Welby*, 2 Saund. 155a, note (4).

But it was also said that where the action was in case the defendant might plead not guilty and give the act and other special matters in evidence. *Benson v. Welby*, 2 Saund. 155a, note (4), citing *Parker v. Welby*, 1 Sid. 439, 1 Vent. 85.

3. "By Due Course of Law."—A plea alleging generally that the prisoner was "discharged out of custody by due course of law," without stating how he was discharged, was held bad on special demurrer. *Currie v. Henry*, 2 Johns. (N. Y.) 433.

Omission in Order of Discharge.—Even if the order of discharge omits a recital of any necessary fact, the sheriff will be protected if he can show by proof *aliunde* the existence of such fact. *Goodwin v. Griffis*, 88 N. Y. 629.

Pleading Discharge under Statute.—In an action for an escape under a *ca. sa.* the defendant by plea attempted to set up a discharge under a statute providing a summary proceeding for the dis-

(5) *Collateral Attack*.—In accordance with the general rule governing collateral proceedings, a sheriff cannot, in an action against him for an escape, attack the judgment or process under which the arrest of the escaped debtor was made, for any irregularity which does not show that it was wholly void.¹

5. **Verdict and Judgment—Special Finding under Statute.**—Where a statute requires that judgment shall not be entered unless the jury expressly find that the escape was with the consent or through the negligence of the sheriff, these facts must be found,² though it is not always necessary that such facts should be found in terms, and if it appears by a necessary conclusion of law it is sufficient.³ But if the facts necessary to such a finding are

charge of a debtor, among other things such statute requiring the sheriff, or other officer making the arrest, to give notice to the plaintiff, his agent or attorney, of the time and place of taking the oath prescribed and of the person before whom the oath was intended to be taken, and that if neither the plaintiff nor his agent or attorney reside in the county such notice shall be posted in the clerk's office. A plea which merely showed that the plaintiff in execution was not a resident of the county, and that therefore notice was posted in the clerk's office, was not sufficient, because it did not appear thereby that the plaintiff had no agent or attorney residing in the county. *Wells v. Rawlings*, 6 Blackf. (Ind.) 29.

Jurisdiction of Court Ordering Discharge.—A defendant pleaded that the prisoner presented his petition to the Court of Common Pleas, etc., and was discharged out of custody on the execution, by order of the Court of Common Pleas, having full power and authority for that purpose, pursuant to the statute; and it was held, on general demurrer, that the plea was sufficient to show that the Court of Common Pleas had jurisdiction in the case. *Cantillon v. Graves*, 8 Johns. (N. Y.) 472.

1. *Howard v. Crawford*, 15 Ga. 423; *Patten v. Halsted*, 1 N. J. L. 320; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Hinman v. Brees*, 13 Johns. (N. Y.) 529; *Dunford v. Weaver*, 84 N. Y. 445; *Goodwin v. Griffis*, 88 N. Y. 629; *Bensel v. Lynch*, 44 N. Y. 165; *Fairchild v. Case*, 24 Wend. (N. Y.) 381; *Jones v. Cook*, 1 Cow. (N. Y.) 309; *Spafford v. Goodell*, 3 McLean (U. S.) 97.

Voidable Process.—In *Dunford v.*

Weaver, 84 N. Y. 452, Ch. J. Folger said: "If the process is erroneous, it is voidable only, and not void, and such defects the sheriff cannot set up." See also *Goodwin v. Griffis*, 88 N. Y. 640.

Plea of Nul Tiel Record after Reversal of Judgment.—Where a party who is held in execution upon an erroneous judgment escaped, and afterwards the judgment was reversed by writ of error, it was held that the action for the escape was gone, and the defendant might plead *nul tiel* record, because without a record the action was not maintainable. *Drury's Case*, 8 Coke 142.

2. *Biggs v. Rucker*, 3 Litt. (Ky.) 175; *Noble v. Beatty*, 4 Bibb (Ky.) 507; *Johnston v. Macon*, 4 Call (Va.) 370; *Vanmeter v. Giles*, 1 Rob. (Va.) 348; *Hooe v. Tebbs*, 1 Munf. (Va.) 501.

Repugnant Finding—Negligent and Voluntary Escape.—A verdict finding that the sheriff voluntarily and negligently suffered the escape is repugnant and contradictory, and judgment cannot be entered thereon. *Grimes v. Butler*, 1 Bibb (Ky.) 194.

3. **Escape Suffered or Permitted.**—A finding that the sheriff permitted a person to escape is equivalent to finding that he voluntarily suffered the escape. *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 74.

So, also, where the action was in debt for an escape under an execution, and the declaration averred that the defendant "suffered and permitted" the escape, and the plea was that the defendant did not owe the sum of money demanded, it was held that the plea put in issue every material averment of the declaration, and a verdict that the defendant did "owe the debt in the declaration mentioned, in manner and

admitted by the defendant, the court may enter a judgment without the intervention of a jury.¹

Nonsuit.—If the plaintiff in an action for an escape on mesne process fails to show any debt against the escaped prisoner, he will be nonsuited.²

6. Officer's Remedies—Negligent Escape.—When the escape is negligent the sheriff may retake the defendant or may bring an action against him for the escape.³

Voluntary Escape.—After a voluntary escape the sheriff, without permission from the creditor, has no remedy against the debtor upon the former judgment or execution;⁴ his only redress is on a new promise from the debtor, running to himself.⁵

Negligence of Jailer or Insufficiency of Jail.—It is also held that the

form as therein alleged," was equivalent to finding that he owed it by reason of the fact that he permitted the escape, which in turn is equivalent to finding that the escape was with the defendant's consent. *Long v. Palmer*, 16 Pet. (U. S.) 69.

1. *Noble v. Beatty*, 4 Bibb (Ky.) 507.

Default.—Where there is a question of damage involved, as in a judgment by default in an action on a sheriff's bond for an escape, the court will not assess damages and give final judgment. *State v. Lawson*, 2 Gill (Md.) 73.

Finding Confined to Proper Issues.—The finding of the jury should be confined to the issues properly within its province. Thus, if the jury find that there was a voluntary return before the suit was brought, a finding that the defendant did not file with his plea an affidavit that the escape was without his knowledge or consent will be rejected as surplusage, because it is a matter outside the issues to be tried by the jury and belongs exclusively to the court. *Richmond v. Tallmadge*, 16 Johns. (N. Y.) 307. See also article VERDICT.

2. *Albee v. Ward*, 8 Mass. 85. See also *Gunter v. Cleyton*, 2 Lev. 85; *Alexander v. Macauley*, 4 T. R. 611.

3. *Appleby v. Clark*, 10 Mass. 59; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y. Super. Ct.) 208; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; *Ridge-way's Case*, 3 Coke 52.

In *Oliver v. Chamberlin*, 1 D. Chip. (Vt.) 41, which was an action against a sheriff for an escape on mesne process, before the court rendered judgment on the verdict they directed plaintiff to enter into a rule that defendant might make use of his name

in recovering the debt to his own use, defendant indemnifying plaintiff from costs.

Action by Sheriff before Recovery against Him.—At common law, when the defendant in custody under mesne process escapes the sheriff has his action against the defendant, and it is not necessary that there should have been an actual recovery against the sheriff to entitle him to this action. The action of the sheriff is grounded upon his own liability, and therefore he may pursue it before as well as after a recovery against him. *Howard v. Blackford*, 3 N. J. L. 350, citing *Atterton v. Harward*, Cro. Eliz. 349.

Action on Prison Bounds Bond.—In *Seymour v. Harvey*, 8 Conn. 70, it was held that after a negligent escape of a prisoner who had given bond for the limits of the jail, the sheriff, when he first discovers the escape, may refuse to accept the prisoner back and resort to his remedy on the security, as "he is not obliged further to trust so slippery a debtor."

4. *Cheever v. Mirrick*, 2 N. H. 378; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; *Appleby v. Clark*, 10 Mass. 59; *Brown v. Getchell*, 11 Mass. 11. See also *supra*, III. 1. *Election of Remedies*.

And in *Cheever v. Mirrick*, 2 N. H. 378, it is said: "This remedy can be assigned to the sheriff, and if so assigned, whether by parol or otherwise, the sheriff may exercise it in a manner as ample as the creditor himself could." Citing *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 15; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 259.

5. *Cheever v. Mirrick*, 2 N. H. 378; *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

sheriff may have an action against the jailer who has been guilty of a negligent escape;¹ or, where the escape occurs through the insufficiency of the jail, while the sheriff is primarily liable² he may have his action over against the county.³

Stay of Proceedings against Sheriff.—Where the sheriff is sued for an escape the court may, in a proper case, allow a stay of proceedings, as where the sheriff wishes to bring his action on the bond of the prisoner for the liberties of the prison.⁴

1. Character of Action.—It is usual for the sheriff to take a bond from the jailer for the faithful discharge of his duties, but where he has omitted to do so he may bring an action of assumpsit upon the implied promise of the jailer. *Kain v. Ostrander*, 8 Johns. (N. Y.) 207. In this case it is held that an action on the case will not lie against the jailer if the sheriff fails to take a bond, because there is no contribution between tortfeasors; and this was likewise held in *Atterton v. Harward*, Cro. Eliz. 349.

But in *Duncan v. Klinefelter*, 5 Watts (Pa.) 144, the sheriff was permitted to succeed in an action on the case against the jailer for the negligent escape, although the two cases cited last above were referred to in support of the proposition that, while the sheriff may take an indemnity bond, if he does not do so the jailer is liable in law upon the promise implied in his undertaking.

2. See *supra*, III. 3. *b. Defendant.*

3. *Brown County v. Butt*, 2 Ohio 349; *Richardson v. Spencer*, 6 Ohio 13; *Burrell v. Lithgow*, 2 Mass. 526; *Stiles v. Dearborn*, 6 N. H. 146.

4. *M'Intyre v. Woods*, 5 Johns. (N. Y.) 357.

Diligence on the Part of the Sheriff—Stay Discretionary.—In *Potts v. Davidson*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 186, wherein the defendant sheriff, after a judgment recovered against him for an escape, moved to stay the judgment until the sheriff could collect from the sureties on the undertaking given by the prisoner, under section 170 of the New York Code of Civil Procedure (which provides that in the case of a negligent escape the court may stay proceedings upon a judgment recovered against a sheriff until the sheriff has had a reasonable time

to prosecute the bond and collect a judgment recovered thereon), it was held that the sheriff should have moved for a summary judgment against the sureties immediately upon the entry of judgment against himself, or that he at least should have moved for a summary judgment at the time of his motion for a stay of proceedings, and that in the absence of such a course of conduct on the part of the sheriff there was no evidence of diligence or good faith, and the intention of section 170 of the Code of Civil Procedure being to protect the sheriff while he is doing everything which the law permits to collect from the sureties, the motion for a stay should be denied.

Unlawful Discharge though Prisoner Not Subject to Arrest.—In *Sherwood v. Benson*, 4 Taunt. 631, the defendant in execution was a bankrupt, and upon his arrest under a *ca. sa.* he exhibited to the officer his certificate of conformity in bankruptcy, and was thereupon immediately released. In an action against the sheriff for the escape, a stay was sought, and an offer made to pay the costs, upon the ground that had the bankrupt taken out a summons in order to his being carried before a judge he must necessarily have been discharged under the statute, and, therefore, no more than nominal damages could be recovered against the sheriff; but the court held that in case of a summons and appearance before a judge, the matter would have come directly under the cognizance of the judge to try whether the debtor were entitled to his discharge or not, and that the question could not be brought before the court collaterally as in this case, and the determination of the question of damages would be left to the action for the escape.

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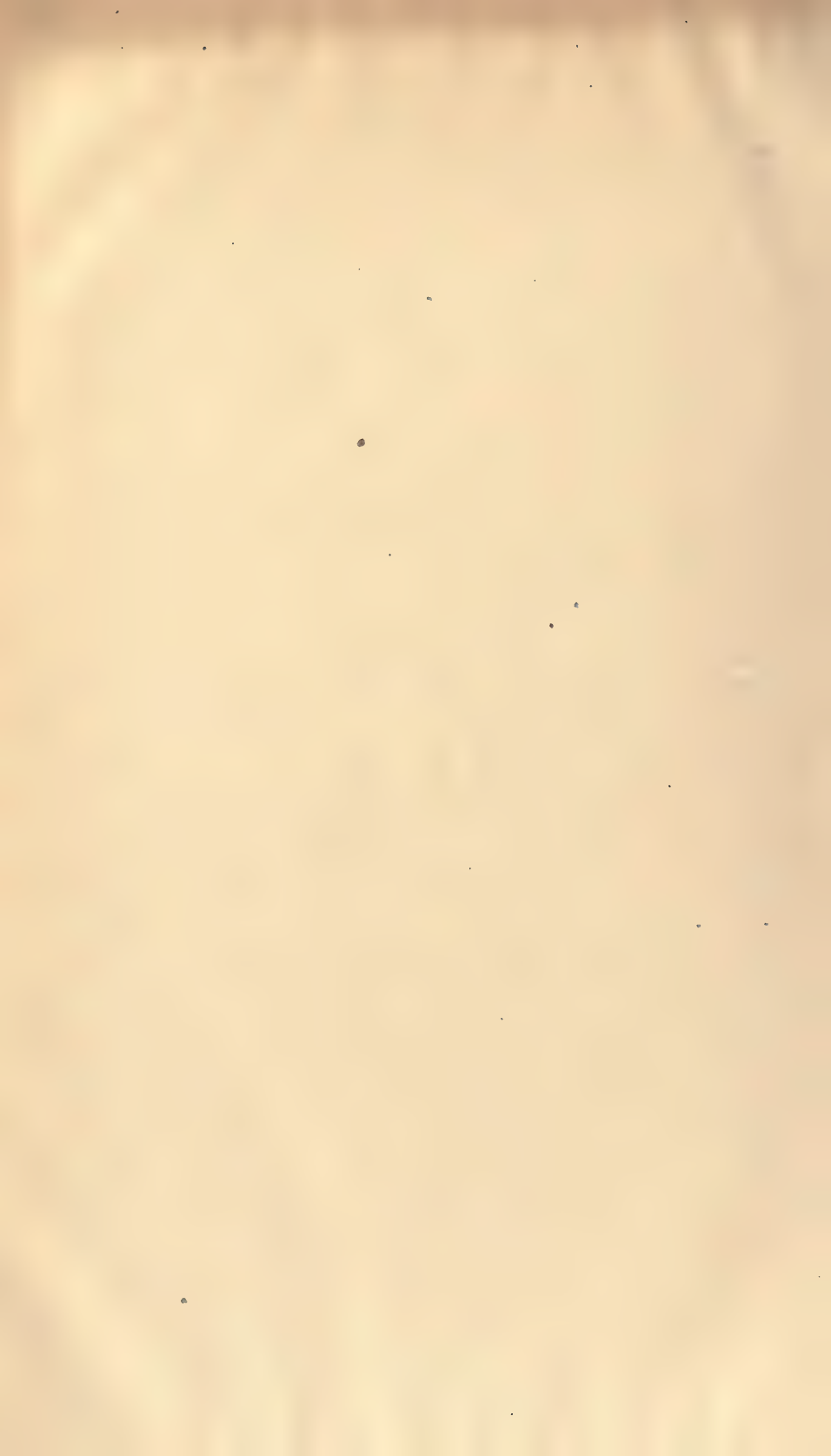
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